IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER
1101 14th Street NW, Suite 400
Washington, DC 20005,
Plaintiff,

v.

FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463,
Defendant.

Civil Action No. 1:24-cv-2585

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff Campaign Legal Center ("CLC") brings this action against the Federal Election Commission ("FEC" or "Commission") for declaratory and injunctive relief pursuant to 52 U.S.C. § 30109(a)(8), challenging as contrary to law the FEC's dismissal of an administrative complaint that CLC filed against Last Best Place PAC ("LBP PAC") for alleged violations of the disclosure and reporting requirements in the Federal Election Campaign Act ("FECA" or "Act").

2. The administrative complaint—filed with the FEC on February 14, 2024, and designated Matter Under Review ("MUR") 8216, *see* Ex. 1, Admin. Compl., MUR 8216 (Last Best Place PAC) (Feb. 14, 2024), https://www.fec.gov/files/legal/murs/8216/8216_01.pdf[1]—alleged that Last Best Place PAC formed as a super PAC in September 2023 and promptly launched a multimillion-dollar ad campaign attacking Republican U.S. Senate candidate Tim Sheehy, without reporting its disbursements for those ads as FECA requires.

[1] The administrative complaint is attached hereto as Exhibit 1. Other documents in the MUR file are available on the FEC's website, at https://www.fec.gov/data/legal/matter-under-review/8216.

3. Specifically, as the administrative complaint explained, LBP PAC treated its media disbursements during the relevant time period as operating expenditures, but one or more of its ads expressly advocated the election or defeat of a clearly identified federal candidate—Sheehy—and thus constituted "independent expenditures" required to be disclosed on a special 48-hour pre-election report and in the super PAC's regularly scheduled committee reports, with details about each independent expenditure's amount, date, purpose, and the identity of the candidate it supported or opposed.

4. For example, the complaint described one unreported LBP PAC ad that explicitly referred to Sheehy as a candidate for the U.S. Senate and criticized Sheehy's character and fitness to hold public office, including by stating that 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." Admin. Compl. ¶ 10. As the complaint explained, this LBP PAC ad clearly meets the express advocacy standard set forth in Commission regulations, because the ad's "electoral portion . . . is unmistakable, unambiguous, and suggestive of only one meaning" and "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. § 100.22(b).

5. Yet LBP PAC did not file any 48-hour reports or disclose any independent expenditures on its year-end filing. In fact, LBP PAC's 2023 year-end disclosure report, which it filed on January 31, 2024—nearly five months after its ads first began airing—asserted that it had made no independent expenditures. Admin. Compl. ¶ 11. The report instead showed that all of LBP PAC's "media" disbursements were paid to a hitherto unknown vendor that shares an address with—and may be a corporate alter ego or shell for—an established media vendor known for working with Democratic Party candidates and PACs, and, further, that LBP PAC received 100%

of its funding from Majority Forward, a 501(c)(4) "dark money" corporation closely linked to SMP (formerly "Senate Majority PAC"), one of the primary super PACs supporting Democratic candidates for the U.S. Senate. *Id.* ¶¶ 3, 8.

6. The administrative complaint asked the Commission to: (1) find reason to believe that LBP PAC violated its independent expenditure reporting obligations under 52 U.S.C. § 30104; (2) conduct an immediate investigation under 52 U.S.C. § 30109(a)(2) to determine whether a violation had occurred or was about to occur; and (3) seek appropriate sanctions. *See* Admin. Compl. ¶¶ 21-32.

7. After reviewing the allegations in CLC's administrative complaint and undertaking a thorough examination of LBP PAC's publicly available ads, the FEC's nonpartisan Office of General Counsel ("OGC") concluded that at least five of the ads expressly advocated Sheehy's defeat and thus constituted independent expenditures subject to FECA reporting requirements. *See* First General Counsel's Report at 2-3, MUR 8216 (May 17, 2024), https://www.fec.gov/files/legal/murs/8216/8216_06.pdf ("OGC Report"). Accordingly, OGC recommended that the Commission find reason to believe that Last Best Place PAC and David M. Lewis, its treasurer, 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 disclose independent expenditures on its regularly scheduled reports and by failing to file 48-hour reports of independent expenditures. *Id.*

8. The Commission, by a vote of 2-4, rejected OGC's recommendations. *See* Amended Certification at 1-2, MUR 8216 (dated July 11, 2024; signed July 17, 2024), https://www.fec.gov/files/legal/murs/8216/8216_07.pdf. The Commission instead voted 4-2 to dismiss the complaint. *Id.* at 2.

