

FEDERAL ELECTION COMMISSION

FIRST GENERAL COUNSEL'S REPORT

MUR 7773

DATE COMPLAINT FILED: Aug. 6, 2020

DATE OF NOTIFICATIONS: Aug. 11, 2020

DATE OF LAST RESPONSE: Sept. 30, 2020

DATE OF ACTIVATION: Oct. 29, 2020

ELECTION CYCLE: 2020

SOL EXPIRATION: Mar. 5, 2024 - May 13, 2024

COMPLAINANTS:

Foundation for Accountability and Civic Trust
Kendra Arnold

RESPONDENTS:

Eugene DePasquale
Eugene DePasquale for Pennsylvania
DePasquale for PA 10 and Rick Galena in his
official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30104(b)

52 U.S.C. § 30125(e)

11 C.F.R. § 100.72

11 C.F.R. § 100.131

11 C.F.R. § 104.3

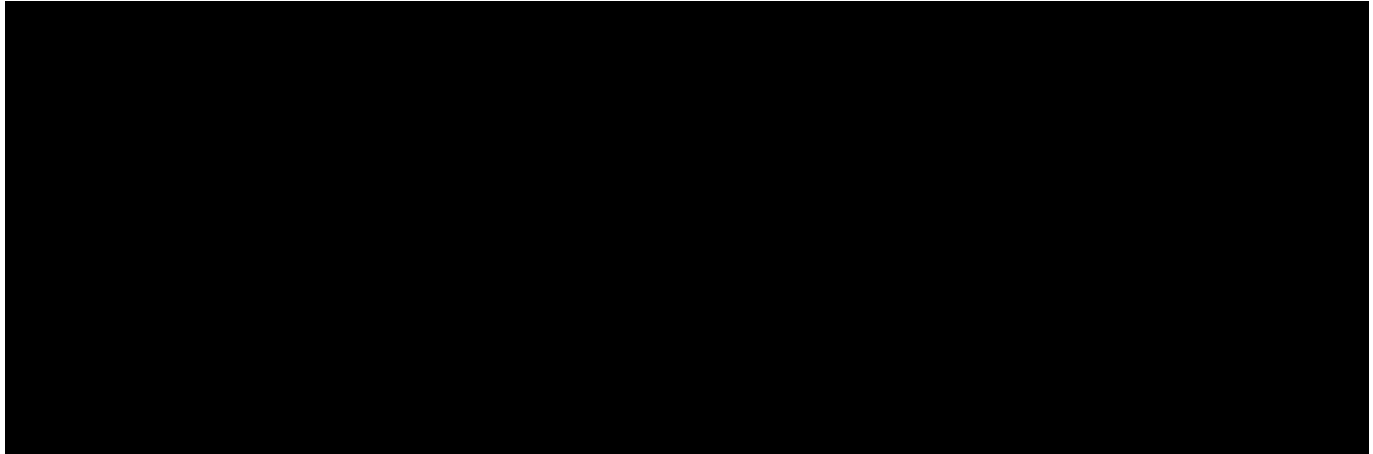
11 C.F.R. § 110.3(d)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

[REDACTED]



1 **I. INTRODUCTION**

2 The Complaint in this matter alleges that former Pennsylvania Auditor General and 2020
3 congressional candidate Eugene DePasquale; DePasquale's principal campaign committee,
4 DePasquale for PA 10 and Rick Galena in his official capacity as treasurer (the "Federal
5 Committee"); and DePasquale's state committee, Eugene DePasquale for PA (the "State
6 Committee"), violated the Federal Election Campaign Act of 1971, as amended (the "Act"), when
7 the State Committee made various payments for DePasquale's testing-the-waters expenditures
8 ahead of his eventual candidacy in Pennsylvania's 10th Congressional District. The Complaint
9 asserts that the State Committee, which had engaged in little activity during DePasquale's second
10 term as Auditor General (DePasquale was ineligible to seek reelection to that office), began to
11 report numerous consulting and media expenditures once DePasquale began to test the waters of a
12 federal election and ceased after DePasquale announced his federal candidacy. As a result, given
13 the timing of the State Committee's resurged payments and unexplained reasons for why the State
14 Committee would start making substantial payments given that DePasquale was not running for
15 state office, the Complaint alleges that DePasquale used his State Committee to fund federal
16 campaign expenditures.

