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By OGC/CELA at 5:53 pm, Aug 07, 2023

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August 7, 2023

VIA E-MAIL

Federal Election Commission  
Office of Complaints Examination & Legal Administration  
Attn: Kathryn Ross, Paralegal  
1050 First Street, NE  
Washington, DC 20463**Craig Engle**

Partner

202.775.5791 **DIRECT**[craig.engle@afslaw.com](mailto:craig.engle@afslaw.com)

Re: MUR 8144 - Response to FEC Complaint MUR 8144 filed with the Federal Election Commission (the “**Commission**”) on June 21, 2023, by Foundation for Accountability and Civic Trust (the “**Complainant**”) against U.S. Senate Candidate Keith Gross (“**Mr. Gross**”), Keith Gross for Florida (“**KGFL**”) and Advancing Florida, Inc. (“**AFL**”, together with Gross and KGFL, collectively, the “**Defendant**”) (the “**Complaint**”)

Dear Commission:

The undersigned is counsel for Mr. Gross, KGFL and AFL.

The Complainant in this matter jumped the gun. Had it waited just a few weeks to review KGFL’s July Quarterly 2023 FEC report, it would have seen that the expenditures involving AFL were permissible testing-the-waters activity personally financed by Mr. Gross and properly reported as in-kind contributions from Mr. Gross to his eventual campaign. Therefore, the Complainant’s assertion that corporate funds, corporate entities or third parties were impermissibly used to support Mr. Gross’ candidacy is simply not true.

### **Introduction**

To begin, attached is an affidavit from Mr. Gross which may be summarized as follows:

Mr. Gross established AFL as a vehicle to finance Mr. Gross’ legislative ideas and issue advocacy in the hope of learning more about Floridian’s preferences. At the time Mr. Gross established AFL, he did not know what direction the effort would ultimately take. Mr. Gross did not establish AFL to raise money from outside groups—instead he wanted to be the only initial financier of it. AFL was incorporated as a 501 (c)(4) organization which seemed to be the most flexible vehicle to finance and disseminate a variety

of political, issue or legislative advocacy. AFL also gave Mr. Gross a way to segregate certain of his personal household funds towards the financing of these efforts. In April 2023, Mr. Gross decided, on the basis of the reactions he received to AFL's issue advocacy, as well as conversations he had with his husband and the feedback he received from friends across the State of Florida, that he should attempt a run for federal office. Mr. Gross hired a skilled FEC Treasurer who promptly registered KGFL as Mr. Gross' principal campaign committee and informed Mr. Gross that any candidate-related expenditures Mr. Gross financed directly or through AFL would be reported as in-kind, testing-the-waters expenditures to the new campaign.

See Aff. of Keith Gross (Aug. 7, 2023). Accordingly, any activities by Mr. Gross or AFL that could be viewed as campaign-related have been properly reported to the Commission as permissible testing-the-waters expenditures that have been financed by the candidate himself, using his personal funds.

### **Analysis**

*1. The Complaint states the law correctly but missed all of the key facts.*

Before becoming a candidate, an individual may “test the waters” and engage in activity to determine whether a campaign is viable. Even during the testing-the-waters phase, all funds raised or spent must comply with federal law's contribution limits and prohibitions. Once an individual either decides to become a candidate or begins to campaign, they must register as a candidate with the Commission, designate a principal campaign committee, and file reports that include all activity that occurred during the testing the waters period. Compl. at 12–13.

That is a correct statement of the law, but it needs to be applied to the following correct statement of facts:

In early 2023, Mr. Gross wanted to test public opinion on a variety of legislative, issue and political messages (including Social Security reform, which is a significant topic in the State of Florida where Mr. Gross resides). On January 23, 2023, Mr. Gross incorporated AFL as the project name under which he could conduct this activity. On February 27, 2023, Mr. Gross made his first contribution of \$45,000 to AFL to pay for digital advertising and consulting. See Keith Gross for Florida, Quarterly Report (FEC Filing 1714538) at 8 & 64 (July 15, 2023).