9. The four Commissioners who voted against OGC's reason-to-believe recommendation subsequently issued a Statement of Reasons explaining the basis for their votes. *See* Statement of Reasons of Chairman Sean J. Cooksey and Commissioners Allen J. Dickerson, Dara Lindenbaum, and James E. "Trey" Trainor, III, MUR 8216 (Aug. 6, 2024), https://www.fec.gov/files/legal/murs/8216/8216_10.pdf ("SOR").

10. According to their Statement of Reasons, these Commissioners determined that the relevant LBP PAC ads—which attacked Sheehy's character, lacked discussion of any public policy issue, and irrefutably referenced his federal candidacy by, for example, accusing him of "trying to buy [Montana's] Senate seat," OGC Report at 5, 23-24—nevertheless did not qualify as independent expenditures, solely because the ads began running too far in advance of Montana's June 4, 2024 primary election to treat them as "expressly advocating" Sheehy's electoral defeat, SOR at 3, 6. Therefore, the Commissioners posited, the ads failed to meet the functional standard in the FEC's regulatory definition of independent expenditure at 11 C.F.R. § 100.22(b), which provides that a communication "expressly advocates" if "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s)," *id.* § 100.22(b)(2). *See* SOR at 6.

11. The Commissioners' timing-based rationale, which they applied in conclusory fashion and without regard to the substance or context of LBP PAC's ads, flouts the Act and the FEC's own definition of "express advocacy" under 11 C.F.R. § 100.22(b).

12. Therefore, the Commission's failure to find reason to believe and consequent dismissal of plaintiff's administrative complaint rested on impermissible interpretations of FECA and FEC regulations and was arbitrary, capricious, and otherwise contrary to law. *See Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986); 52 U.S.C. § 30109(a)(8).

13. In failing to enforce the Act's transparency requirements, the Commission has deprived plaintiff and the public of vital financial information about political communications seeking to influence the outcome of a federal election, and concretely injured plaintiff CLC by denying it statutorily mandated information upon which CLC relies to complete its organizational work and advance its mission.

14. As the OGC Report highlights, the costs and dissemination dates of LBP PAC's unreported independent expenditures "remain unknown." OGC Report at 25-26. Without full and accurate reporting by LBP PAC, plaintiff and the public will remain in the dark regarding the essential details of LBP PAC's independent expenditures, including information about each expenditure's amount, date, and purpose.

15. The dismissal of CLC's administrative complaint undermines FECA's core purpose of revealing "where political campaign money comes from and how it is spent," *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam) (quoting H.R. Rep. No. 92-564, at 4 (1971)), so voters can "make informed decisions" in elections, *Citizens United v. FEC*, 558 U.S. 310, 371 (2010). Without the complete, accurate, and timely disclosure from independent spenders that FECA requires, voters will not have the campaign finance information necessary to "place each candidate in the political spectrum," understand "the interests to which a candidate is most likely to be responsive," or make "predictions of future performance in office," *Buckley*, 424 U.S. at 67—all of which are crucial to casting an informed and meaningful vote.

16. Moreover, because the dismissal relied on an unlawful, arbitrary, and readily exploitable timing standard for defining when a communication qualifies as an independent expenditure, it invites future spenders to seek to evade FECA's transparency requirements by similarly characterizing communications that expressly advocate for or against federal candidates

as non-electoral "issue" ads based merely upon the ads' supposed lack of temporal proximity to an election. The dismissal thus threatens to open a massive loophole in the Act.

17. Accordingly, plaintiff seeks a judicial declaration that the FEC's dismissal of CLC's administrative complaint was arbitrary, capricious, and contrary to law, and an order requiring the Commission to conform with such declaration within thirty days.

JURISDICTION AND VENUE

18. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 52 U.S.C § 30109(a)(8)(A) and 28 U.S.C. § 1331.

19. Venue lies in this district under 52 U.S.C. § 30109(a)(8)(A).

THE PARTIES

20. Plaintiff CLC is a nonpartisan, nonprofit organization that works to strengthen American democracy through, among other activities, local, state, and federal efforts to ensure that the public has access to information regarding the financing and spending of U.S. election campaigns.

21. As part of this effort, CLC conducts research, authors reports and articles, and regularly provides expert analysis to the media. CLC also litigates throughout the country regarding campaign finance matters; files FEC complaints requesting that enforcement actions be taken against individuals or organizations that violate the law; participates in rulemaking and advisory opinion proceedings before the FEC to ensure that the agency is properly interpreting and enforcing federal campaign finance laws; and engages in legislative advocacy for reform measures at the federal, state, and local levels.