17 DePasquale and the Federal Committee deny the allegations, arguing that the payments
18 made by the State Committee listed in the Complaint were to promote DePasquale's activities as
19 Auditor General and support a potential future state candidacy. Respondents state that, during the
20 first half of 2019, DePasquale began considering several options for continuing his public service
21 after his term as Auditor General ended, including state and federal elections to be held in 2020
22 and 2022. Respondents state that the State Committee sought to continue fundraising for a
23 potential future run at the state level and modernize DePasquale's state campaign infrastructure

1 and amplify his work as Auditor General. They assert that DePasquale, in fact, did not engage in
2 any paid federal exploratory activities. Instead, they state that he consulted with family, party
3 leaders, and activists about whether to run for federal office and did not begin raising money for
4 his federal candidacy until after making the decision to run for Congress. Thus, Respondents
5 assert that the State Committee did not make any payment to test the waters of a federal campaign
6 or to benefit a future federal campaign. The State Committee did not respond.

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 [REDACTED] In sum, the available information
14 shows that DePasquale was considering a potential federal candidacy at the same time as
15 evaluating his chances of being elected to a future state office. [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 [REDACTED] Regarding the payment of research that arguably did

[REDACTED]

1 constitute testing-the-waters activity, when DePasquale became a candidate, the Federal
2 Committee reimbursed the State Committee for a share of the costs. And, for video footage
3 purchased by the State Committee and later provided to the Federal Committee after DePasquale
4 became a candidate, the Federal Committee similarly paid the State Committee for a portion of
5 the footage.

6 As explained below, the bulk of the State Committee's disbursements were not related to
7 DePasquale's federal testing-the-waters activities. It appears that research purchased by the State
8 Committee for \$10,000 should have been allocated to DePasquale's federal testing-the-waters
9 activities and therefore the State Committee made a prohibited \$5,000 in-kind contribution. Yet,
10 the Federal Committee reimbursed the State Committee for the research when DePasquale
11 became a federal candidate. The State Committee also provided video footage to the Federal
12 Committee, but this occurred after DePasquale became a candidate and the State Committee
13 charged the Federal Committee for the portion of video it provided. Accordingly, it does not
14 appear that the State Committee made an in-kind contribution to the Federal Committee. The
15 remaining items purchased by the State Committee do not appear to have been related to
16 DePasquale's efforts to test the waters of a federal election. In sum, given the small amount at
17 issue, pursuing the Respondents would not be an efficient use of the Commission's limited
18 resources.

19 Therefore, we recommend that the Commission exercise its prosecutorial discretion and
20 dismiss the allegations that: (1) DePasquale, the State Committee, and the Federal Committee
21 violated 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 300.61 by directing or spending funds in
22 connection with a federal election that were not subject to the limitations, prohibitions, and
23 reporting requirements of the Act, when the State Committee made in-kind contributions for

1 DePasquale's testing-the-waters expenditures; (2) the State Committee and Federal Committee
2 violated 11 C.F.R. § 110.3(d) by transferring assets to the Federal Committee in connection with
3 its testing-the-waters activities; and (3) the Federal Committee violated 52 U.S.C. § 30104(b) and
4 11 C.F.R. 104.3 by failing to disclose in-kind contributions from the State Committee.

