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FIRST GENERAL COUNSEL'S REPORT

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MUR: 6391
DATE COMPLAINT FILED: October 7, 2010
DATE OF NOTIFICATION: November 29, 2010
DATE OF LAST RESPONSE: October 20, 2011
DATE ACTIVATED: June 2, 2011

SOL: September 25, 2015
ELECTION CYCLE: 2010

COMPLAINANT: Democratic Congressional Campaign Committee

RESPONDENTS: Commission on Hope, Growth and Opportunity

MUR: 6471
DATE COMPLAINT FILED: May 23, 2011
DATE OF NOTIFICATION: May 26, 2011
DATE OF LAST RESPONSE: June 1, 2011
DATE ACTIVATED: June 2, 2011

SOL: September 25, 2015
ELECTION CYCLE: 2010

COMPLAINANT: Citizens for Responsibility and Ethics in Washington

RESPONDENTS: Commission on Hope, Growth and Opportunity

RELEVANT STATUTES: 2 U.S.C. § 432
2 U.S.C. § 433(a)
2 U.S.C. § 434(a)
2 U.S.C. § 434(c)
2 U.S.C. § 434(f)
2 U.S.C. § 441d

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: Internal Revenue Service

1 **I. INTRODUCTION**

2 In 2010, the Commission on Hope, Growth and Opportunity (“CHGO”) spent
3 millions of dollars on federal campaign activity. This matter involves allegations that
4 CHGO violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by
5 failing to report and include proper disclaimers on more than \$2 million in federal
6 independent expenditures and electioneering communications. *See* 2 U.S.C. §§ 434,
7 441d.¹ The amount of CHGO’s independent expenditures and electioneering
8 communications, when combined with the apparent lack of any significant non-electoral
9 activity, also indicate that the group violated the Act by failing to organize, register, and
10 report as a political committee in 2010.

11 CHGO asserts that “no text in any of the communications complained of by the
12 DCCC contained a single word or any phrase that would constitute ‘express advocacy,’
13 as that term is defined at 11 C.F.R. § 100.22(a).” *Resp.* at 6 (June 1, 2011). CHGO
14 argues that it “may not and does not engage in electoral politics at the federal level and

¹ The Complaint in MUR 6391 alleges that CHGO violated the Act by spending over \$600,000 to air several advertisements that were either independent expenditures or electioneering communications. Specifically, the complaint alleges that CHGO (i) failed to report the ads pursuant to 11 C.F.R. §§ 109.10 or 104.20, and (ii) failed to include proper disclaimers pursuant to 11 C.F.R. § 110.11. *See Compl.*, MUR 6391 (Oct. 7, 2010). Following the receipt of the MUR 6391 Complaint by the Commission, a notification letter and copy were sent to CHGO. Due to a clerical error, however, the letter and Complaint were not received by CHGO until November 29, 2010. At that time, CHGO filed with the Commission a motion to dismiss MUR 6391 on the basis that the delay in CHGO’s receipt of the notification denied CHGO its due process. On April 21, 2011, the Commission unanimously determined that it would not grant the relief requested in CHGO’s motion to dismiss, and CHGO was subsequently granted additional time to file a substantive response to the MUR 6391 Complaint.

The Complaint in MUR 6471 alleges that CHGO spent more than \$2.3 million to broadcast fifteen advertisements in twelve Congressional races. *See Compl.* at 3, MUR 6471 (May 23, 2011), amend. (Apr. 26, 2012). The MUR 6471 Complaint includes among its attachments each advertisement identified in the MUR 6391 Complaint, as well as several other advertisements. As in MUR 6391, the MUR 6471 Complaint alleges that CHGO aired advertisements that were either independent expenditures or electioneering communications, and (i) failed to report them pursuant to 2 U.S.C. § 434(g) or 2 U.S.C. § 434(f)(1), and (ii) failed to include proper disclaimers pursuant to 2 U.S.C. § 441d. This Complaint also alleges that the reporting violations were knowing and willful. *See Compl.* at 11. The available information, however, does not suggest that the reporting and disclaimer violations were knowing and willful.

1 all communications made to the public by CHGO are specifically issue oriented and do
2 not advocate the election or defeat of any identified federal candidate." *Id.* at 3.² CHGO
3 maintains that the organization's sole purpose is to educate the public on matters of
4 economic policy formulation, and that CHGO is not a political committee. *See Supp.*
5 *Resp.* at 5-6 (Oct. 20, 2011). In our view, these arguments are wide of the mark.

6 As discussed below, we recommend that the Commission find reason to believe
7 that CHGO violated 2 U.S.C. §§ 434(c) and 434(f) by failing to report its independent
8 expenditures and electioneering communications. We also recommend that the
9 Commission find reason to believe that CHGO violated 2 U.S.C. § 441d(a)(3) by failing
10 to include proper disclaimers stating that its communications were not authorized by any
11 candidate or candidate's committee, and 2 U.S.C. § 441d(d)(2) by failing to include
12 proper audio disclaimers on each of the CHGO advertisements. Additionally, the
13 available information regarding CHGO's overall conduct in 2010 supports a finding that
14 there is reason to believe that CHGO had as its major purpose the nomination or election
15 of federal candidates. Accordingly, we recommend that the Commission find reason to
16 believe that CHGO violated 2 U.S.C. §§ 432, 433, and 434 by failing to organize,
17 register, and report as a political committee, and authorize an investigation.

² Additionally, CHGO states that none of its communications was "'targeted' at any specific electoral constituency." *Resp.* at 3. The Response states that if CHGO made an error with respect to the reporting of electioneering communications, such error was made in good faith, and in any event, the underlying policy considerations of the electioneering communications reporting requirements were served in this case by a combination of the disclaimer contained in each advertisement and the publicly available daily logs of broadcasters required by the FCC. *Id.* at 3-5. CHGO also argues that the disclaimer contained in each advertisement was sufficient, on the basis that no broadcaster objected to the disclaimer's language and no member of the public complained that the identity of the communication's sponsor was unclear or misleading. *Id.* at 4.

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Facts**

3 1. CHGO
4

5 CHGO is a non-profit organization formed in March 2010 that is recognized as an
6 exempt organization under section 501(c)(4) of the Internal Revenue Code. Resp. at 2.
7 CHGO describes itself as a social welfare organization “focused on macro-economic
8 issues” and functioning “as an economic ‘think tank’” on tax, trade, budget, and
9 economic growth policies. *Id.* CHGO states that its sole purpose is “to educate the
10 public on matters of economic policy formulation.” Supp. Resp. at 5.

11 2. CHGO's 2010 Activities

12 CHGO's activities appear to have consisted of maintaining its website,³
13 commissioning a policy paper,⁴ fundraising for itself, and disseminating several broadcast
14 advertisements featuring at least 15 candidates for federal office leading up to the 2010
15 general election. See Compl., MUR 6471, Attach.; see also Alison Fitzgerald, *Secret*
16 *Donors Multiply with Finances Dwarfing Watergate*, DAILY HERALD, May 23, 2011
17 [hereinafter Fitzgerald, *Secret Donors*].

18 The following advertisements were attached to the MUR 6471 Complaint:

³ CHGO included in its response screen-shots of each page of its publically available website. See Supp. Resp. at 5, Ex. B. The website apparently no longer exists, although archived copies are publicly available. See <http://www.hopegrowthopportunity.com>; <http://web.archive.org/web/20120731130332/http://hopegrowthopportunity.com/> (last visited Oct. 31, 2013) (archived copy of original website).

⁴ Dan Mitchell, “An Agenda to Restore American Prosperity,” Supp. Resp., Ex. B. Dan Mitchell is a Senior Fellow in Economics at the CATO Institute.