22. CLC relies on the accurate and complete reporting of campaign finance information to carry out activities central to its mission, including the production of reports and other materials

to educate the public about campaign spending. These activities are obstructed when information that is subject to mandatory disclosure under FECA is not publicly available.

23. CLC expends significant resources assisting reporters and other members of the media in their investigative research into candidates' financial support, to ensure that the public is equipped with the information necessary to evaluate different candidates and messages and to cast informed votes.

24. CLC also uses its analyses of federal campaign finance disclosure information to support its administrative practice at the FEC and before state and local campaign finance agencies, and to defend campaign finance laws in its active docket of cases in federal and state courts.

25. When inadequate disclosure of federal campaign finance activity makes it difficult to ascertain the nature of a committee's spending, reporters often contact CLC for guidance as to whether or where they can find the campaign finance information that is not being properly reported. This work requires CLC to divert resources and funds from other organizational needs.

26. Defendant FEC is an independent federal agency charged with the administration and civil enforcement of FECA. 52 U.S.C. § 30106(b).

STATUTORY AND REGULATORY BACKGROUND

FECA's Disclosure and Reporting Requirements

27. FECA requires that "[e]ach treasurer of a political committee . . . file reports of receipts and disbursements" with the Commission. 52 U.S.C. § 30104(a)(1); 11 C.F.R. § 104.1(a).

28. Any political committee other than a candidate-authorized committee must periodically report, among other things, the total amount of all disbursements, as well as all disbursements that constitute independent expenditures, for the reporting period and the calendar year. 52 U.S.C. § 30104(b)(4)(h)(iii); 11 C.F.R. § 104.3(b)(1)(vii).

29. Moreover, FECA requires political committees other than candidate-authorized committees to itemize all independent expenditures aggregating in excess of $200 with certain information, including the name and address of each person who receives disbursements in connection with an independent expenditure, as well as the date, amount, purpose, and identity of the candidate the independent expenditure is supporting or opposing. 52 U.S.C. § 30104(b)(6)(B)(iii); 11 C.F.R. § 104.3(b)(3)(vii).

30. When any person makes or contracts to make independent expenditures aggregating $1,000 or more after the 20th day preceding, but more than 24 hours before, the date of an election, FECA requires that person to file an additional report describing those expenditures within 24 hours. 52 U.S.C. § 30104(g)(1); 11 C.F.R. § 109.10(d). Further, any person that makes or contracts to make independent expenditures aggregating $10,000 or more outside of that 20-day period, up to and including the 20th day, must file a report describing those expenditures within 48 hours. 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2). These 24/48-hour reports must contain the same information that committees are required to include on their regularly scheduled periodic reports, including the identity of any person that receives more than $200 in connection with an independent expenditure. 52 U.S.C. § 30104(g)(3)(B), *cross-referencing id.* § 30104(b)(6)(B)(iii); 11 C.F.R. § 104.4(b)-(c), *cross-referencing id.* § 104.3(b)(3)(vii).

31. The Supreme Court has long recognized the importance of FECA's disclosure and reporting requirements, which "provide[] the electorate with information 'as to where political campaign money comes from and how it is spent,'" *Buckley*, 424 U.S. at 66 (quoting H.R. Rep. No. 92-564, at 4 (1971)), and thereby "enable[] the electorate to make informed decisions," *Citizens United*, 558 U.S. at 371.

Independent Expenditures and "Express Advocacy"

32. Under FECA, an expenditure includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A)(i).

33. An "independent expenditure" is "an expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate" that "is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 52 U.S.C. § 30101(17); *see* 11 C.F.R. § 100.16.

34. Commission regulations provide that a communication is "expressly advocating the election or defeat of a clearly identified candidate" if it meets one of two standards. *See* 11 C.F.R. § 100.22(a)-(b).

35. Under subsection (a) of the Commission's regulation defining express advocacy, a communication is "expressly advocating" if it uses so-called "magic words" such as "vote for," "re-elect," or "defeat," or includes "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)." 11 C.F.R. § 100.22(a).

36. Under subsection (b) of the regulation, a communication expressly advocates if:

> [w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, [it] could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22(b).

37. The Commission has explained that "[c]ommunications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy under . . . section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question." Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,295 (Jul. 6, 1995) ("Express Advocacy E&J").

38. Federal courts have repeatedly affirmed the constitutionality of the express advocacy standard in 11 C.F.R. § 100.22(b), and indeed, multiple Courts of Appeals have stressed that section 100.22(b)'s functional test for express advocacy is consistent with and supported by recent Supreme Court decisions. *See, e.g.*, *Free Speech v. FEC*, 720 F.3d 788, 794-795 (10th Cir. 2013) ("In *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), the Supreme Court adopted a test for the 'functional equivalent of express advocacy' which is consistent with the language set forth in [section 100.22(b), and] . . . closely correlates to the test set forth in subsection [100.22](b)"); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 550-553 (4th Cir. 2012) (same, discussing *Citizens United v. FEC*, 558 U.S. 310 (2010), and *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007)).

