

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
End Citizens United;)
Deanna Nesburg, in her official capacity) MUR # _____
as Treasurer for End Citizens United;)
Beto for Texas; and)
Gwendolyn Pulido, in her official capacity)
as Treasurer for Beto for Texas.)

COMPLAINT

Pursuant to 52 U.S.C. § 30109(a)(1), the undersigned submits this complaint to the Federal Election Commission (“FEC” or “the Commission”) against End Citizens United (“ECU”), Deanna Nesburg, in her official capacity as Treasurer for End Citizens United, Beto for Texas, and Gwendolyn Pulido, in her official capacity as Treasurer for Beto for Texas (collectively, the “Respondents”) for various violations of the Federal Election Campaign Act of 1971, as amended (“the Act”) and Commission regulations.

SUMMARY

Congressman Robert “Beto” O’Rourke is a candidate for U.S. Senate in Texas, and his principle campaign committee is Beto for Texas. ECU is a “super PAC” making expenditures to support Congressman O’Rourke’s candidacy; however, ECU has failed to report such expenditures as either:

- (i) Coordinated communications (and therefore in-kind contributions) to Beto for Texas; or
- (ii) Independent expenditures on behalf of Beto for Texas.

Ironically, Congressman O’Rourke routinely claims—on his website, during his speeches, and in his campaign communications—that he is “focused on curbing the influence of corporate money in Congress” and wants to “stop candidates for federal office from relying on PACs to bankroll their campaigns.” It is no surprise, therefore, that ECU does not want to draw unwanted attention to the fact that Congressman O’Rourke’s candidacy is in fact being supported by a soft money-funded super PAC.

While ECU’s expenditures in support of Congressman O’Rourke’s candidacy are not illegal per se, the failure to report those expenditures is. Furthermore, since the Respondents presumably chose not to report these expenditures because they do not want to overtly contradict Congressman O’Rourke’s deceitful campaign rhetoric,¹ the Commission should investigate whether the

¹ ECU’s failure to file is *not* inadvertent. According to ECU’s publicly available campaign-finance reports, ECU routinely discloses its contributions and files independent expenditure reports in accordance with the Act and Commission regulations. Therefore, it begs the question as to why ECU would not disclose such expenditures in support of Congressman O’Rourke’s candidacy just as it does for the other candidates it supports.

Respondents knowingly and willfully violated the Act and Commission regulations, a crime punishable by imprisonment.

As the independent regulatory agency whose purpose is to enforce campaign finance law in our federal elections, it is the FEC's obligation to ensure that such elections are both fair and transparent. The Respondents' illegal behavior is neither fair nor transparent. The Commission, therefore, should (i) immediately investigate these matters, as required by the Act; (ii) undertake a full and complete investigation of the Respondents without delay to identify the complete extent of these continuing violations; and (iii) ensure that all actions necessary to remediate these violations are taken.

FACTUAL BACKGROUND

ECU is a federally registered political action committee (ID #C00573261) that supports candidates for federal office by making direct contributions, as defined by 52 U.S.C. § 30101(8)(a), and independent expenditures, as defined by 52 U.S.C. § 30101(17). In addition to filing regularly scheduled campaign-finance reports (ECU is a monthly filer), the Act and Commission regulations require ECU to file 24- and 48-hour independent expenditure reports disclosing certain details about the independent expenditures it makes.

Beginning on or about May 23, 2018, ECU solicited contributions—through paid, online advertising—in support of Beto for Texas and in opposition to Congressman O'Rourke's opponent, Senator Ted Cruz. The digital advertising (the "Advertisement"), shown below and also attached as Exhibit A, was paid for by ECU and disseminated on Facebook's social media platform. Importantly, this Advertisement, was disseminated to up to 50,000 individuals and cost ECU at least \$500 to distribute, exclusive of production costs unknown to me. The Advertisement urges recipients to help "DESTROY Ted Cruz":²

The screenshot shows a Facebook advertisement performance report for 'End Citizens United'. The ad itself features a poll titled 'NEW POLL: TED CRUZ COLLAPSING' with two bars: 'BETO 44%' (blue bar with an upward arrow) and 'CRUZ 47%' (red bar with a downward arrow). Below the poll is a green button that says 'DONATE \$5 TO BETO >>'. The ad text reads: 'Ted Cruz's campaign is SINKING! Beto O'Rourke is BARELY behind in the latest poll. If true Democrats send a wave of donations to Beto before this week's budget deadline, we'll totally FINISH Ted Cruz!! So stop what you're doing and send Beto \$5 to DESTROY Ted Cruz:'. Below the ad, it says 'Ted Cruz is PANICKING!! [Beto O'Rourke] Breaking: New Poll' and 'SECURE.ACTBLUE.COM'. The performance report on the right shows the ad was sponsored by End Citizens United, was inactive from May 23, 2018, to Jun 6, 2018, and had 10K - 50K impressions with \$500 - \$999 spent. The audience breakdown shows 0% for Men, 0% for Women, and 0% for Unknown.