CHGO Advertisement	Federal Candidate(s) Identified	Broadcast Area(s) ⁵	Cost ⁶
"Collectible Coin" (7 versions)	John Spratt/Mick Mulvaney; Walt Minnick; Suzanne Kosmas/Sandy Adams; Baron Hill/Todd Young; C.A. Ruppertsberger/Marcelo Cardarelli; Paul Kanjorski/Lou Barletta; Dan Maffei/Ann Marie Buerkle	"nine cities"	\$635,910
"Make America Work" (2 versions)	John Salazar/Scott Tipton; Dan Maffei/Ann Marie Buerkle	Unknown	\$362,810
"Song and Dance" (4 versions)	John Spratt/Mick Mulvaney; Kathy Dahlkemper/Mike Kelly; Frank Kratovil/Andy Harris; Allen Boyd/Steve Southerland	South Carolina, Maryland, Pennsylvania, Ohio, Florida	\$793,150
"What She Believes"	Carol Shea-Porter	Manchester, NH; Portland, ME; Boston	\$415,270
"Queen Nancy"	Allen Boyd	Unknown	\$41,100

1
 2 CHGO's website was created in the summer of 2010. Supp. Resp. at 5. The
 3 former website's publicly available content consisted of a mission statement, one
 4 academic report, and several links to articles and polls produced by other sources. *See*
 5 Supp. Resp., Ex. B; [http://web.archive.org/web/20120731130332/](http://web.archive.org/web/20120731130332/http://hopegrowthopportunity.com/)
 6 <http://hopegrowthopportunity.com/> (last visited Oct. 31, 2013) (archived copy of original
 7 website). CHGO's website also contained a restricted area that purportedly allowed users
 8 with a login and password to access "special reports." *See* Supp. Resp., Ex. B;
 9 <http://www.hopegrowthopportunity.com/login.aspx> (last visited July 31, 2012) (archive
 10 unavailable). The site did not, however, allow public users to create a login and
 11 password in order to access the "special reports." Furthermore, although CHGO claims
 12 that it "regularly initiates academic studies," *see* Supp. Resp., Ex. B,

⁵ *See* Fitzgerald, *Secret Donors*.

⁶ *See Id.*; Compl. at 4-6, MUR 6471.

1 <http://www.hopegrowthopportunity.com/econometric-studies.aspx> (last visited July 31,
2 2012) (archive unavailable), only one such study appears to have been made publicly
3 available. *See supra* note 4.

4 According to CHGO, the organization accepted "less than \$4 million" in
5 donations for the fiscal year 2010. Supp. Resp. at 4. According to CHGO's 2010 tax
6 return, however, CHGO received \$4,801,000 in contributions from fundraising events
7 during calendar year 2010. Compl., MUR 6471, Ex. C (Form 990 – Return of
8 Organization Exempt from Income Tax (Nov. 14, 2011)). For the same time period,
9 CHGO's tax return reports \$4,770,000 in expenses, including: \$4,319,825 to Meridian
10 Strategies, LLC for media placement, \$275,000 to Meridian Strategies, LLC for media
11 production, \$105,175 to Meridian Strategies, LLC for advertising and technology, and
12 \$70,000 in compensation to its President/Executive Director and its counsel. *Id.* The
13 expenses are further broken down into \$55,000 for advertising and promotion, \$20,000
14 for information technology, \$25,000 for website maintenance, \$5,000 for economic
15 research, and \$175 for copyright fees. *Id.*⁷

16 **B. Analysis**

17 As set forth below, there is reason to believe that CHGO violated multiple
18 provisions of the Act in connection with the CHGO advertisements. First, all of the
19 CHGO advertisements should have been reported to the Commission as either
20 independent expenditures or electioneering communications. Second, each of the CHGO
21 advertisements contains an incomplete disclaimer. Finally, because it made more than

⁷ It does not appear that CHGO conducted activities after 2010, as its 2011 tax return reported only \$31,000 in expenditures for website maintenance, accounting and legal fees, and compensation to its President and Executive Director. Form 990 – Return of Organization Exempt from Income Tax (May 4, 2012), available at <http://www.guidestar.org/FinDocuments/2011/271/920/2011-271920168-08862c6f-90.pdf>.

1 \$1,000 in expenditures during 2010 and had federal campaign activity as its major
2 purpose, CHGO should have organized, registered and reported as a political committee.

3 1. Reporting Violations

4 a. Independent Expenditures

5 Under the Act, every person who makes independent expenditures in an aggregate
6 amount or value in excess of \$250 during a calendar year shall report such independent
7 expenditures to the Commission. 2 U.S.C. § 434(c)(1); 11 C.F.R. § 109.10. An
8 "independent expenditure" is an expenditure by a person expressly advocating the
9 election or defeat of a clearly identified federal candidate that is not coordinated with a
10 candidate, a candidate's authorized committee, or their agents, or a political party
11 committee or its agents. 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

12 The Commission defines "express advocacy" at 11 C.F.R. § 100.22 as any
13 communication that:

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

26
27 11 C.F.R. § 100.22(a); see also *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976); *FEC v.*
28 *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is
29 expressly advocating when "it provides, in effect, an explicit directive" to vote for the
30 named candidates).

1 Commission regulations further define express advocacy as any communication

2 that:

3 When taken as a whole and with limited reference to external events, such
4 as the proximity to the election, could only be interpreted by a reasonable
5 person as containing advocacy of the election or defeat of one or more
6 clearly identified candidate(s) because—(1) The electoral portion of the
7 communication is unmistakable, unambiguous, and suggestive of only one
8 meaning; and (2) Reasonable minds could not differ as to whether it
9 encourages actions to elect or defeat one or more clearly identified
10 candidate(s) or encourages some other kind of action.

11
12 11 C.F.R. § 100.22(b). The Commission has stated that “communications discussing or
13 commenting on a candidate’s character, qualifications or accomplishments are considered
14 express advocacy under section 100.22(b) if, in context, they have no other reasonable
15 meaning than to encourage actions to elect or defeat the candidate in question.” Express
16 Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures,
17 60 Fed. Reg. 35,292, 35,295 (Jul. 6, 1995) (explanation and justification).

18 As set forth below, it appears that many, but not all, of the CHGO advertisements
19 expressly advocated the election or defeat of clearly identified federal candidates.

20 Accordingly, we recommend that the Commission find reason to believe that CHGO
21 violated 2 U.S.C. § 434(c) by failing to properly report its independent expenditures.

22 *i. “Collectible Coin”*

23 The MUR 6471 Complaint includes seven versions of “Collectible Coin,” six of
24 which are mock advertisements for a collectible coin bearing the faces of President
25 Barack Obama, Nancy Pelosi, and a specific Democratic congressional candidate, which
26 is then followed by an endorsement of that Democratic congressional candidate’s
27 Republican opponent. *See supra* Section II.A.2.; Compl., MUR 6471, Attach.

1 These six versions of the ad are the same except for the candidates featured in the ads,
2 and all six contain express advocacy under section 100.22(a).

3 One such version features Democratic candidate Dan Maffei and his Republican
4 opponent, Ann Marie Buerkle, and states:

5 Now you can own a piece of American history enshrining forever
6 President Obama increasing the national debt to a staggering \$13.4 trillion.
7 Clad in 24-carat fool's gold, the coin commemorates Dan Maffei's
8 unwavering votes for the Pelosi agenda an astounding 96% of the time.
9 You can own this prized collectible for just your share of the national
10 debt—plus all the taxes Pelosi can think of. Call Congressman Dan
11 Maffei to order yours today.
12

13 The advertisement then abruptly switches narrators, and an image of Ann Marie Buerkle
14 appears along with the written message: "Help Ann Marie Buerkle. Stop the Spending.
15 Make America Work Again." The new narrator states: "Ann Marie Buerkle has a better
16 idea: Stop the spending and get America working again." See Compl., MUR 6471,
17 Attach.