39. As these courts have recognized, Supreme Court jurisprudence thus forecloses the position that "express advocacy" must be limited to the "magic words" standard in section 100.22(a). *See, e.g.*, *Free Speech*, 720 F.3d at 794-95 (noting that the Supreme Court's recent decisions "have upheld the FEC's approach to defining express advocacy not only in terms of

Buckley's 'magic words' as recognized in subsection (a), but also their 'functional equivalent,' as provided in subsection (b)").

Governing Administrative and Judicial Process

40. Any person may file a complaint with the FEC alleging a violation of FECA. 52 U.S.C. § 30109(a)(1). Commission regulations specify, in relevant part, that a complaint must identify the complainants and be sworn and signed, and that any allegations in a complaint "not based upon personal knowledge" should identify the source of the information that "gives rise to the complainant's belief in the truth of such." 11 C.F.R. § 111.4(b), (d).

41. The Commission, after reviewing the complaint, any responses, and OGC's recommendation, then votes on whether there is "reason to believe" a violation has occurred. 52 U.S.C. § 30109(a)(2). The Commission will find "reason to believe" where a complaint "credibly alleges" that a FECA violation "may have occurred." FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007).

42. Any "party aggrieved" by the Commission's dismissal or failure to act upon an administrative complaint may seek judicial review in the U.S. District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A).

FACTUAL BACKGROUND

CLC's Administrative Complaint

43. On February 14, 2024, CLC and Sophia Gonsalves-Brown, an individual, filed an administrative complaint with the FEC against Last Best Place PAC.

44. The FEC designated the matter initiated by the administrative complaint as MUR 8216.

45. The complaint alleged that LBP PAC violated 52 U.S.C. § 30104 and Commission regulations by paying for millions of dollars' worth of ads attacking U.S. Senate candidate Tim Sheehy without disclosing any payments for independent expenditures. *See* Admin. Compl. ¶¶ 21-30. Specifically, drawing on publicly available information including news reports and FEC disclosure records, the complaint alleged that LBP PAC began running ads attacking Tim Sheehy, then a Republican primary candidate for the U.S. Senate in Montana, in September 2023—shortly after the super PAC's formation—without filing the requisite 48-hour report for each of its independent expenditures or disclosing and itemizing its independent expenditures on its 2023 year-end report. *See id.* ¶¶ 1, 4.

46. As noted in the administrative complaint, LBP PAC registered with the Commission as an independent expenditure-only political committee, or "super PAC," on September 5, 2023. Admin. Compl. ¶ 6; Last Best Place PAC, FEC Statement of Organization at 1 (Sep. 5, 2023). According to published reports, the super PAC's name—the "Last Best Place"—invokes a familiar "slogan Montanans use to describe their sparsely populated state." Admin. Compl. ¶ 7 (quoting Liz Skalka, *The Shadowy Group Targeting A Montana Republican Is Actually A Major Democratic Super PAC*, Huffington Post (Jan. 26, 2024), https://www.huffpost.com/entry/montana-senate-tim-sheehy-matt-rosendale_n_65b3ca79e4b014b873b0f261).

47. The administrative complaint further detailed how, soon after its formation in September 2023, LBP PAC reportedly began running ads attacking Tim Sheehy, *see* Admin. Compl. ¶¶ 8-10; news reports indicated that by January 2024, the super PAC had spent nearly $5.8 million on its ad campaign, *id.* ¶ 9 & nn. 5, 8.

48. According to its year-end disclosure report, covering September 5, 2023 to December 31, 2023, LBP PAC disbursed $2,029,549.32—amounting to nearly all of its

$2,126,843.20 in total spending over that period, *see* Admin. Compl. ¶¶ 8-9; Last Best Place PAC, 2023 Year-End Report at 3-4 (Jan. 31, 2024), https://docquery.fec.gov/pdf/736/202401319619374736/202401319619374736.pdf—to "Mountain Media," a vendor that reportedly purchased airtime for LBP PAC's ads and shares the same address as an Alexandria, Virginia-based media buyer that "works with many Democratic campaigns," Admin. Compl. ¶ 9 (quoting 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).

