

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR 8215

DATE COMPLAINT FILED: Feb. 9, 2024
 DATE OF NOTIFICATIONS: Feb. 14, 2024
 RESPONSE RECEIVED: Mar. 29, 2024
 DATE ACTIVATED: Apr. 10, 2024
 EXPIRATION OF SOL: Sept. 14, 2028 -
 Apr. 15, 2029
 ELECTION CYCLE: 2024

COMPLAINANT:

Americans for Public Trust

RESPONDENT:

Last Best Place PAC and David M. Lewis in his
 official capacity as treasurer

MUR 8216

DATE COMPLAINT FILED: Feb. 14, 2024
 DATE OF NOTIFICATIONS: Feb. 16, 2024
 RESPONSE RECEIVED: Apr. 5, 2024
 DATE ACTIVATED: Apr. 10, 2024
 EXPIRATION OF SOL: Sept. 14, 2028 -
 Apr. 15, 2029
 ELECTION CYCLE: 2024

COMPLAINANT:

Campaign Legal Center

RESPONDENT:

Last Best Place PAC and David M. Lewis in his
 official capacity as treasurer

**RELEVANT STATUTES
 AND REGULATIONS:**

52 U.S.C. § 30101(17)
 52 U.S.C. § 30104(b), (g)
 11 C.F.R. § 100.16
 11 C.F.R. § 100.22
 11 C.F.R. § 104.3(b)(3)(vii)
 11 C.F.R. § 104.4(a), (b)(2)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaints in these matters allege that Last Best Place PAC, an independent expenditure-only political committee or “super PAC,” violated the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations by paying for millions of dollars’ worth of ads against U.S. Senate candidate Tim Sheehy without disclosing any payments for independent expenditures. The Complaints identified two ads, titled “Shady Sheehy” and “Millionaire Politician,” as examples of such ads. The publicly available ad database containing “Shady Sheehy” and “Millionaire Politician” cited by the Complaints shows three additional Last Best Place PAC ads that appear to have been part of the same campaign. Last Best Place PAC did not report any of these ads as independent expenditures but reported a different ad ran in April 2024, after it received the Complaints in these matters.

In its response, Last Best Place PAC asserts that “Shady Sheehy” and “Millionaire Politician” do not expressly advocate Sheehy’s defeat and are therefore not required to be reported as independent expenditures. Instead, Last Best Place PAC asserts that the two ads bring awareness to and comment on a government loan program and the corrosive impact of wealth on politics. Alternatively, it asks the Commission to dismiss the Complaints as an exercise of its prosecutorial discretion because it reported payments for ads as operating expenditures on its 2023 Year-End Report.

For the reasons below, “Shady Sheehy” and “Millionaire Politician,” as well as the three additional ads from the same campaign, expressly advocate Sheehy’s defeat and qualify as independent expenditures. Accordingly, Last Best Place PAC should have reported its payments for these ads as independent expenditures on 48-hour reports and on regularly scheduled disclosure reports. Because Last Best Place PAC did not report making any independent

expenditures for the time periods in which these ads appear to have aired, we recommend that the Commission find reason to believe that Last Best Place PAC violated 52 U.S.C. § 30104(b) and (g) and 11 C.F.R. §§ 104.3(b)(3)(vii), 104.4(a), (b)(2) by failing to file 48-hour reports of independent expenditures and by failing to disclose independent expenditures on its regularly scheduled reports.

II. FACTUAL BACKGROUND

Tim Sheehy is a Republican candidate for U.S. Senate in the June 4, 2024 Montana Republican primary election.¹ He first filed his statement of candidacy on July 1, 2023.² Last Best Place PAC registered with the Commission as an independent expenditure-only political committee on September 5, 2023.³ Last Best Place PAC is located in Helena, Montana.⁴ David M. Lewis is the treasurer.⁵

On its 2023 Year-End Report, covering September 5, 2023, through December 31, 2023, Last Best Place PAC reported that it received \$2,135,000 in contributions, all from Majority Forward—a 501(c)(4) nonprofit corporation.⁶ Last Best Place PAC spent \$2,126,843.20 during

¹ Tim Sheehy, Amended Statement of Candidacy (Mar. 27, 2024), <https://docquery.fec.gov/pdf/717/202403279627415717/202403279627415717.pdf>.

² Tim Sheehy, Statement of Candidacy (July 1, 2023), <https://docquery.fec.gov/pdf/729/202307019582427729/202307019582427729.pdf>. Sheehy had announced his candidacy several days earlier. Tim Sheehy, *Tim Sheehy for Senate – God and Country*, YOUTUBE (June 27, 2023), <https://www.youtube.com/watch?v=7ScveOJBIII>.

³ Last Best Place PAC, Statement of Organization (Sept. 5, 2023), <https://docquery.fec.gov/pdf/872/202309059596979872/202309059596979872.pdf>.

⁴ *Id.* at 1.

⁵ *Id.*

⁶ Last Best Place PAC, 2023 Year-End Report at 3, 7-9 (Jan. 31, 2024), <https://docquery.fec.gov/pdf/736/202401319619374736/202401319619374736.pdf>. Majority Forward represents that its mission is to “advocate for progressive policies and engaging in nonpartisan voter registration.” IRS Form 990, Majority Forward, 2021 Return of Organization Exempt from Income Tax (May 11, 2023), https://apps.irs.gov/pub/epostcard/cor/833690373_202206_990O_2023060721392480.pdf. It also states that it “works with an affiliated super PAC, Senate Majority PAC, to elect candidates.” Majority Forward, <https://www.majorityforward.com/> (last visited May 6, 2024).

the same time period, all of which were reported as “operating expenditures.”⁷ It reported paying Mountain Media \$2,114,565.68 for various forms of paid communications, such as “billboard production costs,” “digital ad buy,” “media buy,” and “website design.”⁸

On its April 2024 Quarterly Report, Last Best Place PAC reported that it received \$4,575,000 in contributions, again all from Majority Forward.⁹ Last Best Place PAC spent \$4,573,721.32, again classifying all of its expenses as “operating expenditures.”¹⁰ It reported paying Mountain Media, MVAR Media, LLC, and Waterfront Strategies a combined total of \$4,572,807.07 for various forms of paid communications, such as “digital ad buy,” “digital production costs,” “media buy,” and “media production costs.”¹¹ In both its 2023 Year-End Report and its 2024 April Quarterly Report, Last Best Place PAC asserted that its “media and advertising disbursements were not for independent expenditures.”¹²

The Complaints in these matters allege that Last Best Place PAC ran millions of dollars’ worth of ads advocating against Tim Sheehy without disclosing any payments for independent

⁷ Last Best Place PAC, 2023 Year-End Report at 4 (Jan. 31, 2024), <https://docquery.fec.gov/pdf/736/202401319619374736/202401319619374736.pdf>.