18 In the context of the advertisement, the phrase "Help Ann Marie Buerkle," can
19 have no other reasonable meaning than to urge her election. It is similar to both "support
20 the Democratic nominee," which is one of the enumerated "phrases" in section 100.22(a),
21 as well as "Release Bennett," which appeared in the "Utah Values" mailer in MUR 6317
22 (Stewart).⁸ In the context of a comparison between Maffei's record and Buerkle's "better
23 idea," "Help Ann Marie Buerkle" provides, in effect, an explicit directive to vote for
24 Buerkle. Therefore, the six versions of the "Collectible Coin" ad contain express

⁸ In MUR 6317, the Commission found that a mailer expressly advocated the defeat of Senator Robert Bennett in his bid for nomination for U.S. Senate at the 2010 Utah Republican Party Convention when it stated, in pertinent part: "State Delegates, on May 8th, Release Bennett with a vote of thanks and extend the call to someone new." Factual and Legal Analysis at 7, MUR 6317 (Stewart).

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1 advocacy, and the cost of financing them should have been reported as independent
2 expenditures under 2 U.S.C. § 434(c). *See* 11 C.F.R. § 100.22(a).

3 One version of "Collectible Coin" differs slightly from the rest in that it (i) casts a
4 favorable light on a Democratic candidate (Walt Minnick) and (ii) does not contain
5 express advocacy. In the Walt Minnick version, no opponent is mentioned—only
6 President Obama and Nancy Pelosi are featured on the fake coin—and thus there is no
7 contrast drawn between Minnick and a competitor. Additionally, the final graphic
8 features an image of Minnick and the text: "Walt Minnick. Stop the Spending. An
9 Independent Voice for Idaho. Call [a phone number believed to be Minnick's office
10 phone number at the time]." The voice-over states: "Stop the spending. Stand with Walt
11 Minnick: Idaho's independent voice." Without any direct comparison between Minnick
12 and his opponent, or between an opponent's platform and Minnick's "better idea" (as in
13 the other versions of "Collectible Coin"), the ad's call to "stand with" Minnick is less
14 explicit and could have a reasonable meaning other than to encourage actions to elect
15 Minnick, such as contacting Minnick to encourage him oppose government spending.

16 Similarly, the advertisement does not contain express advocacy under section
17 100.22(b) because it lacks an "electoral portion." It does not feature Minnick's opponent
18 or mention an election, and the advertisement's call to "stand with" Minnick, in the
19 context of the ad, is not an unmistakable or unambiguous way to urge viewers to vote for
20 Minnick's election. Reasonable minds could differ as to whether the ad encourages
21 actions to elect or defeat Minnick, or whether it more generally expresses support for his
22 positions. Therefore, the Minnick version of "Collectible Coin" does not contain express
23 advocacy and its cost need not have been reported as an independent expenditure.

1 CHGO may, however, have been required to report this ad as an "electioneering
2 communication." *See infra* Section II.B.1.b.

3 ii. "Make America Work"

4 There are two versions of a CHGO ad entitled "Make America Work" that attack
5 Democratic candidates and endorse their Republican opponents. Both versions of this ad
6 contain express advocacy under section 100.22(a). One version features John Salazar and
7 his opponent, Scott Tipton, and the other features Dan Maffei and his opponent, Ann
8 Marie Buerkle. The Salazar/Tipton version of the ad states:

9 John Salazar says he's an independent voice. But he voted for the Pelosi
10 agenda an astounding 97% of the time. Salazar squandered billions on a
11 bogus stimulus bill as unemployment skyrocketed. And Salazar led the
12 charge with Pelosi for Obamacare, further crippling rural Colorado's
13 economy. As a local business owner, Scott Tipton believes Coloradans
14 know best how to create jobs and grow our economy. Help Scott Tipton
15 make America work again.

16
17 A graphic on the screen states, "The Tipton Plan," the pillars of which are "cut[ting]
18 taxes and wasteful spending" and "creat[ing] jobs for Colorado." The text accompanying
19 the final image of Scott Tipton also reads: "Help Scott Tipton Make America Work
20 Again." *See* Compl., MUR 6471, Attach.⁹

21 As in "Collectible Coin," the advertisement's call to "Help Scott Tipton" is akin
22 to asking viewers to "support" him, and in context can have no other reasonable meaning
23 than to urge Tipton's election. *See* 11 C.F.R. § 100.22(a). The ad clearly contrasts
24 Salazar's purported positions, which "squandered billions" and "crippl[ed] rural
25 Colorado's economy," with "The Tipton Plan," which promises to cut taxes and create

⁹ The first portion of the Maffei/Buerkle ad substitutes Maffei for Salazar but is almost identical in text. The Maffei/Buerkle ad continues, "Ann Marie Buerkle believes New Yorkers know best how to create jobs and grow our economy. She'll stand up to Nancy Pelosi, fight to create jobs, and lower taxes for all New Yorkers. Help Ann Marie Buerkle make America work again." Compl., MUR 6471, Attach.

1 jobs. Implementation of "The Tipton Plan" depends entirely on Tipton defeating Salazar
2 in the election, and the ad's call to "Help Scott Tipton" provides, in effect, an explicit
3 directive to vote for Tipton so that he can put "The Tipton Plan" into practice. Thus, the
4 two versions of the ad contain express advocacy and the cost of financing them should
5 have been reported as an independent expenditure under 2 U.S.C. § 434(c).¹⁰ See
6 11 C.F.R. § 100.22(a).

7 *iii. "Song and Dance"*

8 There are four versions of a CHGO ad entitled "Song and Dance," which features
9 a chorus line with three of the dancers' faces replaced with the faces of President Obama,
10 Pelosi, and a specific Democratic Congressional candidate, and which is then followed by
11 an endorsement of that Democratic Congressional candidate's Republican opponent. The
12 four versions of the ad are the same except for the candidates featured in the ads, and all
13 four contain express advocacy under section 100.22(a). The Allen Boyd/Steve
14 Southerland iteration of "Song and Dance" states:

15 It's the worst economy in decades. And the folks in Washington are living
16 it up, spending our tax dollars like there's no tomorrow. Leading this big
17 song and dance: Obama, of course, and Nancy Pelosi. But there's one
18 face you might not expect to see—our old friend Allen Boyd. Instead of
19 looking out for us, Boyd approved billions in deficit spending without
20 missing a beat. Let's pull the plug on this song and dance once and for all.

21 At this point in the advertisement, the music stops and the screen fades to black.

22
23 An image of Steve Southerland then appears. A printed message reads: "Fight Back.
24 Join Steve Southerland. Stop the Big Spenders in Congress." The narrator states: "Join

¹⁰ The ad featuring Dan Maffei and his opponent, Ann Marie Buerkle, contains express advocacy because the ad is materially indistinguishable from the Salazar/Tipton ad.

1 Steve Southerland's fight against the big spenders in Washington." *See* Compl., MUR
2 6471, Attach.

3 The advertisement's directives to "pull the plug on this song and dance once and
4 for all" (the "song and dance" being Boyd's purported activities as a member of
5 Congress), "Stop the Big Spenders in Congress" (Boyd having been identified as one of
6 the leaders of the "Big Spenders"), and "Join Steve Southerland's fight against the big
7 spenders in Washington" (Steve Southerland being Boyd's opponent and Boyd having
8 been identified as one of the "big spenders"), in context, can have no other reasonable
9 meaning than to urge Boyd's defeat. *See* Factual and Legal Analysis at 7, MUR 6317
10 (Stewart) ("Release Bennett with a vote of thanks and extend the call to someone new" is
11 suggestive of only one plausible meaning — advocating against the election of Senator
12 Bennett). Even though the words used in "Song and Dance" are "marginally less direct
13 than 'Vote for Smith,'" that margin does not change the meaning of the advertisement.
14 The ad "Song and Dance" provides, "in effect, an explicit directive" to vote against Boyd
15 and for Southerland. *MCFL*, 479 U.S. at 249. Therefore, the four versions of the ad
16 contain express advocacy and the cost of financing them should have been reported as
17 independent expenditures under 2 U.S.C. § 434(c). *See* 11 C.F.R. § 100.22(a).