49. LBP PAC's 2023 year-end disclosure report also revealed that it had received a total of $2,135,000 in contributions as of December 31, 2023, all from a single source, Majority Forward. Admin. Compl. ¶ 8 (citing Last Best Place PAC, 2023 Year-End Report at 3). Majority Forward, a corporation that claims federal tax exemption under Section 501(c)(4) of the Internal Revenue Code, shares an address with, and has contributed over $136 million to, the super PAC "SMP" (formerly known as "Senate Majority PAC")—which, since 2020, has spent over $700 million supporting Democratic candidates for the U.S. Senate. *See id.* (citing Majority Forward 2021 Form 990, Return of Organization Exempt from Income Tax, https://apps.irs.gov/pub/epostcard/cor/833690373_202206_990O_20230607213924 80.pdf; PAC Profile: Senate Majority PAC, OpenSecrets, https://www.opensecrets.org/political-action-committees-pacs/senate-majority-pac/C00484642/summary/2022 (last visited Sept. 5, 2024)).

50. To support its assertions that LBP PAC made and failed to disclose independent expenditures, the complaint detailed how one of the ads in its campaign, "Shady Sheehy," not only attacked Sheehy, but also specifically referred to his campaign for the U.S. Senate and clearly advocated against his election:

> 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.*

Admin. Compl. ¶ 10 (emphasis added); *see also* AdImpact, ADMO Creative Alert, Election Advertisements, Last Best Place PAC, "Shady Sheehy," https://host2.adimpact.com/admo/viewer/36ffda2b-a32a-4a7d-84b5-e8363d3a96e6 (last viewed September 5, 2024).

51. As noted in the complaint, LBP PAC did not file any 48-hour independent expenditure reports disclosing its payments for these ads, nor did it disclose any independent expenditures on its 2023 Year-End Report; on the contrary, that report avowed that "[t]he committee's media and advertising disbursements were not for independent expenditures." Admin. Compl. ¶ 11 (citing Last Best Place PAC, 2023 Year-End Report at 6).

LBP PAC Responds to the Administrative Complaint

52. In a written response filed with the FEC on April 5, 2024, LBP PAC generally denied the allegations in the administrative complaint. Response from Last Best Place PAC and David M. Lewis at 1-2, MUR 8216 (Apr. 5, 2024), https://www.fec.gov/files/legal/murs/8216/8216_05.pdf.

53. In its response, LBP PAC argued that the "Shady Sheehy" ad identified in CLC's complaint "is not an independent expenditure because it does not contain express advocacy," and that therefore, LBP PAC had not violated the Act's disclosure requirements. LBP PAC Resp. at 1.

54. To support this contention, LBP PAC claimed that the ad did not expressly advocate with regard to Sheehy's electoral candidacy, but rather "reference[d]" Sheehy as a "prominent businessman" and sought to "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." LBP PAC Resp. at 1-2.

55. LBP PAC further posited that "Shady Sheehy" falls short of the standard for express advocacy in 11 C.F.R. § 100.22(b) because the ad did not "explicitly" direct voters to take electoral action and "started running in September 2023, far in advance of Mr. Sheehy's upcoming election on June 4, 2024," LBP PAC Resp. at 3-4—meaning, supposedly, that "the electoral portion of the Advertisement is *not* unmistakable, unambiguous, and suggestive of only one meaning, and reasonable minds *could* differ as to whether the Advertisement encourages actions to elect or defeat Mr. Sheehy or some other kind of action," *id.* at 4 (emphasis original).

56. Finally, LBP PAC argued in the alternative that the Commission should exercise its prosecutorial discretion to dismiss the complaint, on the theory that the super PAC's disclosure of undifferentiated disbursements for general operating expenditures in its regular reports had vindicated any transparency interests at stake. *See* LBP PAC Resp. at 4.

OGC Recommends Finding Reason to Believe LBP PAC Violated FECA

57. Based on the administrative complaint and LBP PAC's written response, the FEC's Office of General Counsel recommended that the Commission find reason to believe respondent violated the Act, and initiate an investigation to "confirm the costs and dissemination dates for Last Best Place PAC's unreported independent expenditures in order to properly determine the scope and amount of the violations and the reports under which the ads should have been disclosed." First General Counsel's Report at 26, MUR 8216 (May 17, 2024), https://www.fec.gov/files/legal/murs/8216/8216_06.pdf ("OGC Report").

58. Specifically, OGC recommended that the Commission find reason to believe that Last Best Place PAC and David M. Lewis, its treasurer, 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 disclose independent expenditures on its regularly scheduled reports and by failing to file 48-hour reports of independent expenditures. OGC Report at 25-26.