On April 11, 2023, Mr. Gross determined the most effective way to promote his ideas for reform would be as a candidate for federal office. See Keith Gross for Florida, Keith Gross U.S. Senate Announcement, YouTube (Apr. 11, 2023), <https://www.youtube.com/watch?v=W0rXeqDdJy0> (last visited July 31, 2023). Mr. Gross timely registered with the Commission as a candidate and designated a principal campaign committee. Keith Gross, Statement of Candidacy (FEC Filing 1697022) (Apr. 11, 2023) (designating Keith Gross for Florida as principal campaign committee); Keith Gross for Florida, Statement of Organization (FEC Filing 1697021) (Apr. 11, 2023). Mr. Gross' campaign then filed a July Quarterly Report which included his personal in-kind contribution to AFL, along with any other testing-the-waters expenditures Mr. Gross personally made before the campaign was announced. Keith Gross for Florida, Quarterly Report (FEC Filing 1714538) (July 15, 2023). So, unlike the Complainant had hoped, there are no corporate financed expenditures and no undisclosed activities; instead, there are just typical testing-the-waters expenses that have been personally financed by the candidate and properly reported to the Commission.

*2. Mr. Gross' and AFL's activities are in compliance with the Commission's rules regarding candidate-paid contributions, expenditures and disclosures.*

All of the money that was contributed toward AFL's expenses which could later be classified as testing-the-waters activity came from Mr. Gross' personal funds as defined by 11 C.F.R. 100.33 (2023). See Aff. of Keith Gross at ¶10 (Aug. 7, 2023) ("The money I contributed to AFL that was later classified as testing-the-waters activities came from my personal funds as defined by the Federal Election Campaign Act and did not include any funds from my spouse or any corporation.").

As the KGFL July Quarterly 2023 campaign finance report shows, on February 27, 2023, Mr. Gross made his first contribution of personal funds to AFL which the campaign committee has captured as an in-kind contribution and expenditure for testing-the-waters activity. See Keith Gross for Florida, Quarterly Report (FEC Filing 1714538) at 8 & 64 (July 15, 2023). During this same period, Mr. Gross also made personal expenditures of \$89,820.48 that KGFL has similarly retroactively captured and correctly reported as in-kind testing the waters activities. Id. at 8–10. KGFL's reports filed with the Commission also itemize various other expenses captured as in-kind testing-the-waters activity such as digital consulting, advertising and data expenses. Id. at 58–64.

Accordingly, all of the in-kind expenditures that occurred prior to Mr. Gross' campaign announcement—whether directly or with AFL—which could be later classified as testing-the-waters activity have been retroactively captured and properly reported to the Commission and paid for with the candidate's permissible personal funds.

3. *The only way Mr. Gross would not be eligible for the testing-the-waters exemption is if he fell inside one of the exceptions at 11 C.F.R. 100.72(b) which is not the case here.*

The testing-the-waters exemption is not available if: the pre-candidate uses general public political advertising to publicize their intention to campaign for federal office; the pre-candidate raises funds in excess of what would be reasonably necessary to test-the-waters; or the pre-candidate makes or authorizes statements that refer to themselves as a federal candidate; or the pre-candidate conducts activity in close proximity to an election; or the pre-candidate has taken steps to qualify for the ballot.

Mr. Gross is in compliance with the testing-the-waters exemption and has not fallen into any of the above exceptions. None of the materials included in the Complaint or published by AFL even remotely indicate Mr. Gross had publicly stated any intention to run for office. The best the Complainant can say is that some of the materials Mr. Gross used during his testing period were similar to materials his campaign later used. But that is not the test for a violation: The test is whether any materials used *during* the testing period demonstrated an intention to run. And as the Complainant's own record shows, none of the materials indicated any intention that Mr. Gross was running for federal office.

The other exceptions to the testing-the-waters exemption are also not present. Mr. Gross raised only \$8,632 during the entire first half of 2023, while the leading senatorial candidates raised an average of \$64,911,926 in Florida's 2022 Senate Race. Compare Keith Gross for Florida, Quarterly Report (FEC Filing 1714538) at 3 (July 15, 2023) with Florida Senate 2022 Race, Florida Senate, Summary, Open Secrets, available at: <https://www.opensecrets.org/races/summary?cycle=2022&id=FLS2&spec=N> (last visited July 31, 2023). Moreover, there are no statements in any of the materials that refer to Mr. Gross as a federal candidate; the activity at issue took place during a short period of time from February to April 2023, and more than a year before any upcoming election in Florida. Indeed, it is legally impossible in Florida for an individual to take steps to qualify for the ballot in April of the year before a primary election.