5 **II. FACTUAL BACKGROUND**

6 DePasquale is the former Auditor General of Pennsylvania who served from January 2013
7 to January 2021 and was in office during the relevant period of this matter.³ DePasquale for
8 Pennsylvania was his state committee.⁴ DePasquale was a 2020 congressional candidate in
9 Pennsylvania's 10th district,⁵ having lost the general election on November 3, 2020.⁶ DePasquale
10 for PA 10 is his principal campaign committee and Matt Somers was the treasurer during the
11 period at issue; Rick Galena is currently the treasurer.⁷

12 In March 2019, DePasquale was completing his second term as Auditor General of
13 Pennsylvania and, due to term limits, was prohibited from seeking a third term.⁸ For the first two
14 years of DePasquale's second term as Auditor General, the State Committee reported relatively

³ Compl. at 1 (Aug. 6, 2020).

⁴ *Id.* The State Committee terminated on February 27, 2023. *See* Candidate/Committee Campaign Finance Profile: DePasquale, Eugene for Pennsylvania, PA DEP'T OF ST. ("State Committee Campaign Finance Profile"), <https://www.campaignfinanceonline.pa.gov/pages/CFAnnualTotals.aspx?Filer=2006362> (last visited Mar. 21, 2024).

⁵ Eugene DePasquale, Statement of Candidacy at 1 (July 1, 2020), <https://docquery.fec.gov/pdf/773/201907019150436773.pdf>.

⁶ 2020 Official Results, U.S. Congress Pennsylvania 10th Congressional District, PA DEP'T OF ST., <https://www.electionreturns.pa.gov/General/OfficeResults?OfficeID=11&ElectionID=83&ElectionType=G&IsActive=0> (last visited Mar. 21, 2024).

⁷ DePasquale for PA 10, Amended Statement of Organization at 1 (Oct. 12, 2023) (showing Rick Galena as current treasurer), <https://docquery.fec.gov/pdf/841/202310129597457841/202310129597457841.pdf>; DePasquale for PA 10, Statement of Organization at 1 (July 1, 2019) (showing Matt Somers as former treasurer), <https://docquery.fec.gov/pdf/741/201907019150436741/201907019150436741.pdf>.

⁸ Compl. at 2; *see also* Resp. at 1 (Sept. 30, 2020).

1 limited activity. In 2017 and 2018, the State Committee reported \$20,507.23 and \$43,232.68 in
2 expenditures, respectively.⁹

3 On March 27, 2019, news reports indicated that DePasquale was “strongly considering”
4 running for federal congressional office and, the following day, DePasquale stated in a news
5 interview that he would not rule out a congressional run and, over the next couple of months
6 would talk to people about the best fit to continue his public service.¹⁰ Starting on March 5, 2019,
7 the State Committee made a series of payments for purposes such as “Website,” “Research,”
8 “Media, and “Video Production” that would eventual total \$113,050 and continue until May 13,
9 2019, which coincided with DePasquale announcing his candidacy for federal office and
10 establishing the Federal Committee.¹¹ After his announcement on July 1, 2019, the State
11 Committee effectively ceased its spending activities.¹²

12 The Complaint alleges that between March and May 2019, while DePasquale was
13 considering federal candidacy, the State Committee made expenditures to support DePasquale’s
14 eventual federal campaign and thus made in-kind contributions and prohibited transfers to his
15 Federal Committee.¹³ The Complaint alleges that because DePasquale was not a candidate for
16 State Office, the State Committee had no need for to various expenditures media activities, web

⁹ Candidate/Committee Campaign Finance Profile: DePasquale, Eugene for Pennsylvania, PA. DEP’T OF ST. e(“State Committee Campaign Finance Profile”), <https://www.campaignfinanceonline.pa.gov/pages/CFAnnualTotals.aspx?Filer=2006362> (last visited Mar. 22, 2024).

¹⁰ Compl. at 2 & n.5 (citing John Cole, *DePasquale Mulls Next Step, Possibly Congress*, POLITICSPA (Mar. 27, 2019) [hereinafter Cole Article], <https://www.politicspa.com/depasquale-mulls-next-step-possibly-congress/90769/>).