⁸ *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?committee_id=C00849729&two_year_transaction_period=2024&data_type=processed (disclosing \$3,054 spent on “billboard production costs,” \$284,999 on “digital ad buy,” \$5,233 on “digital ad buy and production costs,” \$1,722,580 on “media buy,” \$100,753.68 on “media production costs,” and \$5,573.53 on “website design”). Last Best Place PAC’s other disbursements were for bank fees, compliance, database services, and legal fees. *Id.*

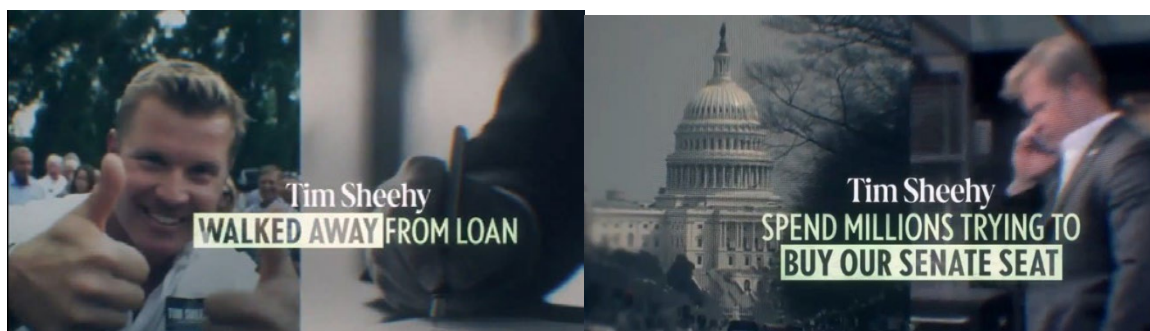
⁹ Last Best Place PAC, 2024 April Quarterly Report at 3 (Apr. 15, 2024), <https://docquery.fec.gov/pdf/683/202404159633269683/202404159633269683.pdf>.

¹⁰ *Id.* at 4.

¹¹ See *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00849729&two_year_transaction_period=2024&min_date=01%2F01%2F2024&max_date=03%2F31%2F2024 (disclosing \$190,500 for “digital ad buy,” \$6,737.90 for “digital production costs,” \$4,320,966.16 for “media buy,” and \$54,603.01 for “media production costs”).

¹² Last Best Place PAC, 2024 April Quarterly at 6 (Apr. 15, 2024), <https://docquery.fec.gov/pdf/683/202404159633269683/202404159633269683.pdf>; Last Best Place PAC, 2023 Year-End Report at 6 (Jan. 31, 2024), <https://docquery.fec.gov/pdf/736/202401319619374736/202401319619374736.pdf>.

expenditures.¹³ The Complaints identify two ads as discrete examples as part of Last Best Place PAC's ad campaign. The first ad, titled "Shady Sheehy," appears to have started running on September 12, 2023.¹⁴ It shows, among other things, Sheehy on the campaign trail and the U.S. Capitol dome.



"Shady Sheehy" says:

They got a home loan and paid it back. She got a car loan and paid it back. But this multimillionaire got an over \$770,000 government loan and never paid it back. But Tim Sheehy doesn't think he should be held accountable. Sheehy got rich off government contracts, walked away from his loan and now he and his campaign can spend millions trying to buy our Senate seat. Shady Sheehy. He's just out for himself. Last Best Place PAC is responsible for the content of this ad.¹⁵

¹³ Compl. at 1-2, MUR 8215 (Feb. 9, 2024) ("Last Best Place PAC has aired 'millions of dollars [sic.] worth' of attack ads that expressly advocate against the election of . . . Tim Sheehy. Spending on these ads has reportedly totaled more than \$5 million."); Compl. at 3 nn. 5, 7, MUR 8216 (Feb. 14, 2024) ("News reports indicate that [Last Best Place] PAC has raised and spent as much as \$5.8 million on ads attacking Sheehy."). We do not know the medium through which each ad discussed in this Report was disseminated.

¹⁴ See Compl. at 2, MUR 8215 (citing Greg Giroux, *Where Club For Growth's Sidelining Itself: Ballots And Boundaries*, BLOOMBERG GOVERNMENT (Sept. 15, 2023), <https://about.bgov.com/news/where-club-for-growth-sidelining-itself-ballots-boundaries/>); Compl. at 3-4, MUR 8216 (citing Ally Mutnick, *Nine Months Before the Montana GOP Primary, a Mysterious Super PAC is on the Airwaves Attacking Tim Sheehy*, POLITICO (Sept. 12, 2023), <https://www.politico.com/live-updates/2023/09/12/congress/montana-senate-sheehy-pac-ads-00115276>). The available information does not make clear whether this ad has stopped running or if it is still running now.

¹⁵ Compl. at 2, MUR 8215; Compl. at 4, MUR 8216; Resp. at 1-2, MUR 8215 (Mar. 29, 2024); AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, "Shady Sheehy" (last viewed May 3, 2024), <https://host2.adimpact.com/admo/viewer/36ffda2b-a32a-4a7d-84b5-e8363d3a96e6>.

The second ad, titled “Millionaire Politician” also appears to have started running in September 2023.¹⁶ It depicts, among other things, Sheehy on the campaign trail, speaking in front of a “Tim Sheehy U.S. Senate” campaign banner, and Sheehy’s campaign Twitter handle “@sheehyforMT.”¹⁷



“Millionaire Politician” says:

Meet Tim Sheehy, the multimillionaire who mocked Montanans struggling to pay their loans saying: “if you take a loan, you pay it back.” But remember this, Sheehy made millions off government contracts, even took an over \$770,000 government loan, and walked away. Never paid a penny back. That’s Shady Sheehy. Just another millionaire politician who says one thing and does another. Last Best Place PAC is responsible for the content of this ad.¹⁸

¹⁶ Resp. at 1, MUR 8215; Compl. at 2, MUR 8215; AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Millionaire Politician” (last viewed May 3, 2024), host2.adimpact.com/admo/viewer/5d906147-3b1a-4f20-9bae-4bac1c960ff5/.

¹⁷ AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Millionaire Politician” (last viewed May 3, 2024), host2.adimpact.com/admo/viewer/5d906147-3b1a-4f20-9bae-4bac1c960ff5/.

¹⁸ *Id.*; MUR 8215 Response at 1-2 (Feb. 9, 2024); MUR 8216 Resp. at 1-2 (Mar. 29, 2024).

The MUR 8215 Complaint asserts that “Shady Sheehy” and “Millionaire Politician” expressly advocate Tim Sheehy’s electoral defeat and that Last Best Place PAC should have reported them as independent expenditures in a 48-hour report.¹⁹ The MUR 8216 Complaint makes the same allegation with respect to “Shady Sheehy” and also alleges that Last Best Place PAC failed to disclose the independent expenditure on its 2023 Year-End Report.²⁰

Both the MUR 8215 and 8216 Complaints allege that the ads described above were part of a campaign by Last Best Place PAC to advocate against the election of Sheehy, and that none of its ads (at the time) were reported by Last Best Place PAC as independent expenditures.²¹ The Complaints allege that the total cost of the ad campaign exceeded \$5 million.²²

In addition to the example ads described by the Complaints, AdImpact, the ad-tracking company cited in the Complaints, shows three more ads that appear to be part of Last Best Place PAC’s ad campaign against Tim Sheehy but were not reported as independent expenditures: “Hedge Fund Fraud,” “Cashing In,” and “Cashing in on China.” “Hedge Fund Fraud” appears to have started running on November 13, 2023.²³ Unlike the specific examples given in the Complaints, it does not explicitly reference Sheehy’s candidacy or his campaign. “Hedge Fund Fraud” says:

Here in the sunny Cayman Islands, all it takes is a P.O. Box and a few signatures to set up your foreign company. And official records show, that’s exactly where millionaire Tim Sheehy went to do his business. The Cayman Islands, home to Ponzi schemes, hedge fund fraud, and millionaires trying

¹⁹ Compl. at 1-2, MUR 8215 (Feb. 9, 2024).

²⁰ Compl. at 1, 8, MUR 8216.

²¹ Compl. at 1-2, MUR 8215; Compl. at 1, 4, 8-11, MUR 8216.

²² Compl. at 2, MUR 8215; Compl. at 1, 8, MUR 8216.