18 *iv. "What She Believes"*

19 One CHGO ad (entitled "What She Believes") contains a split-screen image with
20 text on the left side, and a clip of Congressional candidate Carol Shea-Porter at a podium
21 addressing an unidentified group of people on the right side. The ad proceeds as follows:

On-screen text: Shea-Porter defends her votes for: \$862 billion stimulus	Porter: "Now, I'm not going to pretend that I'm voting with the opposite party half the time. I'm not. I'm not.
Shea-Porter defends her votes for: \$940 billion Obamacare	I think I have about a 90% rating with the President, and maybe 93...
It gets worse Shea-Porter voted for the Pelosi House agenda 93%!	...93% with the House.
Does she believe what we believe? Call Congresswoman Shea-Porter (603) 641-9536	All along, I have said, you know, 'This is what I believe.' This is what I believe." Narrator voice-over: "Call Congresswoman Shea-Porter. Let her know if what you believe is what she believes when it comes to spending your tax dollars."

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See Compl., MUR 6471, Attach.

"What She Believes" does not contain express advocacy under sections 100.22(a) or 100.22(b). The advertisement does not contain any so-called "magic words" or other words that in context can have no other reasonable meaning than to urge the election or defeat of Shea-Porter. "What She Believes" discusses Shea-Porter's voting record on two pieces of legislation (the health care bill and the stimulus bill), and more generally notes how closely her votes align with the President and the House. It does not clearly urge the election or defeat of Shea-Porter on the basis of those votes, instead asking the viewer to call Shea-Porter and "let her know if what you believe is what she believes when it comes to spending your tax dollars." Further, there is no clear electoral portion to the advertisement; it does not mention an election or Shea-Porter's opponent. Even though the advertisement casts a negative light on Shea-Porter's voting record ("It gets worse"), reasonable minds could differ as to whether the advertisement encourages

1 actions to defeat Shea-Porter or encourages her constituents to contact Shea-Porter in an
2 attempt to convince her to vote with the House and the President less often than she has
3 in the past.

4 Therefore, "What She Believes" does not contain express advocacy and its cost
5 need not have been reported as an independent expenditure. It does, however, appear that
6 CHGO should have reported this ad as an "electioneering communication" under
7 2 U.S.C. § 434(f). *See infra* Section II.B.1.b.

8 v. "Queen Nancy"
9

10 There was a single CHGO ad entitled "Queen Nancy," which features images of
11 candidates Allen Boyd and Nancy Pelosi, among others, and states:

12 Once upon a time, there was a very demanding queen of the Congress
13 named Nancy. Whenever Queen Nancy gave an order, it was obeyed.
14 One of her most loyal followers was our Allen Boyd, voting for the
15 queen's agenda 96% of the time. But one day, Allen rebelled and voted
16 'no' on Obamacare. Queen Nancy shouted, 'Off with his head!' and Allen
17 quickly changed his vote to 'yes.' Call Allen. Urge him to vote 'no'
18 again. Tell him you're not afraid of Queen Nancy, and he shouldn't be
19 either.

20
21 Text on the screen reads: "Call Congressman Allen Boyd. (850) 561-3979. Tell him to
22 repeal Obamacare." *See* Compl., MUR 6471, Attach.

23 "Queen Nancy" does not contain express advocacy under sections 100.22(a) or
24 100.22(b). The advertisement does not contain any so-called "magic words" or other
25 words that in context can have no other reasonable meaning than to urge the election or
26 defeat of Boyd or any of the other candidates shown in the advertisement. Rather, it
27 discusses Boyd's vote on a particular piece of legislation and asks the viewer to "call
28 Allen" and "urge him to vote 'no' again" on the same legislation. Its directive to the
29 viewer is clear, and it does not advocate Boyd's election or defeat—in fact, the

1 include a communication that constitutes an expenditure or an independent expenditure.
2 2 U.S.C. § 434(f)(3)(B)(ii). A communication is “targeted to the relevant electorate”
3 when it can be received by 50,000 or more persons in the congressional district the
4 candidate seeks to represent. 11 C.F.R. § 100.29(b)(5)(i).

5 The CHGO advertisements that contain express advocacy—six versions of
6 “Collectible Coin,” both versions of “Make America Work” and all four versions of
7 “Song and Dance”—are not electioneering communications. See 2 U.S.C.
8 § 434(f)(3)(B)(ii). Conversely, “What She Believes” appears to qualify as an
9 electioneering communication that should have been reported to the Commission. First,
10 it was a broadcast, cable, or satellite communication that clearly identified Carol Shea-
11 Porter, a candidate for federal office in the 2010 general election. See *supra* Section
12 II.A.2.; Compl., MUR 6471, Attach. Second, the Complaints allege, and CHGO’s
13 Response confirms, that each of the CHGO advertisements (including “What She
14 Believes”) ran between September 24 and November 2, 2010—the time period within 60
15 days before the 2010 general election. See Resp. at 3, Supp. Resp. at 3. Third, while
16 CHGO’s response generally denies that its advertisements were “‘targeted’ at any
17 specific electoral constituency,” see Resp. at 3, CHGO allegedly spent at least \$415,270
18 to run ads opposing Shea-Porter in Manchester, New Hampshire, which is in her
19 congressional district, as well as in Portland, Maine, and Boston, which may be close
20 enough to the constituents in her congressional district to receive the broadcasts. See
21 Compl. at 6, MUR 6471; Fitzgerald, *Secret Donors*. It appears that “What She Believes”
22 was one of those ads (if not the only such ad), and that “What She Believes” was targeted
23 to the relevant electorate. Therefore, “What She Believes” appears to satisfy the

1 definition of "electioneering communication" and should have been reported to the
2 Commission under 2 U.S.C. § 434(f).

3 "Queen Nancy" and the Walt Minnick version of "Collectible Coin" satisfy the
4 first two prongs of the "electioneering communication" definition. First, they were
5 broadcast, cable, or satellite communications that clearly identified Allen Boyd and Walt
6 Minnick, respectively, both of whom were candidates for federal office in the 2010
7 general election. *See supra* Section II.A.2.; Compl., MUR 6471, Attach. Second, the
8 Complaints allege, and CHGO's Response confirms, that each of the CHGO
9 advertisements (including "Queen Nancy" and the Minnick version of "Collectible
10 Coin") ran between September 24 and November 2, 2010—a time period completely
11 within 60 days before the 2010 general election. *See* Resp. at 3; Supp. Resp. at 3. With
12 respect to the third element of the "electioneering communication" definition, CHGO's
13 Response generally denies that the advertisements were "'targeted' at any specific
14 electoral constituency." *Id.* Many of the CHGO advertisements, however, reportedly
15 were run in (or near) the named candidates' electoral districts. In addition to the
16 aforementioned television ad opposing Shea-Porter, CHGO reportedly paid \$302,300 to
17 run three "Song and Dance" ads on Baltimore TV stations featuring Frank Kratovil, who
18 at the time was a candidate in the Congressional district surrounding Baltimore. *See*
19 Compl. at 6, MUR 6471; Fitzgerald, *Secret donors*. CHGO also reportedly spent at least
20 \$741,928 to run "Song and Dance" ads in South Carolina, Maryland, Pennsylvania, Ohio
21 and Florida. *Id.* The four versions of "Song and Dance" included in the Complaints
22 featured candidates from South Carolina (John Spratt/Mick Mulvaney), Maryland (Frank
23 Kratovil/Andy Harris), Pennsylvania (Kathy Dahlkemper/Mike Kelly) and Florida (Allen

1 Boyd/Steve Southerland). Although only an investigation can obtain exact information
2 relating to the distribution of "Queen Nancy" and the Minnick version of "Collectible
3 Coin," CHGO's reported distribution pattern suggests that both advertisements may have
4 been targeted to the relevant electorate and, thus, CHGO should have reported the ads as
5 electioneering communications under 2 U.S.C. § 434(f).

6 Accordingly, we recommend that the Commission find reason to believe that
7 CHGO violated 2 U.S.C. § 434(f) by failing to properly report its electioneering
8 communications.