¹¹ Eugene DePasquale for Pennsylvania, 2019 2d Friday Pre-Election Report at 18-22 (Oct. 25, 2019), <https://www.campaignfinanceonline.pa.gov/pages/ShowReport.aspx?ReportID=314045&isStatement=0&is24Hour=False>.

¹² Compare DePasquale for Pennsylvania, 2019 2d Friday Pre-Election Report (Oct. 25, 2019), <https://www.campaignfinanceonline.pa.gov/Pages/ShowReport.aspx?ReportID=314045&isStatement=0&is24Hour=False>, with DePasquale for Pennsylvania, 2019 Annual Report (Jan. 31, 2020), <https://www.campaignfinanceonline.pa.gov/Pages/ShowReport.aspx?ReportID=320088&isStatement=0&is24Hour=False>.

¹³ Compl. at 10.

1 services, research, or video production, all of which marked a sudden departure from the State
2 Committee's prior inactivity over the last two years that precisely match the period during which
3 DePasquale was testing the waters for federal candidacy.¹⁴ The Complaint further alleges that,
4 following its July 1, 2019, formation, the Federal Committee began to use many of the same
5 vendors.¹⁵

6 Regarding the State Committee's purchase of \$24,000 in Facebook ads in April and May
7 2019, the Complaint notes that several of these ads sought to collect viewers' email addresses and
8 alleges that this may indicate that DePasquale was working on list-building for his eventual
9 federal campaign.¹⁶ One ad, for example, instructed viewers to "Stand with Eugene DePasquale"
10 and encouraged them to sign a petition that related to protecting children from child abuse.¹⁷
11 Clicking on the ad led to a page that asked for the user's email and street addresses.¹⁸ The
12 accomplishments promoted by the ad related to a 2016 audit of a child abuse hotline.¹⁹ Other ads
13 focused on the cost of prescription drugs,²⁰ which was apparently an important issue for
14 DePasquale's federal campaign.²¹ One of these ads asked the viewer "Do you support lower

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 7-9.

¹⁶ *See id.* at 2, 6, 10.

¹⁷ *Id.* at 3; Resp., Ex. A, Advertisement 2.

¹⁸ *See Defend Pennsylvania's Children*, NGPVAN, <https://secure.ngpvan.com/iBwiiA3SsUeBOVEioeteCQ2> (broken link) (last visited Mar. 22, 2024) (hyperlinked in Resp., Ex. A, Advertisement 2); Compl. at 3, n.10.

¹⁹ *See id.*; Press Release, Pa. Dep't of the Auditor Gen., Auditor General DePasquale Says Audit Leads to Major Changes at ChildLine, Helping Protect More At-Risk Children, (Oct. 12, 2016) ("Child Abuse Audit"), <https://www.paauditor.gov/press-releases/auditor-general-depasquale-says-audit-leads-to-major-changes-at-%20childline-helping-protect-more-at-risk-children> (broken link) (last visited Mar. 21, 2024).

²⁰ Resp., Ex. A, Advertisements 3-4.

²¹ *See Health Care*, EUGENE DEPASQUALE FOR CONGRESS, <https://eugeneforcongress.com/priorities/healthcare/> (broken link) (last visited Mar. 21, 2024) ("Eugene knows that too many families are not able to afford the cost of prescription drugs that their families need. As Auditor General, Eugene has worked tirelessly to help lower the cost of prescription drugs and this would be one of his top priorities in Congress.").