²³ AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Hedge Fund Fraud” (last viewed May 3, 2024), <https://host2.adimpact.com/admo/viewer/c8ee26d0-f6db-4156-877d-c7b4de058a05> [web.archive.org/web/20231113162031/https://host2.adimpact.com/admo/viewer/c8ee26d0-f6db-4156-877d-c7b4de058a05].

to skip out on paying U.S. taxes. Maybe Shady Sheehy thinks it's OK to do his business in the Caymans, but do you? Last Best Place PAC is responsible for the content of this ad.²⁴

“Cashing In” appears to have started running on January 4, 2024.²⁵ Like “Millionaire Politician,” it depicts Sheehy speaking in front of a “Tim Sheehy U.S. Senate” banner.



“Cashing In” says:

Communist China, cheating us on trade, spying from above. Now, records show millionaire Tim Sheehy invested in a Chinese company caught stealing personal information from Americans: addresses, phone numbers, location data. President Trump banned their app to protect national security. But Tim Sheehy bought their stock to make money for himself. Shady Sheehy. Cashing in on communist China. Last Best Place PAC is responsible for the content of this ad.²⁶

“Cashing In On China” appears to have started running on January 26, 2024.²⁷ It does not explicitly reference Sheehy’s candidacy or his campaign. “Cashing In On China” says:

This Chinese tech company has deep ties to the Communist Party, and its app was stealing personal information from millions of Americans: addresses, phone numbers, private location data. President Trump banned

²⁴ AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Hedge Fund Fraud” (last viewed May 3, 2024), <https://host2.adimpact.com/admo/viewer/c8ee26d0-f6db-4156-877d-c7b4de058a05>.

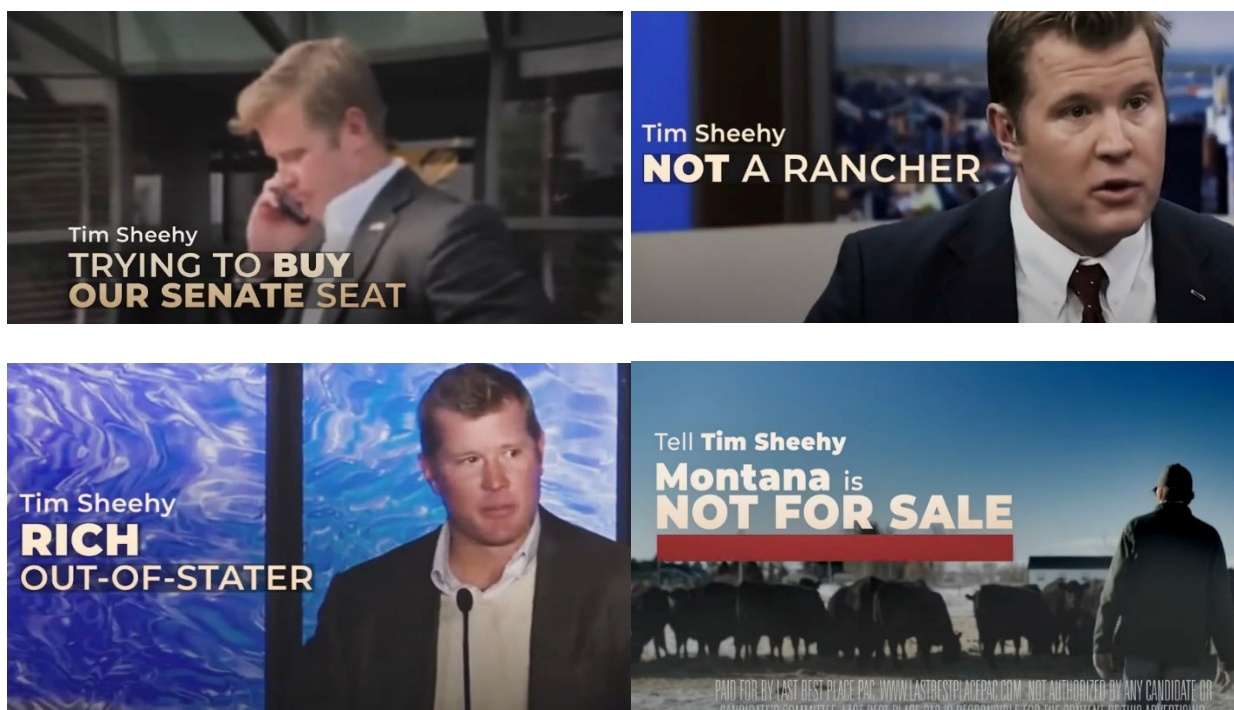
²⁵ AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Cashing In” (last viewed May 3, 2024), <https://host2.adimpact.com/admo/viewer/5112708a-677f-449b-a3dd-17246aece6de> [web.archive.org/web/20240104233911/https://host2.adimpact.com/admo/viewer/5112708a-677f-449b-a3dd-17246aece6de].

²⁶ AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Cashing In” (last viewed May 3, 2024), <https://host2.adimpact.com/admo/viewer/5112708a-677f-449b-a3dd-17246aece6de>.

²⁷ AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Cashing In On China” (last viewed May 3, 2024), <https://host2.adimpact.com/admo/viewer/45f46e0e-a9d1-4c56-b9e8-fa75aa32430d> [host2.adimpact.com/admo/viewer/45f46e0e-a9d1-4c56-b9e8-fa75aa32430d].

it to protect national security. But millionaire Tim Sheehy invested in that company to make more money for himself. Cashing in on China, selling out Montana. That's Shady Sheehy.²⁸

Finally, another Last Best Place PAC ad titled “Not For Sale” was reported as a “new statewide TV spot” on April 9, 2024, and appears to have been reported as an independent expenditure on a 48-hour report on April 11, 2024—approximately two months after the Complaints were filed.²⁹ “Not for Sale” includes, among other things, the following images:



“Not For Sale” says:

This ranch is how I make my living. We run cattle and sell alfalfa. But let me tell you what Tim Sheehy sells on his ranch: pink hoodies, trucker hats, and cute little cups with his logo on it. Tim Sheehy's not a rancher. He's a rich out-of-stater who bought a ranch to play cowboy. Now Sheehy's trying

²⁸ AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Cashing In On China” (last viewed May 3, 2024), <https://host2.adimpact.com/admo/viewer/45f46e0e-a9d1-4c56-b9e8-fa75aa32430d>.

²⁹ See Max Cohen (@maxpcohen), Twitter (Apr. 9, 2024), <https://twitter.com/maxpcohen/status/1777664188631875916> (linking to Last Best Place PAC's YouTube page with “Not for Sale” ad); Last Best Place PAC, 48-Hour Report of Independent Expenditures (Apr. 11, 2024), <https://docquery.fec.gov/pdf/437/202404119627560437/202404119627560437.pdf>.

to buy our Senate seat, too. So here's what I'm saying: Montana is not for sale. Last Best Place PAC is responsible for the content of this ad.

Last Best Place PAC responded to each Complaint separately but makes the same arguments. It asserts that "Shady Sheehy" and "Millionaire Politician" are not independent expenditures because they lack express advocacy.³⁰ Instead of expressly advocating, Last Best Place PAC claims the ads "bring awareness to and comment on matters of public concern: specifically, how the Paycheck Protection Program benefitted wealthy corporations and the corrosive impact of wealth in politics."³¹ Last Best Place PAC also argues that Commission enforcement precedent does not support interpreting "Shady Sheehy" and "Millionaire Politician" as expressly advocating because (1) "Shady Sheehy" and "Millionaire Politician" include no "explicit directive" to take electoral action;³² and (2) "Shady Sheehy" and "Millionaire Politician" began running in September 2023, nine months before the Montana Republican primary election.³³ Finally, the Responses requests that the Commission dismiss the Complaint in an exercise of its prosecutorial discretion because Last Best Place PAC "disclosed its expenditures for the Advertisements on its Year-End 2023 report."³⁴

III. LEGAL ANALYSIS

A. The Commission Should Find Reason to Believe that Last Best Place PAC Failed to Report Independent Expenditures in Violation of 52 U.S.C. § 30104(b) and (g) and 11 C.F.R. §§ 104.3(b)(3)(vii), 104.4(a), (b)(2).