9 2. Disclaimer Violations

10 Under the Act, all public communications¹¹ that expressly advocate the election or
11 defeat of a clearly identified candidate and all electioneering communications must
12 contain a disclaimer. 2 U.S.C. § 441d; 11 C.F.R. § 110.11(a)(2). Communications not
13 authorized¹² by a candidate, authorized committee of a candidate, or an agent of either,
14 must clearly state the full name and permanent street address, telephone number, or
15 World Wide Web address of the person who paid for the communication, and that the
16 communication is not authorized by any candidate or candidate's committee. 2 U.S.C.
17 § 441d(a)(3); 11 C.F.R. § 110.11(b)(3).

18 As discussed above, each of the CHGO advertisements included in the
19 Complaints appears to be either an electioneering communication or a public

¹¹ A "public communication" means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. 2 U.S.C. § 431(22); 11 C.F.R. § 100.26.

¹² In the event that any CHGO advertisement was authorized by a candidate, the advertisement would be required to state that it is authorized by such candidate's authorized political committee and include an audio statement by the candidate that identifies the candidate and states that the candidate has approved the communication. See 2 U.S.C. §§ 441d(a)(2), 441d(d)(1)(B).

1 the communication was nevertheless sufficient to prevent misleading the public).¹³
2 Dismissal with caution is not warranted here, however, because the CHGO
3 advertisements do not contain any audio disclaimers whatsoever. Thus, they are not
4 merely technical violations resulting from a poorly executed attempt to comply with
5 2 U.S.C. § 441d(d)(2), but rather a complete omission of the language required by
6 2 U.S.C. § 441d(d)(2).

7 Accordingly, we recommend that the Commission find reason to believe that
8 CHGO violated 2 U.S.C. § 441d(d)(2) by failing to include proper audio disclaimers on
9 each of the CHGO advertisements.

10 3. Political Committee Status

11 Although the complainant's allegations regarding reporting violations by CHGO
12 specifically referred to its failure to report electioneering communications and
13 independent expenditures, the available information appears to establish that CHGO
14 violated the Act by failing to organize, register and report as a political committee.

15 a. The Test for Political Committee Status

16 The Act and Commission regulations define a "political committee" as "any
17 committee, club, association or other group of persons which receives contributions
18 aggregating in excess of \$1,000 during a calendar year or which makes expenditures
19 aggregating in excess of \$1,000 during a calendar year." 2 U.S.C. § 431(4)(A); 11 C.F.R.
20 § 100.5. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held that defining

¹³ As noted, 2 U.S.C. § 441d(d)(1) imposes requirements on communications by candidates or authorized persons. See *supra* note 12. The failure to include "stand by your ad" language in communications made by a candidate who is identified in the communication (as in MURs 6260 and 6252) arguably presents a lesser risk of misleading the public as to the person responsible for the advertising than does the failure to include such language in communications by other persons that do not identify a representative of the responsible person.

1 political committee status “only in terms of the annual amount of ‘contributions’ and
2 ‘expenditures’” might be overbroad, reaching “groups engaged purely in issue
3 discussion.” *Id.* at 79. To cure that infirmity, the Court concluded that the term “political
4 committee” “need only encompass organizations that are under the control of a candidate
5 or the *major purpose of which is the nomination or election of a candidate.*” *Id.*
6 (emphasis added). Accordingly, under the statute as thus construed, an organization that
7 is not controlled by a candidate must register as a political committee only if (1) it crosses
8 the \$1,000 threshold and (2) it has as its “major purpose” the nomination or election of
9 federal candidates.

10 i. *The Commission's Case-By-Case Approach*
11 *to Major Purpose*
12

13 Although *Buckley* established the major purpose test, it provided no guidance as
14 to the proper approach to determine an organization's major purpose. *See, e.g., Real*
15 *Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012), *cert. denied*,
16 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311) (“*RTAA*”). The Supreme Court's
17 discussion of major purpose in a subsequent opinion, *Massachusetts Citizens for Life v.*
18 *FEC*, 479 U.S. 238 (1986) (“*MCFL*”), was similarly sparse. *See id.* at 262. In that case,
19 the Court identified an organization's independent spending as a relevant factor in
20 determining an organization's major purpose, but examined the entire record as part of its
21 analysis and did not chart the outer bounds of the test. 479 U.S. at 238. Following
22 *Buckley* and *MCFL*, lower courts have refined the major purpose test—but only to a

1 limited extent.¹⁴ In large measure, the contours of political committee status—and the
2 major purpose test—have been left to the Commission.¹⁵

3 Following *Buckley*, the Commission adopted a policy of determining on a case-
4 by-case basis whether an organization is a political committee, including whether its
5 major purpose is the nomination or election of federal candidates. Political Committee
6 Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) (Supplemental Explanation and Justification).
7 The Commission has periodically considered proposed rulemakings that would have
8 determined major purpose by reference to a bright-line rule—such as proportional (*i.e.*,
9 50%) or aggregate threshold amounts spent by an organization on federal campaign
10 activity. But the Commission consistently has declined to adopt such bright-line rules.
11 *See* Independent Expenditures; Corporate and Labor Organization Expenditures, 57 Fed.
12 Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking); Definition of
13 Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance Notice of
14 Proposed Rulemaking); *see also* Summary of Comments and Possible Options on the
15 Advance Notice of Proposed Rulemaking on the Definition of “Political Committee,”
16 Certification (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance).

¹⁴ *See* *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 396 (D.C. Cir. 1981) (stating that political committee “contribution limitations did not apply to . . . groups whose activities did not support an existing ‘candidate’” and finding Commission’s subpoena was overly intrusive where directed toward “draft” group lacking a “candidate” to support); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 861-62 (D.D.C. 1996) (holding that a group’s support of a “farm team” of future potential federal candidates at the state and local level did not make it a political committee under the Act); *see also* *Unity08 v. FEC*, 596 F.3d 861, 869 (D.C. Cir. 2010) (concluding that an organization “is not subject to regulation as a political committee unless and until it selects a ‘clearly identified’ candidate”).

¹⁵ Like other administrative agencies, the Commission has the inherent authority to interpret its statute through a case-by-case approach. *See* *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) (“[T]he choice made between proceeding by general rule or by individual . . . litigation is one that lies primarily in the informed discretion of the administrative agency.”)

1 compared to its activities unrelated to campaigns.” *Id.* at 5601-02. The Commission
2 concluded that the determination of an organization’s major purpose “requires the
3 flexibility of a case-by-case analysis of an organization’s conduct that is incompatible
4 with a one-size fits-all rule,” and that “any list of factors developed by the Commission
5 would not likely be exhaustive in any event, as evidenced by the multitude of fact
6 patterns at issue in the Commission’s enforcement actions considering the political
7 committee status of various entities.” *Id.*

8 To determine an entity’s “major purpose,” the Commission explained that it
9 considers a group’s “overall conduct,” including public statements about its mission,
10 organizational documents, government filings (*e.g.*, IRS notices), the proportion of
11 spending related to “federal campaign activity,” and the extent to which fundraising
12 solicitations indicate that funds raised will be used to support or oppose specific
13 candidates. *Id.* at 5597, 5605. Among other things, the Commission informed the public
14 that it compares how much of an organization’s spending is for “*federal campaign*
15 *activity*” relative to “activities that [a]re not campaign related.” *Id.* at 5601, 5605
16 (emphasis added).

17 To provide the public with additional guidance, the Supplemental E&J referenced
18 enforcement actions on the public record, as well as advisory opinions and filings in civil
19 enforcement cases following the 2004 rulemaking. *Id.* at 5604-05. The Commission
20 noted that the settlements in several MURs involving section 527 organizations “provide
21 considerable guidance to all organizations” regarding the application of the major
22 purpose test and “reduce any claim of uncertainty because concrete factual examples of

1 the Committee's political committee analysis are now part of the public record." *Id.* at
2 5595, 5604.