4. *The Commission's own explanatory materials on the testing-the-waters exemption clearly shows the exemption applies here.*

Another consideration, though not a requirement, is the segregation of testing-the-waters funds from personal funds. The Commission recommends that the individual set up a separate bank account for the deposit of receipts and the payment of expenses. If the individual later becomes a candidate, a campaign account must be established to keep the campaign funds separate from an individual's personal funds. Testing the waters for possible candidacy, FEC, available at:

<https://www.fec.gov/help-candidates-and-committees/registering-candidate/testing-the-waters-possible-candidacy/> (last visited July 31, 2023).

That is exactly what happened here: Mr. Gross established a separate account—AFL—to segregate his household funds from his issue advocacy and eventual testing-the-waters activity. This allowed for ease of accounting when the KGFL’s first FEC report was prepared, and the FEC Treasurer was able to identify which expenditures from AFL were testing-the-waters related. This also allowed Mr. Gross to keep a substantial reserve of funds in AFL in case he needed a vehicle to continue his issue advocacy in the future. But while he is a candidate, Mr. Gross has no plans to raise money for—or contribute to—AFL, nor does Mr. Gross plan for AFL to be an active voice in any Florida issue, legislative or political advocacy. *See* Aff. of Keith Gross at ¶12 (Aug. 7, 2023) (“While I am a candidate for federal office, I have no plans to raise money for—or contribute to—AFL, nor do I plan for AFL to be an active voice in any Florida issue, legislative or political advocacy.”).

*5. The Commission’s rules clearly identify certain activities that fall under the testing-the-waters exemption, which are the same activities identified in the Complaint.*

The Commission states that an individual may carry out a variety of activities to test the waters. Examples of permissible testing the waters activities include conducting polling, traveling and making telephone calls to determine whether the individual should become a candidate. *See* Testing the waters for possible candidacy, FEC, available at: <https://www.fec.gov/help-candidates-and-committees/registering-candidate/testing-the-waters-possible-candidacy/> (last visited July 31, 2023).

These are the same activities that occurred here. Mr. Gross and AFL published op-eds and did a variety of digital outreach (similar to old-fashioned telephone calls) and tried to engage public opinion by allowing viewers to respond to Mr. Gross’ views by registering their name or joining a list. But in no instance did Mr. Gross use any internet activity to publicize his intention to campaign or to inform the media that he would announce his candidacy at a later date.

*6. Mr. Gross’ exploratory effort complied with the Commission’s advice regarding its name and whether it must register with the Commission.*

The Commission has stated that an “exploratory committee” or “testing-the-waters-committee” is not considered a political committee under the Federal Election Campaign Act (“FECA”) and is not required to register or report to the Commission. *Id.* The Commission has noted that “the name of the exploratory committee . . . [should not] refer to the individual as a candidate. For example, an exploratory committee could not be called ‘Samantha Jones for Congress,’ which

would indicate that Jones had already decided to run for federal office. Instead, the committee could be called ‘Samantha Jones Congressional Exploratory Committee.’” Id.

Again, Mr. Gross has followed the Commission’s guidance. The exploratory effort—AFL—did not even have Mr. Gross’ name in its title. Instead, it was called “Advancing Florida” which is a generic-sounding name that could be used for issue, legislative or political advocacy. In any event, AFL does not violate the Commission’s rules regarding the naming of an exploratory effort or the requirement for disclaimers in general public political advertising that are required for political committees.

*7. All the materials published by AFL are within the testing-the-waters exemption.*

None of the materials attached to the Complaint expressly advocate anyone’s election or defeat. Instead, the content is similar to the sort of issue advocacy that appears thousands of times on the internet every minute: a person appearing as a spokesman for a new organization and publishing new content or new opinion pieces. The Complainant criticizes an op-ed that Mr. Gross wrote for AFL in January 2023 regarding the performance of the Federal Aviation Administration (the “FAA”). Compl. at 7. Near the end of the 750-word story, the piece mentioned Transportation Secretary Buttigieg, President Biden and U.S. Senator Rick Scott who may be Mr. Gross’ primary opponent in an election to be held twenty months in the future. Mr. Gross is a licensed pilot. Over the years he has personally experienced FAA mismanagement and his article recounts numerous instances of errors by the FAA. Mr. Gross points out where the FAA has serious safety issues that are often hidden from the public. This is news and analysis; it is hardly electioneering, let alone express advocacy.