An "independent expenditure" is an expenditure "expressly advocating the election or defeat of a clearly identified candidate; and that is not made in concert or cooperation with or at

³⁰ Resp. at 1, MUR 8215; Resp. at 1, MUR 8216.

³¹ Resp. at 2, MUR 8215; Resp. at 2, MUR 8216.

³² Resp. at 3, MUR 8215; Resp. at 2-3, MUR 8216.

³³ Resp. at 3-4, MUR 8215; Resp. at 2-4, MUR 8216.

³⁴ Resp. at 4-5, MUR 8215; Resp. at 4, MUR 8216.

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."³⁵

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!’”³⁶

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.”³⁷

³⁵ 52 U.S.C. § 30101(17); *see also* 11 C.F.R. § 100.16.

³⁶ 11 C.F.R. § 100.22(a).

³⁷ *Id.* § 100.22(b). More than twenty years ago, two U.S. Circuit Courts of Appeals held section 100.22(b) invalid. *See Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001) (“*VSHL*”); *Maine Right to Life, Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996). More recently, courts have upheld 100.22(b)’s validity. *See Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 550 (4th Cir. 2012) (“*RTAA*”) (upholding section 100.22(b) and stating that *VSHL* “can no longer stand, in light of [*FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449 (2007 (“*WRTL*”))]”); *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013). It appears likely that the 9th Circuit, which includes Montana, would also uphold section 100.22(b). *See Yamada v. Snipes*, 786 F.3d 1182, 1189 (9th Cir. 2015) (“After *Buckley*, case law and Federal Election Commission regulations have broadened the concept of express advocacy to include its ‘functional equivalent,’ as defined in [*WRTL*]. *See* 11 C.F.R. § 100.22; [*RTAA*].”) (emphasis added). But regardless of how the 9th Circuit might view section 100.22(b), because the 9th Circuit has not directly addressed the question, the regulation remains in effect and has the force of law in that jurisdiction. Factual and Legal Analysis (“F&LA”)

All political committees other than authorized committees that make independent expenditures must disclose these expenditures to the Commission as part of their regular reporting.³⁸ 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.³⁹ 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.⁴⁰

1. “Shady Sheehy,” “Millionaire Politician,” “Hedge Fund Fraud,” “Cashing In,” and “Cashing In On China” Expressly Advocate Under 11 C.F.R. § 100.22(a)

Among other types of communications, 11 C.F.R. § 100.22(a) captures “advertisements” that include “individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of a clearly identified candidate(s).”⁴¹ Examples include “Nixon’s the One” and “Mondale!” both of which are clear expressions of support.⁴² Here, the ads run by Last Best Place PAC use language that is the exact opposite — “Shady Sheehy” — which is a clear expression of opposition.

“Shady Sheehy,” “Millionaire Politician,” Hedge Fund Fraud,” “Cashing In,” and “Cashing In On China” meet this test because in context, the use of the personally denigrating

at 4, MUR 5024R (Council for Responsible Government, *et al.*); *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986) (“[I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned.”).

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

³⁹ *See id.* § 30104(g)(1)(A); 11 C.F.R. § 104.4(b)(1).

⁴⁰ 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

⁴¹ 11 C.F.R. § 100.22(a).

⁴² *Id.*

term “shady” has no other reasonable meaning than to urge viewers to defeat Sheehy.⁴³ The ads clearly identify Sheehy, who is a federal candidate. Sheehy has never held public office, so the ads were not discussing Sheehy in a capacity other than as a U.S. Senate candidate. Finally, the ads do not express a view on a public policy issue or direct the reader to take action with respect to a public policy issue. In this context, the label “Shady Sheehy” serves, in essence, as a negative counter to section 100.22(a)’s “Mondale!” example. Accordingly, the ads expressly advocate under 11 C.F.R. § 100.22(a).

In MUR 5831 (Softer Voices), the Commission determined that an ad that said, *inter alia*, “Rick Santorum. Real. Experienced. Leadership” met section 100.22(a)’s “no reasonable meaning” test because that statement was “centered on the candidate and reference[d] personal characteristics unrelated to any issue.”⁴⁴ In another matter, MUR 5365 (Club for Growth), the Commission acknowledged that the ad at issue “does not use the words ‘vote for’ Steve King,” but nevertheless interpreted the phrase ““Congress sure could use a real Iowa conservative”” as express advocacy under section 100.22(a) because in context it had “no other reasonable meaning than to advocate that voters support King.”⁴⁵ The “Shady Sheehy” phrase in the five ads in this case is equivalent to the “Real. Experienced. Leadership.” phrase that the Commission found to be express advocacy under 100.22(a) in Softer Voices.

“Shady Sheehy,” “Millionaire Politician,” and “Cashing In” also explicitly refer to Sheehy as a candidate, thus strengthening the conclusion that the language has “no other

⁴³ See RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY at 1756 (2d ed. 2001) (defining “shady” to mean “of dubious character; rather disreputable”); NEW OXFORD AMERICAN DICTIONARY at 1602 (3rd ed. 2010) (defining “shady” to mean “of doubtful honesty or legality”).

⁴⁴ F&LA at 8, MUR 5831 (Softer Voices) (“The ad does not direct the reader to take action to express a view on a public policy issue or urge the reader to take some action other than to vote for Santorum.”).

⁴⁵ F&LA at 29-30, MUR 5365 (Club for Growth, Inc., *et al.*).

reasonable meaning” than to urge viewers to vote against Sheehy. “Shady Sheehy,” says “[Sheehy] and his campaign can spend millions trying to buy our Senate seat.”⁴⁶ “Millionaire Politician” describes Sheehy as “just another millionaire politician,” which is a clear reference to Sheehy’s status as a candidate (since his status as a politician arises out of his candidacy).⁴⁷ Each ad includes video of Sheehy on the campaign trail (“Shady Sheehy” and “Millionaire Politician”), speaking in front of a “Tim Sheehy U.S. Senate” banner (“Millionaire Politician” and “Cashing In”) and/or Sheehy’s campaign Twitter handle (“Millionaire Politician”).⁴⁸ This additional context, while not necessary to establish that “Shady Sheehy” is express advocacy under section 100.22(a), further supports the fact that in context the phrase “Shady Sheehy” has no other reasonable meaning than to urge the defeat of a clearly identified candidate.

The Responses’ claim that “Shady Sheehy” and “Millionaire Politician” comment on “how the Paycheck Protection Program benefitted wealthy corporations” is contradicted by the ads themselves, which barely mention that program and certainly do not discuss it.⁴⁹ Instead, the

⁴⁶ Resp. at 1-2, MUR 8215; Resp. at 1-2, MUR 8216.

⁴⁷ Resp. at 2, MUR 8215; RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY at 1497 (2d ed. 2001) (defining “politician” as, among other things, “a seeker or holder of public office, who is more concerned about winning favor or retaining power than about maintaining principles”); NEW OXFORD AMERICAN DICTIONARY at 1353 (3rd ed. 2010) (defining politician as “a person who is professionally involved in politics, esp. as a holder of or a candidate for an elected office”).