59. In its detailed written report accompanying this recommendation, OGC reviewed the allegations in CLC's administrative complaint—alongside similar allegations against LBP PAC made by a different complainant, *see* MUR 8215, https://www.fec.gov/data/legal/matter-under-review/8215—and concluded that at least five of LBP PAC's publicly available ads expressly advocated Sheehy's defeat and thus constituted independent expenditures subject to FECA reporting requirements. *See* OGC Report at 2-3.

60. In addition to the "Shady Sheehy" ad discussed in CLC's administrative complaint, OGC reviewed another LBP PAC ad, "Millionaire Politician," identified by the complainant in MUR 8215, *see* OGC Report at 6-7, as well as three other publicly available LBP PAC ads, "Hedge Fund Fraud," "Cashing In," and "Cashing In On China," that were apparently part of the same ad campaign and also were not reported as independent expenditures, *id.* at 7-10.

61. "Millionaire Politician" appears to have started running at approximately the same time as "Shady Sheehy," in September 2023, and "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.'" OGC Report at 6-7.

62. The other three ads identified in OGC's report—"Hedge Fund Fraud," "Cashing In," and "Cashing In On China"—apparently began running on November 14, 2023, and January 4 and 24, 2024, respectively. OGC Report at 7-10. All three of these ads refer to "Shady Sheehy" and disparage his character. *Id.* And, like the "Millionaire Politician" ad, "Cashing In" "depicts Sheehy speaking in front of a 'Tim Sheehy U.S. Senate' banner." *Id.* at 8.

63. OGC also described a sixth LBP PAC ad—"Not For Sale"—that began running in April 2024 and that the super PAC seemingly did disclose as an independent expenditure in a 48-hour report. OGC Report at 9-10. "Not For Sale" denigrates Sheehy's character and, like "Shady Sheehy," accuses him of "trying to buy our Senate seat." *Id.*

64. In assessing whether any of LBP PAC's unreported ads contained express advocacy and thus qualified as independent expenditures, OGC first considered them under the standard set forth in 11 C.F.R. § 100.22(a), *see* OGC Report at 12-16, which provides that an ad "expressly advocates" if it uses so-called "magic words" such as "vote for," "re-elect," or "defeat," or includes "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)," 11 C.F.R. § 100.22(a).

65. OGC concluded that all five of the unreported LBP PAC ads it examined met the express advocacy standard of 11 C.F.R. § 100.22(a), reasoning:

> "[S]hady" has no other reasonable meaning than to urge viewers to defeat Sheehy. 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.

OGC Report at 13. In further support of this finding, OGC noted, *inter alia*, that "Shady Sheehy," "Millionaire Politician," and "Cashing In" explicitly referenced Sheehy's candidacy and variously depicted images of Sheehy on the campaign trail or alongside "Tim Sheehy U.S. Senate" campaign banners. *See id.* at 13-14.

66. OGC next turned to an assessment of LBP PAC's ads under the express advocacy standard in 11 C.F.R. § 100.22(b), and determined that "Shady Sheehy," "Millionaire Politician," and "Cashing In" satisfied both elements. *See* OGC Report at 16-24.

67. Finding that these three ads easily met the first element of the standard in section 100.22(b) because "[t]he electoral portion of each ad is clear," OGC Report at 16, OGC primarily focused its analysis on why the ads also satisfied the standard's second element—under which an ad expressly advocates if "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action," 11 C.F.R. § 100.22(b)(2); OGC Report at 17-24.

68. In evaluating the ads under this standard, OGC highlighted three key reasons for finding that "reasonable minds could not differ as to whether 'Shady Sheehy,' 'Millionaire Politician,' and 'Cashing In' encourage actions to defeat Sheehy and not some other action," OGC Report at 17—and in the process, considered and rejected each of LBP PAC's arguments to the contrary, *see id.* at 17-24.

69. *First*, OGC emphasized each ad's use of the "personally denigrating label 'Shady Sheehy,'" OGC Report at 17-20, which, when paired with the ads' unmistakable references to Sheehy's federal candidacy and given the absence of any countervailing non-electoral or public policy message, meant the ads could only reasonably be interpreted as encouraging Sheehy's electoral defeat, *id.* In particular, OGC stressed that Sheehy is not now, nor has he ever been, a public officeholder, distinguishing several FEC decisions cited by LBP PAC where an assessment of express advocacy turned on whether an ad disparaging a candidate could reasonably be interpreted as relating to the person's role as an officeholder rather than to their candidacy. *See, e.g.*, *id.* at 19-20. Here, there was no equivalent ambiguity.