The other opinion piece written by Mr. Gross at issue in the Complaint is focused on Social Security and U.S. Senator Rick Scott. Id. In it, Mr. Gross criticizes Senator Scott’s position on Social Security, which tens of thousands of Floridians, both Republican and Democrats, as well as President Biden and other Senate Republicans have done. This is advocacy and analysis of a serious issue. The closest the article comes to any express advocacy is the rather generic statement, “replace ineffective people.” Keith Gross, Rick Scott and Social Security, Advancing Fla. (Feb. 15, 2023), available at: <https://advancingfl.org/rick-scott-and-social-security-opinion/>.

The Complaint also takes issue with several pages of AFL that contained phrases such as, “Are you with us?”, “Join the Movement Now” or “Your Input is Vital.” Compl. at 6. This is not campaigning for office. Rather, it is stating what millions of commercial and social internet sites and advertisements do every second, namely: trying to engage the reader and gauge public opinion. How else can someone test the waters over the internet without receiving replies from its viewers? And broadly speaking, these web-based advertisements that allow people to register



their opinions and leave their names are the modern (albeit unscientific) version of polling, which is a specific activity permitted under the testing the waters regulations.

8. *This matter is not remotely similar to Ready for Ron v. Federal Election Commission.*

In Ready for Ron v. Fed. Election Comm’n, an entity that was already a political committee attempted to give a future federal candidate committee a list of supporters’ names that it had spent millions of dollars compiling. No. CV 22-3282 (RDM), 2023 WL 3539633 at \*1 (D.D.C. May 17, 2023). The committee specifically said it was not authorized by the benefitting candidate, was not acting in coordination with any candidate committee and was registered as an independent committee with the Commission. Id. at \*3. In other words, it was a third party. There is no third party in this matter: AFL and KGFL are both affiliated with Mr. Gross.

9. *The Complaint’s last attempt effort to categorize AFL as a political committee is contrary to the Commission’s rules and guidance.*

The Complainant alleges that AFL is a political committee. Compl. at 14. AFL is not a political committee; it is a 501 (c)(4) organization that has engaged in a variety of issue advocacy and political speech and is properly registered with the Internal Revenue Service (the “IRS”). To be a political committee, an entity must be a “group of persons . . . which receives contributions aggregating in excess of \$1,000 during a calendar year.” 11 C.F.R. 100.5(a) (2023). AFL is not a group of persons; it is one person. Mr. Gross was the sole initial financier of AFL. And regardless, all of the campaign-related activities that occurred under the “Advancing Florida” name have been reported to the Commission, which is the whole point of campaign finance laws.

Next, not all of AFL’s activities needed to be captured and reported as testing-the-waters expenditures. As AFL engaged in some non-election-related activities which will be properly reported to the IRS on its Form 990, only AFL’s campaign-related activities needed to be reported to the Commission. And last, as Mr. Gross stated in his affidavit: Mr. Gross is going to keep AFL open as a vehicle for possible future legislative advocacy, but he will not raise any funds for it or direct any expenditures by it while he is a candidate for federal office. Aff. of Keith Gross at ¶13 (Aug. 7, 2023).

### **Conclusion**

In the end, the Complainant concedes that Mr. Gross and AFL have operated correctly:

“Gross should have filed as a candidate earlier than he did and been subject to the contribution laws and reporting requirements. However, *even if he wasn’t required to file as a candidate* before April 11, the campaign activity that Gross engaged in through Advancing Florida *at a*

*minimum would qualify as testing-the-waters activities* that are subject to the contribution laws and reporting requirements.” Compl. at 13.

That is correct. And that is what Mr. Gross has done and his campaign has properly reported.

The above nine points of this Response are supported by the law and regulations of the Commission, the attached personal affidavit of Mr. Gross and the public record. And while we agree with the Complainant that federal law prohibits candidates and their agents from soliciting, directing or spending unreported funds in connection with an election in violation of FECA, that simply did not happen here.