⁴⁸ AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Shady Sheehy” (last viewed May 3, 2024), <https://host2.adimpact.com/admo/viewer/36ffda2b-a32a-4a7d-84b5-e8363d3a96e6>; AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Millionaire Politician” (last viewed May 3, 2024), host2.adimpact.com/admo/viewer/5d906147-3b1a-4f20-9bae-4bac1c960ff5/; AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Cashing In” (last viewed May 3, 2024), <https://host2.adimpact.com/admo/viewer/5112708a-677f-449b-a3dd-17246aece6de>.

⁴⁹ Screenshots of both “Shady Sheehy” and “Millionaire Politician” identify a “PPP Bailout Amount” of \$774,300 as a “government loan” Tim Sheehy received and that he then “walked away.” AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Shady Sheehy” (last viewed May 3, 2024), <https://host2.adimpact.com/admo/viewer/36ffda2b-a32a-4a7d-84b5-e8363d3a96e6>; AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Millionaire Politician” (last viewed May 3, 2024), host2.adimpact.com/admo/viewer/5d906147-3b1a-4f20-9bae-4bac1c960ff5/.

content of the ads confirm what Last Best Place PAC's treasurer himself acknowledged — that Last Best Place PAC's ads focused on Sheehy's candidacy and on his character.⁵⁰

The Responses cite MUR 5634 (Sierra Club) and MUR 5854 (Lantern Project) in support of its argument that there must be an “electoral directive” explicitly telling people how to vote to be express advocacy.⁵¹ But section 100.22(a) includes examples of express advocacy that do no such thing — “Nixon's the One,” “Mondale!,” “Reagan/Bush” — provided that in context the word(s) used have no other reasonable meaning than to urge the election or defeat of a candidate.⁵² Moreover, the communications at issue in MUR 5634 and MUR 5854 are easily distinguishable from the five ads at issue here. For instance, the Lantern Project's ads in MUR 5854 identified a candidate *who was also a sitting officeholder* (U.S. Senator Rick Santorum), and “overwhelming[ly] focus[ed] . . . on issues and Santorum's policies or positions on those issues.”⁵³ And the Lantern Project's ads did not use a personally denigrating term like “shady” to describe Santorum. Accordingly, unlike here, the Lantern Project's ads could reasonably mean something other than to urge the election or defeat of a candidate.⁵⁴ In MUR 5634, the

⁵⁰ See Ally Mutnick, *Nine Months Before the Montana GOP Primary, a Mysterious Super PAC is on the Airwaves Attacking Tim Sheehy*, POLITICO (Sept. 12, 2023), <https://www.politico.com/live-updates/2023/09/12/congress/montana-senate-sheehy-pac-ads-00115276> (quoting Dave Lewis: “‘Montanans deserve to know who Mitch McConnell's hand-picked millionaire candidate really is,’ he said. ‘The truth is Tim Sheehy walked away from a loan, dodges Montana taxes, and profits off government contracts.’”); *supra* at pp.5-9.

⁵¹ Resp. at 3, MUR 8215; Resp. at 2-3, MUR 8216.

⁵² 11 C.F.R. § 100.22(a) (including examples).

⁵³ F&LA at 2, MUR 5854 (Lantern Project) (representative examples of the Lantern Project's ads: “It's hard to make ends meet. Yet Rick Santorum voted against raising the minimum wage. But Santorum voted to allow his own pay to be raised by \$8000. What is he thinking?”; “From privatizing Social Security to cutting student loans for the middle class, when Rick Santorum has to choose between siding with George Bush or middle class Pennsylvanians, Santorum supports Bush. What is he thinking?”; “Rick Santorum's committees accepted more money from lobbyists last year than any other member of Congress. No wonder Santorum voted to give billions in special tax breaks to oil companies. What was he thinking?”; *id.* at 5-6 (concluding the ads do not expressly advocate under section 100.22(a)).

⁵⁴ *Id.* at 6 (“[O]ne can reasonably view each communication as criticizing Santorum's legislative or issues agenda, and not as encouraging voting for or against Santorum”).

Commission concluded that a Sierra Club pamphlet that said “‘LET YOUR CONSCIENCE BE YOUR GUIDE and LET YOUR VOTE BE YOUR VOICE,’ accompanied by images and checkmarks that ‘in effect’ direct[ed] voters to vote for particular candidates . . . cross[ed] the line into express advocacy under 11 C.F.R. § 100.22(a).”⁵⁵ But that decision did not establish the boundary for what constitutes express advocacy under section 100.22(a). In fact, the Commission subsequently applied section 100.22(a) to a communication lacking an explicit directive to vote but which had no other reasonable meaning than to urge the election or defeat of a candidate, including Softer Voices and Club for Growth, discussed above.⁵⁶

2. “Shady Sheehy,” “Millionaire Politician,” and “Cashing In” Expressly Advocate Under 11 C.F.R. § 100.22(b)

“Shady Sheehy,” “Millionaire Politician,” and “Cashing In” also expressly advocate under 11 C.F.R. § 100.22(b). The electoral portion of each ad is clear. “Shady Sheehy” includes a depiction of Tim Sheehy on the campaign trail and accuses Sheehy and “his campaign” of “trying to buy our Senate seat.”⁵⁷ “Millionaire Politician” identifies Sheehy as a “politician,” which is clearly referencing Sheehy’s status as a candidate because he has never held public office.⁵⁸ In addition, the ad depicts Sheehy on the campaign trail, speaking in front of a “Tim Sheehy U.S. Senate” campaign banner, and depicts Sheehy’s campaign Twitter handle

⁵⁵ F&LA at 4, MUR 5634 (Sierra Club, Inc.). Other Sierra Club pamphlets at issue in MUR 5634 could be interpreted as *lobbying* officeholders to take positions on the environment in accordance with the Sierra Club’s public policy views and were therefore not express advocacy under section 100.22(b). See First GCR at 5-6 & Cert. ¶ 2 (Sept. 20, 2005), MUR 5634 (Sierra Club, Inc.). But here, since Last Best Place PAC did not express a view on the Paycheck Protection Program and Sheehy has never been an elected official, neither “Shady Sheehy” nor “Millionaire Politician” can reasonably be interpreted as lobbying an officeholder. See *infra* pp. 17-24.

⁵⁶ *Supra* pp. 13-14.

⁵⁷ AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Shady Sheehy” (last viewed May 3, 2024), <https://host2.adimpact.com/admo/viewer/36ffda2b-a32a-4a7d-84b5-e8363d3a96e6>.

⁵⁸ Resp. at 1-2, MUR 8215; see *supra* note 47 (quoting dictionary definitions of “politician”).

1 “@sheehyforMT.”⁵⁹ “Cashing In” depicts Sheehy speaking in front of a “Tim Sheehy U.S.
 2 Senate” banner.⁶⁰

3 As to section 100.22(b)’s second element, reasonable minds could not differ as to
 4 whether “Shady Sheehy,” “Millionaire Politician,” and “Cashing In” encourage actions to defeat
 5 Sheehy and not some other action.

6 *First*, the personally denigrating label “shady Sheehy,” as used in each of the three ads,
 7 constitutes a comment on Sheehy’s character (*i.e.*, that he is self-serving and not
 8 trustworthy).⁶¹ In its 1995 Explanation and Justification accompanying section 100.22(b), the
 9 Commission stated that “commenting on a candidate’s character, qualifications, or
 10 accomplishments are considered express advocacy under new section 100.22(b) if, in context,
 11 they have no other reasonable meaning than to encourage actions to elect or defeat the candidate
 12 in question.”⁶² Here, Sheehy’s candidacy is referenced in each of the three ads, such as video of
 13 him on the campaign trail and/or speaking in front of a “Tim Sheehy U.S. Senate” banner. The
 14 ads could not have been discussing Sheehy in any officeholder capacity because he has never
 15 held public office. The ads do not express a view on a public policy issue or direct the reader to
 16 take action with respect to a public policy issue. In this context, the use of the personally
 17 denigrating label “shady Sheehy” has no other reasonable meaning than to encourage actions to
 18 defeat Sheehy. The additional statement in “Shady Sheehy” that Sheehy is “just out for

⁵⁹ AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Millionaire Politician” (last viewed Apr. 2, 2024), host2.adimpact.com/admo/viewer/5d906147-3b1a-4f20-9bae-4bac1c960ff5/.