3 After the Commission issued the Supplemental E&J, the *Shays I* plaintiffs again
4 challenged, under the Administrative Procedure Act, 5 U.S.C. §§ 551-59, the
5 Commission's case-by-case approach to political committee status. The court rejected
6 the challenge, upholding the Commission's case-by-case approach as an appropriate
7 exercise of the agency's discretion. *Shays v. FEC*, 511 F. Supp. 2d 19, 24 (D.D.C. 2007)
8 ("*Shays II*"). The court recognized that "an organization . . . may engage in many non-
9 electoral activities so that determining its major purpose requires a very close
10 examination of various activities and statements." *Id.* at 31.

11 Recently, the Fourth Circuit rejected a constitutional challenge to the
12 Commission's case-by-case determination of major purpose. The court upheld the
13 Commission's approach, finding that *Buckley* "did not mandate a particular methodology
14 for determining an organization's major purpose," and so the Commission was free to
15 make that determination "either through categorical rules or through individualized
16 adjudications." *RTAA*, 681 F.3d at 556. The court concluded that the Commission's
17 case-by-case approach was "sensible, . . . consistent with Supreme Court precedent and
18 does not unlawfully deter protected speech." *Id.* at 558.¹⁶ The Fourth Circuit concluded

¹⁶ The *RTAA* court rejected an argument that the major purpose test must be confined to "(1) examining an organization's expenditures to see if campaign-related speech amounts to 50% of all expenditures; or (2) reviewing 'the organization's central purpose revealed by its organic documents.'" *RTAA*, 681 F.3d at 555. The Fourth Circuit recognized that determining an organization's major purpose "is inherently a comparative task, and in most instances it will require weighing some of the group's activities against others." *Id.* at 556; *see also Koerber v. FEC*, 483 F. Supp. 2d 740 (E.D.N.C. 2008) (denying preliminary relief in challenge to Commission's approach to determining political committee status, and noting that "an organization's 'major purpose' is inherently comparative and necessarily requires an understanding of an organization's overall activities, as opposed to its stated purpose"); *FEC v. Mulenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering organization's statements in brochures and "fax alerts" sent to potential and actual contributors, as well as its spending influencing federal

1 that the Supplemental E&J provides “ample guidance as to the criteria the Commission
2 might consider” in determining an organization’s political committee status and therefore
3 is not unconstitutionally vague. *Id.*; see *Free Speech v. FEC*, No. 2:12-cv-00127-SWS, at
4 12-14 (D. Wy. Mar. 19, 2013) (quoting *RTAA* and upholding Commission’s case-by-case
5 method of determining political committee status), *aff’d* 720 F.3d (10th Cir. 2013).¹⁷

6 *iii. Organizational and Reporting Requirements for*
7 *Political Committees*
8

9 Political committees—commonly known as “PACs”—must comply with certain
10 organizational and reporting requirements set forth in the Act. PACs must register with
11 the Commission, file periodic reports for disclosure to the public, appoint a treasurer who
12 maintains its records, and identify themselves through “disclaimers” on all of their
13 political advertising, on their websites, and in mass e-mails. See 2 U.S.C. §§ 432-34;
14 11 C.F.R. §110.11(a)(1).¹⁸ The Act’s reporting requirements “are minimal” and the
15 organizational requirements are not “much of an additional burden.” *SpeechNow.org v.*

elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) (“The organization’s purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.”); *id.* at 864, 866 (applying a fact-intensive inquiry, including review of organizations’ meetings attended by national leaders and organization’s “Political Strategy Campaign Plan and Budget,” and concluding that organization did not have as its major purpose the election of federal candidates).

¹⁷ The Supreme Court’s decision in *FCC v. Fox Television Stations, Inc.* is not to the contrary. See 132 S. Ct. 2307, 2317 (2012) (“[A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved”). In that case, the FCC’s indecency standard was held to be vague for lack of notice when it applied a new stricter standard, *ex post facto*, to the Fox defendants, and when it relied on a single “isolated and ambiguous statement” from a 50-year old administrative decision to support its finding of indecency against the ABC defendants. *Id.* at 2319. Here, in sharp contrast, the Supplemental E&J — which was issued several years before the conduct at issue — provides extensive guidance on the Commission’s approach to major purpose and has withstood both APA and constitutional challenges. See *Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012) (“*Madigan*”) (rejecting vagueness challenge to the definition of “political committee” in the Illinois campaign finance statute).

¹⁸ An organization must register as a political committee when it crosses the \$1,000 threshold and determines, based on the guidance in the Supplemental E&J, that it has the requisite major purpose.

1 *FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (“*SpeechNow*”) (discussing the organizational
2 requirements of committees that make only independent expenditures. Committees that
3 make contributions to candidates or parties are additionally subject to contribution limits
4 and the *SpeechNow* decision does not apply to these committees.). These requirements,
5 which promote disclosure, do not, of course, prohibit speech. *RTAA*, 681 F.3d at 552 n.3.

6 In the wake of the Supreme Court’s decision in *Citizens United v. FEC*, 130 S. Ct.
7 876 (2010), which struck down the Act’s prohibitions on corporate independent
8 expenditures and electioneering communications, the D.C. Circuit held in *SpeechNow*
9 that political committees that engage only in independent expenditures are not subject to
10 contribution limits. *See* 599 F.3d at 696. These political committees, often referred to as
11 independent expenditure-only political committees or Super PACs, continue to be
12 subject, however, to the “minimal” “reporting requirements of 2 U.S.C. §§ 432, 433, and
13 434(a), and the organizational requirements of 2 U.S.C. §§ 431(4) and 431(8).” *Id.* at
14 689. These political committees continue to be subject to certain source prohibitions,
15 such as foreign nationals and federal contractors. *See* 2 U.S.C. §§ 441c, 441e.

16 Notably, the Supreme Court has stressed that such requirements serve the vital
17 role of disclosure in political discourse. *See Citizens United*, 130 S. Ct. at 916
18 (recognizing that increased “transparency” resulting from FECA disclosure requirements
19 “enables the electorate to make informed decisions and give proper weight to different
20 speakers and messages”); *Doe v. Reed*, 561 U.S. ___, 130 S. Ct. 2811, 2820 (2010)
21 (holding that public disclosure of state referendum petitions serves important government
22 interest of “promot[ing] transparency and accountability in the electoral process,” and
23 “preserving the integrity of the electoral process”); *Madigan*, 697 F.3d at 490 (upholding

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1 Illinois's campaign finance disclosure provisions against constitutional facial challenge,
2 finding a substantial relation to "Illinois's interest in informing its electorate about who is
3 speaking before an election"); *see also Doe*, 130 S. Ct. at 2837 (Scalia, J., concurring)
4 ("Requiring people to stand up in public for their political acts fosters civic courage,
5 without which democracy is doomed.").¹⁹

6 b. Application of the Test for Political Committee Status to
7 CHGO

8
9 i. *Statutory Threshold*

10 To assess whether an organization has made an "expenditure," the Commission
11 "analyzes whether expenditures for any of an organization's communications made
12 independently of a candidate constitute express advocacy either under 11 C.F.R.
13 § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b)." Supplemental E&J at
14 5606.

15 It appears that CHGO made over \$1,000 in expenditures during 2010 by
16 disseminating several communications that contain express advocacy. Although the
17 exact amount spent by CHGO on expenditures is not known, CHGO reportedly spent at
18 \$793,150 to disseminate four versions of "Song and Dance," \$561,790 to disseminate six
19 versions of "Collectible Coin," and \$362,810 to disseminate two versions of "Make
20 America Work." "Song and Dance," "Collectible Coin," and "Make America Work"
21 contain express advocacy and are thus independent expenditures. *See supra* Section

¹⁹ *But cf. Minn. Citizens for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (striking down certain registration and disclosure provisions of Minnesota's campaign finance law, finding that those obligations as applied to associations that do *not* meet *Buckley's* "major purpose test" are unduly burdensome and do not match any "sufficiently important disclosure interest").