70. *Second*, OGC repudiated LBP PAC's assertions that an ad's temporal proximity to a federal election is dispositive of whether the ad qualifies as express advocacy under 11 C.F.R. § 100.22(b), noting that "when the Commission promulgated section 100.22(b), it explicitly said

that it was 'not establish[ing] a time frame' in which comments on a candidate's character, qualifications, or accomplishments would be considered express advocacy." OGC Report at 21. Instead, the governing inquiry considers the significance of timing, if any, according to each communication's specific context. But as OGC pointed out, LBP PAC's timing argument was categorical, and would seemingly apply to defeat regulation under section 100.22(b) irrespective of an ad's substance or context; indeed, LBP PAC made no attempt to explain why the timing of *its* ads affects whether they can reasonably be regarded as containing express advocacy. *Id.* Finally, OGC noted that even if this timing defense had any merit, there was "no information indicating 'Shady Sheehy,' 'Millionaire Politician,' or 'Cashing In' have stopped running." *Id.* at 21-22.

71. *Third*, OGC invoked the Supreme Court's decision in *Wisconsin Right to Life* for the standard it articulated in finding that Wisconsin Right to Life's ads were not the functional equivalent of express advocacy, *see* 551 U.S. at 469-70—because application of that same standard to LBP PAC's ads compels the opposite conclusion. OGC Report at 22-23.

The Commission Rejects OGC's Recommendation and Dismisses the Complaint

72. On July 11, 2024, the Commission failed, by a vote of 2-4, to approve OGC's recommendations to find reason to believe and initiate an investigation into LBP PAC's alleged reporting violations. *See* Amended Certification at 1-2, MUR 8216 (dated July 11, 2024; signed July 17, 2024), https://www.fec.gov/files/legal/murs/8216/8216_07.pdf.

73. Also on July 11, 2024, the Commission voted 4-2 to dismiss the complaint and close the file, Amended Certification at 2—with the proviso that its decision to close the file would not take effect until thirty days after the certification of the Commission's July 11, 2024 vote was signed, *id.*

74. Nearly a month after the Commission's vote, on August 6, 2024, the four Commissioners who voted against OGC's reason-to-believe recommendation issued a Statement

of Reasons providing a post hoc explanation of their decision. *See* Statement of Reasons of Chairman Sean J. Cooksey and Commissioners Allen J. Dickerson, Dara Lindenbaum, and James E. "Trey" Trainor, III, MUR 8216 (Aug. 6, 2024), https://www.fec.gov/files/legal/murs/8216/8216_10.pdf ("SOR"). *See also End Citizens United PAC v. FEC*, 69 F.4th 916 (D.C. Cir. 2023).

75. By letter dated August 16, 2024, the Commission notified plaintiff that it had closed the file and dismissed CLC's administrative complaint. Notification to CLC at 1, MUR 8216 (dated Aug. 16, 2024), https://www.fec.gov/files/legal/murs/8216/8216_09.pdf.

76. On September 6, 2024, the two Commissioners who voted to approved OGC's reason-to-believe recommendation issued their own Statement of Reasons, further detailing why, in their view, LBP PAC's "Shady Sheehy" and "Millionaire Politician" ads met the standard for express advocacy under 11 C.F.R. § 100.22(b) and therefore should have been reported as independent expenditures. *See* Statement of Reasons of Vice Chair Ellen L. Weintraub and Commissioner Shana M. Broussard at 4-5, MUR 8216 (Sept. 6, 2024), https://www.fec.gov/files/legal/murs/8216/8216_11.pdf. As the Commissioners explained, "[t]hese are political attack ads with one goal: defeating Sheehy," *id.* at 4; both ads use "[t]he denigrating modifier, 'shady,' to describe Sheehy" and malign his character, "draw a direct connection between Sheehy's character and his candidacy, and can 'only be interpreted by a reasonable person as containing advocacy' of his defeat in the election for which he had just declared his candidacy," *id.* (citing 11 C.F.R. § 100.22(b)).

77. In contrast, the Statement of Reasons issued by the four Commissioners who rejected OGC's reason-to-believe recommendations demonstrates that their votes rested on interpretations of FECA and FEC regulations that are legally unsustainable, arbitrary and capricious, and otherwise contrary to law.

78. Compared to the painstaking analysis in OGC's Report, the explanation for the dismissal offered by the four no-voting Commissioners is conspicuously terse. According to their Statement of Reasons, these Commissioners—after rejecting OGC's analysis with respect to 11 C.F.R. § 100.22(a)[2]—determined that LBP PAC's ads, based solely upon the ads' timing relative to the election, likewise failed to satisfy the "high standard for finding express advocacy" under 11 C.F.R. § 100.22(b). SOR at 6. While the Commissioners conceded that the ads unambiguously met the "electoral portion" requirement of 11 C.F.R. § 100.22(b)(1), they posited that, because the ads began running in September 2023, "months before" the Montana primary election in June 2024, they were not run sufficiently proximate to the election to meet the standard of 11 C.F.R. § 100.22(b)(2). *See* SOR at 3, 6.