⁶⁰ AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, “Cashing In” (last viewed May 3, 2024), <https://host2.adimpact.com/admo/viewer/5112708a-677f-449b-a3dd-17246aece6de>.

⁶¹ *See supra* note 43 (quoting dictionary definition of “shady”).

⁶² Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995) (emphasis added) (“Express Advocacy E&J”).

himself,” and the claim in “Millionaire Politician” that Sheehy “says one thing and does another,” are also comments on Sheehy’s character and can similarly have but one reasonable meaning in the context in which they were made: don’t vote for Sheehy.

The Responses rely on a three-Commissioner Statement of Reasons in MUR 7513 (Community Issues Project) to argue that an “unambiguous call to [electoral] action” is needed for finding express advocacy.⁶³ But section 100.22(b) has no such requirement. Indeed, in its Explanation and Justification on Express Advocacy, the Commission declined to require “a clear call to action” in order for communications discussing or commenting on a candidate’s character to be express advocacy under section 100.22(b).⁶⁴ Moreover, on numerous occasions, the Commission has interpreted communications commenting on a candidate’s character, qualifications or accomplishments as encouraging their election or defeat absent a “call to action” (*i.e.*, verbs telling the reader/viewer/listener to affirmatively take electoral action as found in the first part of section 100.22(a)).⁶⁵

⁶³ Resp. at 4, MUR 8215; Resp. at 4, MUR 8216.

⁶⁴ Express Advocacy E&J at 35,295.

⁶⁵ 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 that 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.

And contrary to the Response's contention, the Statement of Reasons in MUR 7513 (Community Issues Project), which is not precedential,⁶⁶ did not explicitly state that section 100.22(b) contains a "call to action" requirement and instead stated that the call to action in the communications in that matter could reasonably be interpreted as relating to that candidate's role as a state elected official.⁶⁷ By contrast, Sheehy has never been an elected official and "Shady Sheehy," "Millionaire Politician," and "Cashing In" clearly reference him as a federal candidate.⁶⁸ In any event, the Commission has found express advocacy under section 100.22(b), including in a more recent case, where communications lacked an explicit "call to action." For example, in MUR 7543, the Commission determined that mailers expressly advocated under section 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."⁶⁹ The Commission made its express advocacy determination despite the mailer's omission of an electoral call to action. Similarly, in MUR 7537, decided after the Commission's split vote in MUR 7513, 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

⁶⁶ See *Campaign Legal Center v. FEC*, 312 F. Supp. 3d 153, 166 (D.D.C. 2018) ("reasoning of the three Commissioners . . . [is] 'not [] binding legal precedent or authority for future cases.'" (quoting *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988))).

⁶⁷ Statement of Reasons of Comm'rs Cooksey, Dickerson, and Trainor, III at 4-5, MUR 7513 (Community Issues Project).

⁶⁸ See Resp. at 1-2, MUR 8215; Resp. at 1-2, MUR 8216.

⁶⁹ F&LA at 8, MUR 7543 (Jefferson United, Inc.).

express advocacy under section 100.22(b).⁷⁰ In MUR 7930, which Last Best Place PAC cites for support, 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.⁷¹ In that context, the Commission determined the billboard’s message was not unambiguous.⁷² But Tim Sheehy has never been a federal officeholder and the ads at issue clearly reference his federal candidacy. Thus, Last Best Place PAC’s reliance on MUR 7930 is misplaced.

Furthermore, “Shady Sheehy,” “Millionaire Politician,” and “Cashing In” bear little resemblance to an ad the Commission said was *not* express advocacy in Advisory Opinion 2012-11 (Free Speech), despite characterizing a federal candidate *and officeholder* as untrustworthy. There, the Commission determined an ad that said “Obama supports gun control. Don’t trust him. Support Wyoming state candidates who will protect your gun rights” was not express advocacy because it criticized then-President Obama’s support of a public policy (gun control) and exhorted viewers to “[s]upport Wyoming state candidates,” and had therefore had “no Federal electoral references.”⁷³ By contrast, Sheehy is not an officeholder, “Shady Sheehy,” “Millionaire Politician,” and “Cashing In” fail to discuss any public policy issue, and they clearly do refer to Sheehy’s federal candidacy.

⁷⁰ F&LA at 13, MUR 7537 (Unknown Respondents). The Commission later rescinded its reason to believe finding in this matter on procedural grounds. *See* Cert. (Feb. 6, 2024) & Statement of Reasons of Comm’rs Cooksey, Weintraub, Broussard, Dickerson, Lindenbaum, and Trainor III, MUR 7537 (Care in Action, Inc., *et al.*).

⁷¹ F&LA at 12-13, MUR 7930 (Minocqua Brewing Company SuperPAC, *et al.*).

⁷² *Id.*

⁷³ Advisory Opinion 2012-11 at 5-6 (Free Speech).

1 *Second*, Last Best Place PAC argues that where an ad comments on a candidate's
 2 character, it must be run close to an election to be express advocacy under section 100.22(b).⁷⁴
 3 But that is not correct. The Commission has never established a specific time frame beyond
 4 which comments on a candidate's character are or are not considered express advocacy. Indeed,
 5 when the Commission promulgated section 100.22(b), it explicitly said that it was "not
 6 establish[ing] a time frame" in which comments on a candidate's character, qualifications, or
 7 accomplishments would be considered express advocacy.⁷⁵ Instead, the Commission considers
 8 communications "in context" and the impact of timing (if any) on a "case-by-case basis."⁷⁶

9 Last Best Place PAC makes no case as to why the ads' timing impacts their substance; for
 10 example, if Sheehy was not yet a candidate at the time the ads aired.⁷⁷ It is common for
 11 campaign ads to run long before an election, for example, in order to frame the election and/or
 12 define opponents in the minds of voters as early as possible, when the cost of airtime is cheapest,
 13 and before the relevant market has been saturated with political ads.⁷⁸ But even if Last Best

⁷⁴ Resp. at 3, MUR 8215; Resp. at 3, MUR 8216.

⁷⁵ Express Advocacy E&J at 35,295. The Commission has applied 11 C.F.R. § 100.22(b) to communications commenting on a candidate's character months before an election. *See, e.g.*, Compl. at 4-5. Exs. C, D, G & Conciliation Agreement Part IV. ¶¶ 15, 25-28, MURs 5511 & 5525 (Swift Boat Veterans) (ads begun in August 2004, three months before the November 2004 election, deemed express advocacy under 11 C.F.R. § 100.22(b)); F&LA at 10-11, MUR 5024R (Council for Responsible Government, *et al.*) (noting brochures at issue were distributed during the "months" leading up to a primary election); *see also* Second GCR at 17, MUR 5487 (Progress for America Voter Fund) (viewing ad aired in July 2004, four months prior to the 2004 general election, as express advocacy under 11 C.F.R. § 100.22(b)).

⁷⁶ Express Advocacy E&J at 35,295; *Free Speech v. FEC*, 720 F.3d 788, 794 (10th Cir. 2013) (section 100.22(b) defines expressly advocating "more contextually") (quoting *RTAA*, 681 F.3d at 550).

⁷⁷ *See generally* *WRTL*, 551 U.S. at 469-70 (inquiry into whether ad is the functional equivalent of express advocacy "must be objective, focusing on the substance of the communication").