1 Dance," approximately \$561,790 to show six versions of "Collectible Coin," and
2 approximately \$363,810 on two versions of "Make America Work"—each of which²⁰
3 contains express advocacy. According to the available information, there is reason to
4 believe that CHGO's spending on independent expenditures constituted a significant
5 portion of its overall spending in the 2010 calendar year. These figures reflect only
6 advertisements identified in the Complaints and Responses and not the full extent of
7 CHGO's spending during the 2010 calendar year.

8 In past enforcement actions, however, the Commission has determined that funds
9 spent on communications that support or oppose a clearly identified federal candidate,
10 but do not contain express advocacy, should also be considered in determining whether
11 that group has federal campaign activity as its major purpose.²¹ For example, the
12 Commission has relied, in part, on the following advertisements in determining that an
13 entity was a political committee:

- 14 • **Child's Pay:** The advertisement contains "images of children performing
15 labor-intensive jobs: washing dishes in a restaurant kitchen, vacuuming a
16 hotel hallway, working on an assembly line in a factory, collecting
17 garbage, working at an auto repair shop, and checking groceries," and

²⁰ Not including the Walt Minnick version of "Collectible Coin." See *supra* Section II.B.1.b.

²¹ See Conciliation Agreement ¶ IV.11, MUR 5754 (MoveOn.org Voter Fund) (relying on funds used for advertisements that "opposed" or "criticized" George W. Bush to establish political committee status); Factual and Legal Analysis at 2, MUR 5753 (League of Conservation Voters 527) (finding major purpose satisfied where funds spent on door-to-door and phone bank express advocacy campaign, and also on advertisements "supporting or opposing clearly identified federal candidates, some of which contained express advocacy"); Conciliation Agreement ¶ IV.14, MUR 5487 (Progress for America Voter Fund) (concluding that PFA VF had met the major purpose test after spending 60 percent of its funds on communications that "praised George W. Bush's leadership as President and/or criticized Senator Kerry's ability to provide similar leadership"); see also Stipulation for Entry of Consent Judgment ¶ 22, *FEC v. Citizens Club for Growth, Inc.*, Civ. No. 1:05-01851 (Sept. 6, 2007) (entering stipulation of Commission, approved as part of a consent judgment, where organization was treated as a political committee because "the vast majority of [the group's disbursements] were made in connection with federal elections, including, but not limited to, funding for candidate research, polling, and advertisements and other public communications referencing a clearly identified federal candidate").

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concludes with the question: "Guess who's going to pay off President Bush's \$1 trillion deficit?"²²

- **70 Billion More:** The advertisement shows images of a young boy sitting at a school desk and a young girl with a thermometer in her mouth. The voice-over states: "We could build thousands of new schools, or hire a million new teachers. We could make sure every child has insurance. Instead, George Bush has spent \$150 billion in Iraq and has a secret plan to ask for \$70 billion more. But after four years it's now clear: George Bush has no plan for taking care of America. Face it. George Bush is not on our side."²³
- **Jobs:** "Is George Bush listening to us? Since taking office, he's let oil and energy companies call the shots. Special exemptions from the Clean Water and Clean Air Acts. Halliburton collecting billions in no-bid contracts. Here in Wisconsin, 52,500 manufacturing jobs lost. America is going in the wrong direction. And George Bush just listens to the special interests."²⁴
- **Yucca You Decide:** "Yucca Mountain. While everyone plays politics, who's looking out for Nevada? Eighty-five percent of the nuclear waste could come through Las Vegas. Past businesses. Through communities. By our schools. Accidents happen, and if so, how could Las Vegas, a city and economy built on tourism, recover? Who would come visit us then? The question: did George W. Bush really try and stop Yucca Mountain? Or was he just playing politics?"²⁵
- **Finish It:** [On screen: Images of Mohammed Atta, Osama bin Laden, Khalid Sheik Mohammed, Nick Berg's killers, and victims of terrorist attacks.] "These people want to kill us. They killed hundreds of innocent children in Russia. Two hundred innocent commuters in Spain. And 3,000 innocent Americans. John Kerry has a 30-year record of supporting cuts in defense and intelligence and endlessly changed positions on Iraq.

²² Factual and Legal Analysis at 3-4, 12-13, MUR 5754 (MoveOn.Org Voter Fund). The full communication can be viewed at <http://www.youtube.com/watch?v=A9WKimKIyUQ>.

²³ *Id.* at 4, 12-13. The full communication can be viewed at <http://archive.org/details/movf70billionmore>.

²⁴ Factual and Legal Analysis at 5, 18, MUR 5753 (League of Conservation Voters 527). The full communication can be viewed at http://archive.org/details/lcv_jobs_102604.

²⁵ *Id.* at 5, 18. The full communication can be viewed at http://archive.org/details/lcv_yucca_decide.

1 Would you trust Kerry against these fanatic killers? President Bush didn't
2 start this war, but he will finish it."²⁶
3

- 4 • ***Ashley's Story***: This advertisement recounts the story of Ashley Faulkner,
5 whose mother was killed in the September 11, 2001, terrorist attacks, and
6 the interaction she had with President George W. Bush during a visit to
7 Ohio. It closes with Ashley Faulkner's father stating: "What I saw was
8 what I want to see in the heart and in the soul of the man who sits in the
9 highest elected office in our country."²⁷
10

11 The Commission found that each of these advertisements—though not express
12 advocacy—indicated that the respondent had as its major purpose the nomination or
13 election of federal candidates. These ads evidenced that the organization's major purpose
14 was federal campaign activity because they "support," "oppose," "praise," or "criticize"
15 the federal candidates. *See supra* note 21-25.

16 Likewise, the following advertisements on which CHGO spent an unknown
17 amount in 2010, though not express advocacy, support or oppose federal candidates and
18 therefore provide evidence that CHGO had as its major purpose the nomination or
19 election of federal candidates: "What She Believes,"²⁸ "Queen Nancy,"²⁹ and
20 "Collectable Coin" (Minnick Version) ("Stop the spending. Stand with Walt Minnick:
21 Idaho's independent voice.").

22 CHGO argues in its Response and Supplemental Response that none of its
23 communications can be classified as express advocacy under either 11 C.F.R.
24 §§ 100.22(a) or 100.22(b), and that each of its communications qualifies as an "issue ad"

²⁶ Conciliation Agreement ¶ IV.14, MUR 5487 (Progress for America Voter Fund). The full communication can be viewed at <http://www.livingroomcandidate.org/commercials/2004/finish-it>.

²⁷ *Id.* The full communication can be viewed at <http://www.livingroomcandidate.org/commercials/2004/ashleys-story>.

²⁸ *See supra* Section II.B.1.iv.

²⁹ *See supra* Section II.B.1.v.

1 and therefore not an “expenditure.” Resp. at 3; Supp. Resp. at 6. As discussed above,
2 however, that argument fails to come to terms with the Commission’s longstanding view
3 — upheld by the courts — that the required major purpose test is not limited solely to
4 express advocacy (or the functional equivalent of express advocacy). Each of the CHGO
5 ads features a clearly identified federal candidate, supports or opposes a candidate, and
6 was run in the candidate’s respective state shortly before a primary or general election.
7 The fact that some of the ads do not contain express advocacy, or the functional
8 equivalent, does not shield such ads from consideration under the major purpose test.³⁰

9 Nor does *Buckley* support an argument that determining an organization’s major
10 purpose is limited to consideration of its express advocacy. The Court first established
11 the major purpose test in the context of its discussion of Section 434(e)—a provision that
12 required the disclosure of expenditures by persons *other* than political committees. In
13 order to cure vagueness concerns in that section, the Court construed “expenditure” to
14 reach only express advocacy. 424 U.S. at 79-80. By contrast, limiting which
15 expenditures *political committees* would have to disclose, the Court held that the term
16 “political committee”—as defined in Section 431(d)—“need only encompass
17 organizations that are under the control of a candidate or the major purpose of which is
18 the nomination or election of a candidate.” *Id.* at 79. Thus, the two limitations were
19 imposed on two different terms in two different sections of the Act: (1) “express
20 advocacy” as a limitation on “expenditures” made by persons other than political

³⁰ Similarly, the fact that some of the ads contain a tag line requesting that the viewer call the candidate and tell the candidate to take certain action (*i.e.*, “Call Congresswoman Shea-Porter. Let her know if what you believe is what she believes when it comes to spending your tax dollars.”) does not immunize the communications from being considered federal campaign activity when determining major purpose.