1 prescription drug costs?”²² but the landing page associated with that question sought to collect
2 contact information first and noted that any response to the question it posed was optional.²³
3 Other ads promoted a “policy survey,” which also led to a similar landing page collecting contact
4 information.²⁴

5 Although the State Committee paid for the ads, none of the ads appear to link to the State
6 Committee’s established campaign webpage, which seems to have been located at
7 www.eugene4pa.com.²⁵ Instead, the Facebook ads contained in the Facebook Ad Library
8 appeared to link to a different webpage, www.eugenePA.com.²⁶ The Internet Archive has no
9 record of ever capturing a home page for www.eugenePA.com. In September 2019, months after
10 the State Committee’s ads ran on Facebook and after DePasquale became a federal candidate two
11 subpages of www.eugenePA.com were archived, but these subpages appeared to merely redirect
12 to www.eugeneforcongress.com, DePasquale’s eventual federal campaign webpage.²⁷ It is

²² Resp., Ex. A, Advertisement 3.

²³ See *Taking Eugene’s Prescription Drug Survey*, NGPVAN, https://secure.ngpvan.com/7oVVoo6-3EOS_Ng0TrF4Rg2 (broken link) (last visited Mar. 21, 2024) (hyperlinked in Resp., Ex. A, Advertisement 3).

²⁴ See *Share Your Thoughts with Eugene*, <https://secure.ngpvan.com/Error/Index/404?aspxerrorpath=%2F-%2520PQIqkKaFkm85R8o7c1ITA2> (broken link) (last visited Mar. 21, 2024) (hyperlinked in Resp. at Ex. A, Advertisement 1; Compl. at 3, n.10); Caruso Article.

²⁵ See EUGENE4PA, www.eugene4pa.com, https://web.archive.org/web/2019*/eugene4pa.com (last visited Mar. 22, 2024) (promoting DePasquale for Auditor General).

²⁶ See Resp. Ex. A, (Advertisement 1). The Response claims that www.eugenePA.com was “the same domain name consistently used in DePasquale’s Auditor General campaigns.” *Id.* at 3. It is unclear whether Respondents meant to refer to www.eugene4pa.com or www.eugenePA.com.

²⁷ See EugenePA, www.eugenepa.com/pharma/, <https://web.archive.org/web/20190913211108/https://eugenepa.com/pharma/> (last visited Mar. 21, 2024) (attempting to redirect to www.eugeneforcongress.com/pharma, but failing to locate an archived page); EugenePA, www.eugenepa.com/robots.txt, <https://web.archive.org/web/20190913211104/https://eugenepa.com/robots.txt> (last visited Mar. 21, 2024) (attempting to redirect to www.eugeneforcongress.com/robots.txt but failing to locate an additional archived page).

1 unclear whether those pages directed to www.eugeneforcongress.com at the time that the State
2 Committee ran the ads.²⁸

3 Along with the \$24,000 in Facebook ads, the State Committee also paid about \$89,000 for
4 “website,” “research,” “media,” “media production,” “video production,” “consulting,” “retainer,”
5 and “software,” which the Complaint alleges were made to benefit the Federal Committee.²⁹

6 According to the Complaint, at the time of these expenditures, the State Committee appeared to
7 have been reducing its website presence.³⁰ The Complaint, citing to the Internet Archive, alleges
8 that the State Committee and DePasquale shut down DePasquale’s Auditor General campaign
9 website, www.eugene4pa.com, in early March 2019.³¹ A review of the cached pages for
10 DePasquale’s state campaign page confirms that www.eugene4pa.com has not been archived
11 since March 4, 2019.³² The final archived page contains articles concerning DePasquale’s 2016
12 campaign and did not appear to have been updated for some time.³³ Although DePasquale does
13 not appear to have had a public webpage presence throughout the spring of 2019 on either
14 www.eugene4pa.com or, as detailed above, the similarly named webpage www.eugenepa.com,
15 the State Committee made numerous expenditures in the total amount of \$8,000 to “Think Big

²⁸ See EUGENE4PA, www.eugene4pa.com, https://web.archive.org/web/2019*/eugene4pa.com (last visited Mar. 21, 2024).