⁷⁸ *See, e.g.*, Domenico Montanaro, *Do Early Campaign Ads Really Make A Difference In The Presidential Election*, NPR (Apr. 21, 2024), <https://www.npr.org/2024/04/21/1246170482/do-early-campaign-ads-really-make-a-difference-in-the-presidential-election> (quoting Obama campaign strategist David Axelrod, "We went up with an early flight of media that really helped define the [2012] race and, frankly, define our opponent in a way that really framed the debate. . . . by the time you get to a general election, coverage is so saturated that it's very hard to break through"); Steven Shepard, *What An Unprecedented Biden Ad Blitz Says About His Reelection Fight*, POLITICO (Sept. 9, 2023), <https://www.politico.com/news/2023/09/09/what-an-unprecedented-biden-ad-blitz-says-about-his->

Place PAC's argument did have merit, there is no information indicating "Shady Sheehy," "Millionaire Politician," or "Cashing In" have stopped running.⁷⁹

Here, the electoral context of "Shady Sheehy," "Millionaire Politician," and "Cashing In" is clear, the ads comment on Sheehy's character, and the ads lack any discussion of a public policy issue. Under these circumstances, the fact that "Shady Sheehy" and "Millionaire Politician" aired as much as nine months before the Montana Republican primary election does not make them susceptible to a reasonable meaning other than to encourage Sheehy's electoral defeat. By the same token, the fact "Cashing In" appears to have aired five months before the Montana Republican primary election does not make it susceptible to a reasonable meaning other than to encourage Sheehy's electoral defeat.

Finally, in *FEC v. Wisconsin Right to Life, Inc.*, the Supreme Court said, "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."⁸⁰ There, the Court determined that the ads by Wisconsin Right to Life were not the functional equivalent of express advocacy because the ads were:

consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position,

[reelection-fight-00114838](#) (reporting on ads by the Biden campaign and allied super PACs, as well as ads purchased by the Trump campaign in the fall of 2019); Jeremy W. Peters, *Blitz of Campaign Ads Is Early And Aggressive*, N.Y. TIMES (May 16, 2012), <https://www.nytimes.com/2012/05/17/us/politics/campaign-ads-early-and-aggressive.html> (reporting on ads by Obama and Romney campaigns, as well as by their allies five months before the general election); Paul Farhi, *Campaign Ads Enrich Advisers, Raise Questions*, WASH. POST (Feb. 9, 2004), <https://www.washingtonpost.com/archive/politics/2004/02/10/campaign-ads-enrich-advisers-raise-questions/bc566ab4-16e5-40c1-b789-3e7e2c3dae44/> (reporting on Howard Dean's campaign ads seven months before the 2004 Democratic Primary election); Howard Kurtz, *Clinton Team's Early Offensive Blunted Effect of Dole Ad Blitz*, N.Y. TIMES (Oct. 24, 1996), <https://www.washingtonpost.com/archive/politics/1996/10/25/clinton-teams-early-offensive-blunted-effect-of-dole-ad-blitz/71abaecb-f727-4b17-92b9-de3699e06f8a/> (reporting on efforts to define Bob Dole in battleground states early in the 1996 presidential election).

⁷⁹ Last Best Place PAC notes that "Shady Sheehy" and "Millionaire Politician" began running in September 2023, nine months before the Montana Republican primary election. Resp. at 1, MUR 8215; Resp. at 1, MUR 8216.

⁸⁰ *WRTL*, 551 U.S. at 469-70.

1 and urge the public to contact public officials with respect to the matter.
 2 Second, their content lacks indicia of express advocacy: The ads do not
 3 mention an election, candidacy, political party, or challenger; and they do
 4 not take a position on a candidate's character, qualifications, or fitness for
 5 office.⁸¹

6 Using the same methodology, "Shady Sheehy," "Millionaire Politician," and "Cashing
 7 In" are the functional equivalent of express advocacy.⁸² The three ads are "not consistent with
 8 that of a genuine issue ad:" they do not "focus on a legislative issue, take a position on the issue,
 9 exhort the public to adopt that position, and urge the public to contact public officials with
 10 respect to the matter."⁸³ In fact, nothing in the text or video of "Shady Sheehy" or "Millionaire
 11 Politician" supports Last Best Place PAC's contention that those ads "bring awareness to and
 12 comment on matter of public concern: specifically, how the Paycheck Protection Program
 13 benefitted wealthy corporations and the corrosive impact of wealth in politics."⁸⁴ Instead, as
 14 Last Best Place PAC's treasurer indicated, its ads focus on disparaging Sheehy, not discussing
 15 the merits or demerits of any public policy issue.⁸⁵ Accordingly, "Shady Sheehy," "Millionaire

⁸¹ *Id.* at 470. The ads at issue in *FEC v. Wisconsin Right to Life, Inc.* were radio ads which said, *inter alia*, "A group of Senators is using the filibuster delay tactic to block federal judicial nominees . . . Contact Senators Feingold and Kohl and tell them to oppose the filibuster." *Id.* at 458-59.

⁸² *WRTL*, 551 U.S. at 470 (assessing whether Wisconsin Right to Life's ad was the "functional equivalent of express advocacy" and determining it was not). Section 100.22(b) "closely correlates" with *WRTL*'s "functional equivalent" standard. *Free Speech*, 720 F.3d at 795; *RTAA*, 681 F.3d at 552 (section 100.22(b) is "consistent with the test for the 'functional equivalent of express advocacy' that was adopted in [*WRTL*]").

⁸³ *WRTL*, 551 U.S. at 470.

⁸⁴ *See* Resp. at 2, MUR 8215; Resp. at 2, MUR 8216. Even if "Shady Sheehy" and "Millionaire Politician" could reasonably be viewed as also commenting on the Paycheck Protection Program, the fact that an ad serves multiple purposes does not mean that the ad cannot also be the "functional equivalent" of express advocacy. *See* Express Advocacy E&J at 35,295; *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1235-36 (10th Cir. 2023) ("nearly every advocacy ad has the additional purpose of satisfying existing donors, attracting new donors, educating the public, or gaining publicity. We therefore understand the functional-equivalent standard to require that the ad indisputably function as an appeal to vote for or against a candidate. That an ad might express a message *in addition* to that appeal does not immunize a communicating entity from liability.") (emphasis in original).

⁸⁵ *See* Ally Mutnick, *Nine Months Before the Montana GOP Primary, a Mysterious Super PAC is on the Airwaves Attacking Tim Sheehy*, POLITICO (Sept. 12, 2023), <https://www.politico.com/live-updates/2023/09/12/congress/montana-senate-sheehy-pac-ads-00115276> (quoting Dave Lewis: "'Montanans deserve

1 Politician,” and “Cashing In” fit the Supreme Court’s description of the functional equivalent of
 2 express advocacy.

3 Finally, “Shady Sheehy,” “Millionaire Politician,” and “Cashing In” bear no
 4 resemblance to ads courts have held are *not* express advocacy.⁸⁶

5 * * * * *

6 In sum, “Shady Sheehy,” “Millionaire Politician,” “Hedge Fund Fraud,” “Cashing In,” and
 7 “Cashing In On China” expressly advocate under 11 C.F.R. § 100.22(a). “Shady Sheehy,”
 8 “Millionaire Politician,” and “Cashing In” also expressly advocate under 11 C.F.R. § 100.22(b).
 9 Last Best Place PAC’s payment for these ads therefore constitute independent expenditures. The
 10 available information also indicates that the cost for the ads was significant; potentially reaching

to know who Mitch McConnell’s hand-picked millionaire candidate really is,’ he said. ‘The truth is Tim Sheehy walked away from a loan, dodges Montana taxes, and profits off government contracts.’”).