79. In lieu of employing the careful inquiry dictated by FECA and Commission precedent or engaging meaningfully with OGC's findings, therefore, the no-voting Commissioners impermissibly ascribed controlling weight to the timing of LBP PAC's character attack ads. Had they considered the ads "in context" as relevant authority directs, the ads could have "no other reasonable meaning than to encourage actions to . . . defeat" Sheehy in the 2024 election, rather than "some other kind of action," Express Advocacy E&J, 60 Fed. Reg. at 35,295: "Shady Sheedy" alleges that Sheehy and his campaign are "trying to buy [Montana's] Senate seat," "Millionaire Politician" depicts him alongside "Tim Sheehy U.S. Senate" campaign banners, and by calling him "Shady" and maligning his personal character, both ads are clearly "discussing or commenting on" Sheehy's "character, qualifications, or accomplishments," *see id.*

[2] All six Commissioners apparently agreed that LBP PAC's ads did not constitute express advocacy under 11 C.F.R. § 100.22(a). *See* Amended Certification at 1; SOR at 5 n.24.

80. Moreover, notwithstanding that the ads' timing was so central to their rationale, the Commissioners showed a revealing lack of interest in ascertaining whether or when the ads in fact stopped running. The Commissioners arbitrarily ignored OGC's repeated admonitions that, although it was possible to estimate when each LBP PAC ad *began* running, it was not clear whether any of the ads had ever *stopped* running. *See, e.g.*, OGC Report at 5 n. 14, 22 n. 79, 26; *see also id.* at 22 ("[T]here is no information indicating 'Shady Sheehy,' 'Millionaire Politician,' or 'Cashing In' have stopped running."). Whereas OGC reasoned that timing alone could not dictate the analysis under section 100.22(b)(2), in part because it was unclear whether or when the ads had stopped running, the Commissioners drew the opposite conclusion: even as they claimed to eschew a bright-line rule, they treated the ads' timing as dispositive while claiming there was no indication that the ads had *not* stopped running. *See* SOR at 6 n.30.

81. The explanation for the dismissal provided in the Commissioners' Statement of Reasons, especially given the perfunctory and one-sided nature of their analysis, fails to meet the minimum standards of reasoned agency decisionmaking, much less to comport with the Act or FEC regulations.

82. Indeed, under the rigid temporal test embraced in the controlling Statement of Reasons, an ad's timing relative to an election is alone sufficient to preclude finding that the ad expressly advocates a candidate's election or defeat, and thus, to shield it from the Act's disclosure requirements for independent expenditures—regardless of the ad's substantive attributes or context. If permitted to stand without correction, the decision thus effectively lays out a roadmap for spenders seeking to evade their disclosure obligations and opens an immense loophole in the Act's transparency requirements.

83. Accordingly, the dismissal of CLC's administrative complaint was contrary to law because it rested on an unsupported, impermissible, and manifestly arbitrary legal standard that flouts the Act and relevant agency precedent, "unduly compromises the Act's purposes," and clearly "create[s] the potential for gross abuse." *Orloski*, 795 F.2d at 164-65.

CAUSE OF ACTION

Count I: FECA, 52 U.S.C. § 30109(a)(8)(A)

84. Plaintiff repeats and realleges paragraphs 1-83 as if set forth fully herein.

85. CLC's administrative complaint in MUR 8216 established reason to believe that LBP PAC violated its independent expenditure reporting obligations under 52 U.S.C. § 30104.

86. The Commission's failure to find reason to believe that these violations occurred and its dismissal of Plaintiff's administrative complaint were arbitrary, capricious, and contrary to law. *See* 52 U.S.C. § 30109(a)(8)(A); *Orloski*, 795 F.2d at 161.

REQUESTED RELIEF

WHEREFORE, Plaintiff requests that this Court:

(1) Declare that the FEC's dismissal of Plaintiff's administrative complaint was arbitrary, capricious, and contrary to law under 52 U.S.C. § 30109(a)(8)(A);

(2) Order the FEC to conform with this declaration within thirty days pursuant to 52 U.S.C. § 30109(a)(8)(C);

(3) Award Plaintiff its costs and reasonable attorney's fees incurred in this action; and

(4) Grant such other relief as the Court may deem just and proper.

Dated: September 9, 2024

Respectfully submitted,

/s/ Megan P. McAllen

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