²⁹ Compl. at 4; *see also* Eugene DePasquale for Pennsylvania, 2019 2d Friday Pre-Election Report at 18-22 (Oct. 25, 2019), <https://www.campaignfinanceonline.pa.gov/pages/ShowReport.aspx?ReportID=314045&isStatement=0&is24Hour=False>.

³⁰ *Id.* at 2 & n.6 (analyzing the history of www.eugene4pa.com via the Internet Archive’s Wayback Machine) (citing EUGENE4PA, www.eugene4pa.com, https://web.archive.org/web/2019*/eugene4pa.com) (last visited Mar. 21, 2024).

³¹ *Id.*

³² EUGENE4PA, www.eugene4pa.com, https://web.archive.org/web/2019*/eugene4pa.com (last visited Mar. 21, 2024).

³³ See EUGENE4PA (Mar. 4, 2019), www.eugene4pa.com, <https://web.archive.org/web/20181110074422/http://www.eugene4pa.com/home.html> (last visited Mar. 21, 2024).

1 Campaigns” (“Think Big”) for website-related activity.³⁴ Additionally, over the spring of 2019,
 2 the State Committee made several expenditures to Rising Tide Interactive (“Rising Tide”) in the
 3 amount of \$58,000, and Jackson Media Group (“Jackson Media”) in the amount of \$33,000,
 4 which appear to relate to website design and social media activity.³⁵ Finally, the State Committee
 5 made expenditures to Stanford Campaigns for “research” in the amount of \$10,000 and to
 6 EveryAction Inc. (“EveryAction”) for software in the amount of \$4,050.³⁶

7 On July 1, 2019, DePasquale filed his Statement of Candidacy and the Federal Committee
 8 filed its Statement of Organization.³⁷ The Federal Committee ultimately purchased some of the
 9 materials created by two of the State Committee’s vendors from the State Committee: a portion
 10 of the research completed by Stanford Campaigns in the amount of \$6,800, and a licensing
 11 agreement to some of the media footage created by Jackson Media in the amount of \$1,000.³⁸ In

³⁴ Compl. at 4 (citing Eugene DePasquale For Pennsylvania Campaign Finance Report (Oct. 25, 2019), <https://www.campaignfinanceonline.pa.gov/Pages/ShowReport.aspx?ReportID=314045&isStatement=0%20&is24Hour=0> (identifying \$8,000 in expenditures to Think Big)).

³⁵ *Id.* (identifying \$58,000 in expenditures to Rising Tide and \$33,000 in expenditures to Jackson Media).

³⁶ *Id.* at 7-9 (identifying \$10,000 in expenditures to Stanford Campaigns and \$4,050 in expenditures to Every Action).

³⁷ Resp. at 3-4; DePasquale for PA 10, Statement of Organization at 2 (July 1, 2019), <https://docquery.fec.gov/pdf/741/201907019150436741/201907019150436741.pdf>; Eugene DePasquale, Statement of Candidacy at 1 (July 1, 2019), <https://docquery.fec.gov/pdf/773/201907019150436773/201907019150436773.pdf>. DePasquale did not win the general election and ended his campaign on November 5, 2020. Sam Ruland, *Scott Perry Wins Pa.’s 10th Congressional District in Tight Race Against Eugene DePasquale*, YORK DAILY RECORD (Nov. 5, 2020), <https://www.ydr.com/story/news/politics/2020/11/05/pa-election-2020-scott-perry-wins-pa-s-10th-congressional-district-eugene-depasquale/6173562002/>.

³⁸ DePasquale for PA 10, 2019 Year-End Report at 334 (Jan. 29, 2020), <https://docquery.fec.gov/pdf/047/202001299182369047/202001299182369047.pdf> (disclosing a payment of \$6,800 to the State Committee for “research materials”); DePasquale for PA 10, 2019 October Quarterly Report at 218 (Oct. 15, 2019), <https://docquery.fec.gov/pdf/323/201910159163908323/201910159163908323.pdf> (disclosing payment to the State Committee of \$1,000 for “licensing”); *see also* Resp. at 3, 7; *see also* Eugene DePasquale for Pennsylvania, 2019 2d Friday Pre-Election Report at 13 (Oct. 25, 2019), <https://www.campaignfinanceonline.pa.gov/pages/ShowReport.aspx?ReportID=314045&isStatement=0&is24Hour=False> (State Committee disclosing receipts of \$6,800 for “research book” and \$1,000 for “video licensing agreement” from the Federal Committee).