² Facebook, Inc. provides a searchable database of all advertising content, available to users. The Advertisement is available by search at:

https://www.facebook.com/ads/archive/?active_status=all&ad_type=political_and_issue_ads&country=US&q=destroy%20ted%20cruz

At the time of filing this complaint, the Respondents have not filed disclosure reports containing any information related to the production of, payment for, or dissemination of the Advertisement.³

ANALYSIS

A. The Advertisement is a public communication.

The Act and FEC regulations create various disclosure obligations for multicandidate PACs that disseminate “public communications,” as defined by the Act and FEC regulations. Not only does the definition of a “public communication” include traditional public advertising, but Commission regulations also specify the applicability of the public communication rules to internet activity when a multicandidate PAC pays to distribute content online.⁴ The only exception to this rule for internet content is content maintained entirely on a website owned exclusively by the multicandidate PAC; however, that exception does not apply here because ECU does not exclusively own Facebook.

As demonstrated by the Facebook data provided herein, (i) the Advertisement was hosted on Facebook, a commercial internet social media marketing company; (ii) the Advertisement was paid for by ECU; and (iii) ECU’s payments were for the public distribution of the Advertisement to between 10,000 and 50,000 individuals by means of internet impressions. While ECU maintained a content page on Facebook to promote its own efforts, the Advertisement was not maintained entirely on a website owned exclusively by ECU. The Advertisement is, therefore, a public communication within the meaning of the Act and Commission regulations.

B. Option 1: The Advertisement is an independent expenditure by ECU.

Multicandidate PACs make independent expenditures when they pay to produce and disseminate public communications that expressly advocate the election or defeat of a clearly identified candidate and are not made in cooperation with any candidate, candidate’s authorized committee, or candidate’s agent.⁵ A public communication satisfies the requirement that it expressly advocate election or defeat of a candidate by naming a candidate and either using explicit words, including, but not limited to, “vote against,” “reject,” “defeat,” “support,” or “elect,” or providing no other alternative for the reasonable viewer but the conclusion that the entire public communication is a call for election or defeat of the candidate.⁶

The Advertisement clearly calls for the defeat of Senator Ted Cruz. As enumerated by the Act and Commission rules, urging voters to help ECU “DESTROY” Senator Ted Cruz is synonymous with advocating the defeat of Senator Ted Cruz. Presuming that the Respondents do not wish physical harm on Senator Ted Cruz, the only other reasonable interpretation of the call to “DESTROY” Senator Ted Cruz is that the Respondents seek support for their efforts to professionally defeat Senator Ted Cruz by electing Congressman O’Rourke. The Advertisement leaves no reasonable interpretation other than advocating the defeat of Senator Ted Cruz and the election of Congressman O’Rourke to the U.S. Senate. The Advertisement references poll numbers, FEC

³ All FEC disclosure filings are available on the FEC’s website at www.fec.gov.

⁴ See 11 C.F.R. § 100.26; see also 52 U.S.C. § 30101(22).

⁵ See 11 C.F.R. § 100.16; see also 2 U.S.C. § 431(17); 11 C.F.R. § 109.1(a).

⁶ 11 C.F.R. § 100.22.

filing deadlines, and advocates financial support for Congressman O'Rourke in order to "totally FINISH Ted Cruz."

Since I am not privy to the internal discussions and contacts of ECU, my analysis presumes that ECU has not coordinated production and dissemination of the Advertisement with Beto for Texas. The Commission should, however, investigate the internal conduct of ECU to determine whether ECU had contact with Beto for Texas for purposes of the production and dissemination of the Advertisement. If no contact is found, this Advertisement is an independent expenditure under the Act and FEC rules and, therefore, must be disclosed by ECU in accordance with the law.

C. Option 2: The Advertisement is a coordinated communication between ECU and Beto for Texas and, therefore, a contribution from ECU to Beto for Texas.