Best regards,

A handwritten signature in blue ink, appearing to read "Engle", written in a cursive style.

Craig Engle

A handwritten signature in blue ink, appearing to read "J. Klotzbach", written in a cursive style.

Jamy Klotzbach

*Attachments: Affidavit of Keith Gross*





**EXHIBIT A**

**Affidavit of Keith Gross**

(See attached)

**AFFIDAVIT OF KEITH GROSS**

The undersigned, as of August 7, 2023, hereby declares under oath the following to be true and honest to the best of his knowledge or recollection as of the date hereof:

1. My name is Keith Gross, I am over the age of eighteen years and am a citizen of the United States of America.
2. I have read and am familiar with the letter dated August 7, 2023, prepared by ArentFox Schiff LLP and addressed to the Federal Election Commission (the “**Commission**”) on behalf of myself, my principal campaign committee, Keith Gross for Florida (“**KGFL**”) and Advancing Florida, Inc. (“**AFL**”) (the “**Response**”) in response to Complaint MUR 8144 filed with the Commission on June 21, 2023, by Foundation for Accountability and Civic Trust against me, KGFL and AFL (the “**Complaint**”).
3. I have personal knowledge of the events described in the Response and believe that the facts and circumstances described in the Response are accurate and complete.
4. On January 23, 2023, I organized AFL as an organization under Section 501(c)(4) of the Internal Revenue Code established to finance legislative ideas, to conduct issue advocacy and to gather information about Florida preferences (including Social Security reform, which is a significant topic in the State of Florida), while also allowing me to segregate certain of my personal funds towards the financing of these efforts.
5. On February 27, 2023, I contributed \$45,000 to AFL to pay for digital advertising and consulting.
6. During the period described in the Complaint, I also made direct personal expenditures for political purposes.
7. On April 11, 2023, I determined the most effective way to promote my ideas for legislative reform would be as a candidate for federal office. This decision was influenced by responses to AFL’s issue advocacy, as well as conversations with my husband and feedback from friends. I timely registered my candidacy with the Commission on April 11, 2023, and designated KGFL as my principal campaign committee.
8. Upon filing my candidacy for federal office, I hired a political treasurer who promptly registered KGFL and informed me that any candidate-related expenditures I personally made or financed through AFL would be reported as in-kind, testing-the-waters expenditures towards my new campaign.
9. KGFL filed a Quarterly Report with the Commission on July 15, 2023. This report disclosed my in-kind contribution to AFL, as well as testing-the-waters expenditures I made personally before the campaign was announced.

10. The money I contributed to AFL that was later classified as testing-the-waters activities came from my personal funds as defined by the Federal Election Campaign Act and did not include any funds from my spouse or any corporation.
11. All in-kind expenditures made before my campaign announcement have been retroactively captured and properly reported to the Commission and paid for with my permissible personal funds.
12. While I am a candidate for federal office, I have no plans to raise money for—or to contribute to—AFL, nor do I plan for AFL to be an active voice in any Florida issue, legislative or political advocacy.
13. I will keep AFL in existence as a possible future vehicle for legislative advocacy, but I will not raise any funds for it or direct any expenditures by it while I am a candidate for federal office.

This Affidavit is made for the purpose of supporting facts and arguments in the Response. I swear that the above is truthful to the best of my ability and recollection pursuant to Title 18, United States Code, Section 1001 and Title 22, United States Code, Section 618(a)(2).

***[Remainder of Page Intentionally Left Blank;  
Signature Follows on the Next Page]***

IN WITNESS WHEREOF, the undersigned has executed this Affidavit as of the date first written above.

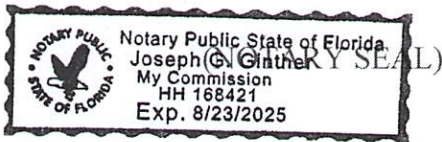
  
Keith Gross

### ACKNOWLEDGEMENT

STATE OF FLORIDA

COUNTY OF Brevard

The foregoing instrument was acknowledged before me this 4<sup>th</sup> day of Aug, 2023, by Joseph Ginter.



  
Name of Notary

Personally Known ☒ OR Produced Identification \_\_\_\_\_

Type of Identification Produced \_\_\_\_\_