1 committees pursuant to Section 434(e); and (2) "major purpose" as a limitation on the
2 definition of "political committee" pursuant to Section 431(d). The opinion could have
3 articulated a test that linked the limitations—requiring, for example, that to be considered
4 a political committee an organization's "major purpose must be to *expressly advocate* the
5 nomination or election of a candidate." But the Court did not take that tack. Indeed, the
6 Court noted that even "*partisan committees*," which include "groups within the control of
7 the candidate or *primarily organized for political activities*" would fall outside the
8 definition of "political committee" *only* if they fail to meet the statutory spending
9 threshold. *Id.* at 80 (emphasis added).

10 Similarly, in *MCFL*, the Court's opinion nowhere suggests that express advocacy
11 communications are the only kind of "campaign activity" that can satisfy the major
12 purpose test. *See MCFL*, 479 U.S. at 252-53, 262 (political committee requirements
13 inapplicable to "organizations whose major purpose is not *campaign advocacy*," but
14 "political committee" does include organizations with a major purpose of "*campaign*
15 *activity*") (emphasis added). And many lower federal courts have likewise decided that a
16 determination of major purpose is not restricted to consideration of a group's express
17 advocacy as compared to its other activities.³¹

³¹ *See North Carolina Right to Life v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008) (major purpose test may be implemented by examining, *inter alia*, "if the organization spends the majority of its money on *supporting or opposing* candidates") (emphasis added); *Akins v. FEC*, 101 F.3d 731, 742 (D.C. Cir. 1997) ("an organization devoted almost entirely to *campaign spending* could not plead that the administrative burdens associated with such spending were unconstitutional as applied to it") (emphasis added), *vacated on other grounds*, 524 U.S. 11 (1998); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 393 (D.C. Cir. 1981) (recognizing "the grave constitutional difficulties inherent in construing the term 'political committee' to include groups whose activities are not . . . directly related to *promoting or defeating* a clearly identified 'candidate' for federal office") (emphasis added); *RTAA*, 796 F. Supp. 2d 736, 751 (E.D. Va. 2011) (Recognizing that "the FEC considers whether the group spends money extensively on campaign activities such as canvassing or phone banks, or on express advocacy communications" and "the FEC is entitled to consider the full range of an organization's activities in deciding whether it is a political committee"), *affirmed* by 681 F.3d 544 (4th Cir. June 12, 2012); *Free Speech v. FEC*, No. 2:12-cv-00127-

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1
2 In short, based on available information regarding CHGO's spending in 2010,
3 there is reason to believe that CHGO's major purpose is federal campaign activity.
4 CHGO allegedly spent over \$1.7 million on express advocacy communications and over
5 \$530,000 on non-express advocacy communications that support or oppose a clearly
6 identified federal candidate. CHGO reported spending a total of \$4,770,000 in 2010,
7 including \$4,594,825 on media placement and production alone. Given our assessment
8 that all of CHGO's known advertisements contained express advocacy or were
9 electioneering communications based on the standard described above, a substantial part
10 of its \$4.5 million in media-related expenses, including over \$2.2 million spent on the
11 advertisements identified in the Complaints, may relate to federal campaign activity as
12 well, a question warranting further Commission inquiry.

13 Moreover, although it is unclear at this stage whether the amount CHGO spent on
14 federal campaign activity exceeds 50% of its budget, that fact is not dispositive. *See*
15 *supra* at 25 and note 16; *see also Human Life of Washington, Inc. v. Brumsickle*,
16 624 F.3d 990, 1009 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (2011) ("Nothing in
17 *Buckley* suggests . . . that disclosure requirements are constitutional only when applied"

SWS, at 12-14 (D. Wy. Mar. 19, 2013) (quoting *RTAA* and upholding Commission's case-by-case method of determining political committee status), *aff'd* 720 F.3d (10th Cir. 2013). *But see New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (interpreting *Buckley*'s major purpose test as establishing that regulation as a political committee is only constitutionally permissible (1) when an organization's central purpose is "campaign or election related"; or (2) when a "preponderance of [the organization's] expenditures is for express advocacy or contributions to candidates."); Statement of Reasons, Comm'rs. Petersen and Hunter at 6, MUR 5842 (Economic Freedom Fund) (interpreting the Court's major purpose requirement to mean that "the Act does not reach those 'engaged purely in issue discussion,' but instead can only reach . . . 'communications that expressly advocate the election or defeat of a clearly identified candidate'" (citing *Buckley*, 424 U.S. at 79-80); *see also Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007) (holding a Colorado statute unconstitutional as applied because it "would, as a matter of common sense, operate to encompass a variety of entities based on an expenditure that is insubstantial in relation to their overall budgets").

1 to "organizations whose *single* major purpose was political advocacy") (emphasis added).
2 And that consideration is particularly compelling here, at the initial stage of the
3 enforcement process, where the Commission would seek merely to obtain a full record
4 and would not be finding a violation of the Act on the facts before it. *See* Statement of
5 Policy Regarding Commission Action in Matters at the Initial Stage of the Enforcement
6 Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007) ("[R]eason to believe findings indicate
7 only that the Commission has found sufficient legal justification to open an investigation
8 to determine whether a violation of the Act has occurred."). Accordingly, in light of the
9 nature of the substantial spending for which we currently have information, there is
10 reason to believe that CHGO's major purpose in 2010 was federal campaign activity (*i.e.*,
11 the nomination or election of a federal candidate).

12 c. Conclusion

13
14 CHGO made over \$1,000 in expenditures during 2010, and its spending during
15 that calendar year indicates that it had as its major purpose federal campaign activity (*i.e.*,
16 the nomination or election of federal candidates). Accordingly, we recommend that the
17 Commission find reason to believe that CHGO violated 2 U.S.C. §§ 432, 433, and 434,
18 by failing to organize, register, and report as a political committee, and that the
19 Commission authorize an investigation.

20 **III. PROPOSED DISCOVERY**

21 We plan to seek information (1) to establish the extent, nature, and cost of
22 CHGO's federal campaign activity; and (2) to identify potential witnesses who may have
23 relevant knowledge of these facts. We also request that the Commission authorize the
24 use of compulsory process, including the issuance of appropriate interrogatories,

1 document subpoenas, and deposition subpoenas, as necessary. The information sought
2 through any discovery would be focused on ascertaining the scope of CHGO's reporting
3 obligations, and would be consistent with the type of information that the Commission
4 seeks in its analysis of a group's requirements as a political committee.

5 **IV. RECOMMENDATIONS**

- 6 1. Find reason to believe that the Commission on Hope, Growth and Opportunity
7 violated 2 U.S.C. § 434(c).
8
9 2. Find reason to believe that the Commission on Hope, Growth and Opportunity
10 violated 2 U.S.C. § 434(f).
11
12 3. Find reason to believe that the Commission on Hope, Growth and Opportunity
13 violated 2 U.S.C. § 441 d(a)(3).
14
15 4. Find reason to believe that the Commission on Hope, Growth and Opportunity
16 violated 2 U.S.C. § 441 d(d)(2).
17
18 5. Find reason to believe that the Commission on Hope, Growth and Opportunity
19 violated 2 U.S.C. §§ 432, 433 and 434.
20
21 6. Authorize the use of compulsory process in this matter.
22
23 7. Approve the attached Factual and Legal Analysis.

2025 RELEASE UNDER E.O. 14176

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8. Approve the appropriate letter.

Date: 12/26/2013

By: Lisa Stevenson /ms

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