⁸⁶ See, e.g., *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) (TV ad describing “Bill Clinton’s vision for America” with respect to “homosexuals” and job quotas, service in the military, adoption, and being foster parents and asking “is this your vision for a better America?” deemed not express advocacy); *FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995) (letter with special election-year “ANTI-WAR BALLOT” with the purpose to let President Reagan know that group “represent[s] millions of the American electorate who reject his militaristic policies in Central America” and second letter which asked “Ronald Reagan: Four More Years?” and contained a survey to “help us understand and articulate the deep fears of the American people” of a second Reagan term were not express advocacy); *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (*en banc*) (pamphlets picturing members of Congress and claiming they voted for higher taxes and more government not express advocacy despite exhorting readers to “Put Big Government on a diet”); *FEC v. Freedom’s Heritage Forum*, 1999 WL 33756662 at *4 (W.D. Ky. 1999) (mailer contrasting the positions of two republican primary candidates and clearly indicating that one candidate’s views aligned with President Bill Clinton not express advocacy because “the reader is left to draw her own conclusions”); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 57 (D.D.C. 1999) (mailing that identified specific candidates and included a congressional scorecard that “will give America’s Christian voters the facts they need to distinguish between GOOD and MISGUIDED Congressmen” not express advocacy because it did not “provide a baseline level of agreement indicating the Coalition’s electoral endorsement”); *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448 (D. Colo. 1993) (radio advertisement attacking Senate candidate (and sitting U.S. Representative’s) alleged positions on defense spending and balanced budget issues not express advocacy); *FEC v. Nat’l Org. for Women*, 713 F. Supp. 428, 431-32 (D.D.C. 1989) (among other letters, letter which said “Jesse Helms, Strom Thurmond, and the 17 other Republican senators up for re-election in 1984 must be made to understand that the failure to pass the ERA will result in powerful campaigns to defeat them” did “not go beyond issue discussion”); *FEC v. AFSCME*, 471 F. Supp. 317 (1979) (poster lampooning Gerald Ford’s pardon of Richard Nixon “may have tended to influence voting, [but] it contains communication on a public issue widely debated during the campaign. . . it is the type of political speech which is protected from regulation”).

millions of dollars.⁸⁷ Because the costs for “Shady Sheehy,” “Millionaire Politician,” “Hedge Fund Fraud,” “Cashing In,” and “Cashing In On China” appear to have aggregated \$10,000 or more for an election in any calendar year, up to and including the 20th day before an election, Last Best Place PAC should have reported its payments of those costs as independent expenditures on 48-hour reports. Last Best Place PAC should have also disclosed the independent expenditures on its regularly scheduled disclosure reports. Because Last Best Place PAC failed to do so, we recommend that the Commission find reason to believe that Last Best Place PAC violated 52 U.S.C. § 30104(b) and (g) and 11 C.F.R. §§ 104.3(b)(3)(vii), 104.4(a), (b)(2).⁸⁸

IV. INVESTIGATION

The available information indicates that “Shady Sheehy,” “Millionaire Politician,” “Hedge Fund Fraud,” “Cashing In,” and “Cashing In On China” expressly advocated for Tim Sheehy’s defeat and that Last Best Place PAC failed to properly report its payment for them as

⁸⁷ See *supra* p.7.

⁸⁸ Prudential considerations strongly support finding reason to believe because none of the discretionary factors described in *Heckler v. Chaney* favor dismissal. See 870 U.S. 821, 831 (1985). There has been a violation for the reasons described. The Commission is likely to succeed. [REDACTED]

[REDACTED] Indeed, the Commission has pursued other political committees for failing to file independent expenditure reports where the amounts in violation were less than what appears to be the case in this matter. See, e.g., F&LA & Conciliation Agreement, MUR 7607 (PowerPAC.org) (failing to properly disclose independent expenditures totaling \$75,023); F&LA & Conciliation Agreement, MUR 7275 (Conservative Campaign Committee) (failing to properly disclose independent expenditures totaling \$286,286). The Commission has also enforced 52 U.S.C. § 30104(g) against political committees (including defunct committees) when their independent expenditures were already disclosed on regularly scheduled reports in accordance with 52 U.S.C. § 30104(b). See, e.g., F&LA & Conciliation Agreement, MUR 8174 (OkieWay); F&LA & Conciliation Agreement, MUR 7962 (Just the Political Truth Political Action Committee). By contrast, Last Best Place PAC’s 2023 Year-End Report and 2024 April Quarterly Report disclosed *zero* independent expenditures and Last Best Place PAC has taken the position that its “media and advertising disbursements were *not* for independent expenditures.” Last Best Place PAC, 2023 Year-End Report at 6 (Jan. 31, 2024), <https://docquery.fec.gov/pdf/736/202401319619374736/202401319619374736.pdf> (emphasis added). We believe that “the agency has enough resources to undertake the action.” *Heckler*, 470 U.S. at 831. Lastly, 28 U.S.C. § 2462, as interpreted by the 9th Circuit, will not run for over four years. See *FEC v. Williams*, 104 F.3d 237 (9th Cir. 1996). Accordingly, the resources required for an investigation are unlikely to negatively impact other Commission work.

1 independent expenditures. However, the costs of these ads remain unknown. The record also
2 does not indicate whether any of these ads have stopped running.

3 We believe it is necessary to confirm the costs and dissemination dates for Last Best
4 Place PAC's unreported independent expenditures in order to properly determine the scope and
5 amount of the violations and the reports under which the ads should have been disclosed.
6 Accordingly, we anticipate that such an investigation would entail submitting written questions
7 to Last Best Place PAC requesting it provide under oath: (1) the total costs for "Shady Sheehy,"
8 "Millionaire Politician," "Hedge Fund Fraud," "Cashing In" and "Cashing In On China"; (2) the
9 date each ad was paid for; (3) the respective dates of each ad's distribution; and (4) the full name
10 of the payee for each ad. We also anticipate requesting documents directly from Last Best Place
11 PAC, or its media vendors in the event Last Best Place PAC does not have the records or does
12 not cooperate, sufficient to confirm the accuracy of its answers, such as copies of order forms,
13 invoices, payment confirmations, and/or receipts.

14 **V. RECOMMENDATIONS**

- 15 1. Find reason to believe that Last Best Place PAC and David M. Lewis violated
16 52 U.S.C. § 30104(b) and (g) and 11 C.F.R. §§ 104.3(b)(3)(vii), 104.4(a), (b)(2) by
17 failing to disclose independent expenditures on its regularly scheduled reports and by
18 failing to file 48-hour reports of independent expenditures;
19
- 20 2. Direct the Office of General Counsel to circulate an Investigative Plan pursuant to
21 Directive 74 following the receipt of a response to the Reason-to-Believe letter or in
22 the event it appears no response will be made;
23
- 24 3. Approve the attached Factual and Legal Analysis; and
25

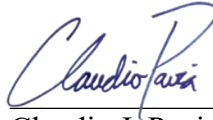
4. Approve the appropriate letter.

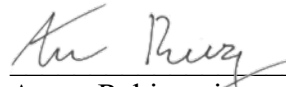
Lisa J. Stevenson
Acting General Counsel

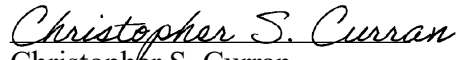
Charles Kitcher
Associate General Counsel for Enforcement

May 17, 2024

DATE



Claudio J. Pavia
Deputy Associate General Counsel for Enforcement

Aaron Rabinowitz
Assistant General Counsel

Christopher S. Curran
Attorney