Multicandidate PACs make coordinated communications when they pay to produce and distribute public communications that are coordinated with a candidate, candidate's authorized committee, or candidate's agent.⁷ FEC rules consider a public communication coordinated with a candidate when the public communication is paid for by the multicandidate PAC, not the candidate, and the public communication satisfies the "content" and "conduct" standards enumerated in the FEC rules.⁸ Any republication of a candidate's campaign material or the dissemination of public communications that advocate the election or defeat of a candidate as discussed above satisfy the content standard of the FEC rule.⁹ The conduct standard is also explicitly outlined by FEC regulations and includes all material involvement, substantial discussion, and use of a common vendor between the candidate and a multicandidate PAC.¹⁰

Any expenditure for a public communication that is coordinated with a federal candidate and made by a multicandidate PAC is an in-kind contribution to the candidate. As an in-kind contribution, all expenditures for this coordinated public communication must be disclosed on the relevant FEC disclosures of the multicandidate PAC. In addition, the expenditures must comply with all amount and source limitations applicable to in-kind contributions under the FEC rules.¹¹

As discussed above in the context of independent expenditures, the Advertisement clearly advocates the defeat of Senator Ted Cruz and the election of Congressman O'Rourke. The Advertisement uses explicit and direct words synonymous with those referenced in the FEC rules, and the entire tenor of the Advertisement leaves no alternative but for the reasonable viewer to conclude that the Advertisement is advocating the defeat of Senator Ted Cruz and the election of Congressman O'Rourke.

Given that the Advertisement satisfies both the payment and content standards of a coordinated communication under the FEC rules, the Commission should investigate the conduct of ECU to determine whether ECU's interaction with Beto for Texas, and the agents thereof, constitute a coordinated communication. Under the Act and Commission regulations, if the conduct of ECU satisfies this standard, then ECU's activity has resulted in a reportable in-kind contribution to Beto

⁷ 11 C.F.R. § 109.20.

⁸ 11 C.F.R. § 109.21.

⁹ 11 C.F.R. § 109.21(c)(3)-(4); *see also* 11 C.F.R. § 100.22.

¹⁰ 11 C.F.R. § 109.21(d).

¹¹ 11 C.F.R. § 109.21(b); *see also* 11 C.F.R. § 100.52.

for Texas. If ECU has not satisfied this conduct standard, then their activity still constitutes an independent expenditure that must be reported (but was not) in accordance with the Act and Commission regulations.

C. Respondents have not properly reported any independent expenditures or payments for coordinated communications in support of Congressman O'Rourke's candidacy.

As stated above, the Advertisement constitutes either an (i) independent expenditure advocating the defeat of Senator Ted Cruz and the election of Congressman O'Rourke, or (ii) in-kind contribution to Beto for Texas in the form of a coordinated communication. The Respondents' disclosure filings, however, show no itemized transactions evidencing either independent expenditures or coordinated communications in support of Congressman O'Rourke's candidacy.

Pursuant to the Act and FEC regulations, independent expenditures must be itemized on relevant FEC reports when aggregating in excess of \$200 for a particular election, whereas all contributions to federal candidates must be itemized regardless of value.¹² Therefore, since ECU's dissemination of the Advertisement cost at least \$500, the Respondents clearly violated the Act and Commission regulations by failing to disclose either an independent expenditure by ECU in support of Beto for Texas or an in-kind contribution from ECU to Beto for Texas.

CONCLUSION

The facts and analysis provided by this complaint demonstrate the need for the Commission to (i) immediately investigate these matters, as required by the FECA; (ii) undertake a full and complete investigation of the Respondents without delay to identify the complete extent of these continuing violations; and (iii) ensure that all actions necessary to remediate these violations are taken. Anything less than a full investigation of this complaint will fail the FEC's obligations to ensure fairness and transparency in federal elections.

Thank you for your attention to this matter. Please do not hesitate to contact me if I can be of additional assistance as you pursue this investigation.

Respectfully submitted,

Kyle Whatley
Complainant

//
//
//
//

¹² 11 C.F.R. § 104(b); 11 C.F.R. § 104.3(b)(3)(v)

I hereby swear and affirm that the facts presented in this complaint are true to the best of my knowledge, information and belief. Sworn pursuant to 18 U.S.C. §1001.

Kyle Whatley
211 East 7th Street, #915
Austin, TX 78701

Subscribed and sworn to before me this _____ day of _____, 2018.

Notary Public

My Commission expires: _____

EXHIBIT A

Ad Performance

End Citizens United
Sponsored • Paid for by End Citizens United

Ted Cruz's campaign is SINKING! Beto O'Rourke is BARELY behind in the latest poll. If true Democrats send a wave of donations to Beto before this week's budget deadline, we'll totally FINISH Ted Cruz!! So stop what you're doing and send Beto \$5 to DESTROY Ted Cruz:



Ted Cruz is PANICKING!! [Beto O'Rourke]
Breaking: New Poll
SECURE.ACTBLUE.COM

[Donate Now](#)

End Citizens United
View more ads from this Page

Sponsored • Paid for by End Citizens United

When an advertiser categorizes their ad as being related to politics or issues of national importance, they are required to disclose who paid for the ad. [Learn more](#)

Ad Performance

Inactive
May 23, 2018 - Jun 6, 2018

10K - 50K Impressions	\$500 - \$999 Money spent (USD)
--------------------------	------------------------------------

Audience Breakdown

Age and Gender

Men Women Unknown