1 addition, the Federal Committee paid the State Committee \$4,050 for data.³⁹ Each of these
2 transactions were listed on the Federal Committee's disclosure reports.

3 The Federal Committee also began to pay several of the vendors identified in the
4 Complaint directly (Stanford Campaigns, Rising Tide, Think Big, and Jackson Media).⁴⁰ After
5 DePasquale announced his congressional campaign, the State Committee stopped making
6 expenditures to these vendors.⁴¹

7 The Federal Committee and DePasquale submitted a joint response, stating that
8 DePasquale "did not undertake any paid federal exploratory activities"; instead, he consulted with
9 family, party leaders, and activists about whether to run and did not begin raising money for his
10 federal candidacy until after making the decision to run for Congress.⁴² The Response concedes
11 that DePasquale was contemplating a federal candidacy and asserts that in the spring of 2019,
12 "DePasquale was considering several different options to continue his public service at the end of

³⁹ See DePasquale for PA 10, 2019 October Quarterly at 218 (Oct. 15, 2019), <https://docquery.fec.gov/cgi-bin/fecimg/?201910159163908540> (disclosing payment to the State Committee of \$4,500 for "data purchase"); see also Resp. at 7; Eugene DePasquale for Pennsylvania, 2019 2d Friday Pre-Election Report at 13 (Oct. 25, 2019), <https://www.campaignfinanceonline.pa.gov/pages/ShowReport.aspx?ReportID=314045&isStatement=0&is24Hour=False> (State Committee disclosing receipt of \$4,500 for "purchase of data" from the Federal Committee).

⁴⁰ *DePasquale for PA 10: Disbursements*, FEC, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00710533&recipient_name=stanford&two_year_transaction_period=2020 (last visited Mar. 22, 2024) (disbursements to Stanford Campaigns); *DePasquale for PA 10: Disbursements*, FEC, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00710533&recipient_name=Rising+Tide+Interactive&two_year_transaction_period=2020 (last visited Mar. 22, 2024) (disbursements to Rising Tide); *DePasquale for PA 10: Disbursements*, FEC, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00710533&recipient_name=Think+Big+Campaigns&two_year_transaction_period=2020 (last visited Mar. 22, 2024) (disbursements to Think Big); *DePasquale for PA 10: Disbursements*, FEC, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00710533&recipient_name=Jackson+Media+Group&two_year_transaction_period=2020 (last visited Mar. 22, 2024) (disbursements to Jackson Media).

⁴¹ Compare DePasquale for Pennsylvania, 2019 2d Friday Pre-Election Report (Oct. 25, 2019), <https://www.campaignfinanceonline.pa.gov/Pages/ShowReport.aspx?ReportID=314045&isStatement=0&is24Hour=False>, with DePasquale for Pennsylvania, 2019 Annual Report (Jan. 31, 2020), <https://www.campaignfinanceonline.pa.gov/Pages/ShowReport.aspx?ReportID=320088&isStatement=0&is24Hour=False>.

⁴² Resp. at 2, 4.

1 his Auditor General term, including a run for multiple federal offices, but was primarily focused
2 on his role as Auditor General of Pennsylvania.”⁴³ While the Response does not specify what
3 state office DePasquale was considering, [REDACTED]
4 [REDACTED]⁴⁴ The Response
5 further asserts that the vendors identified in the Complaint, “provided services to the state
6 campaign committee in connection with [DePasquale’s] activities as Auditor General and in
7 support of a future run for state office and prior to DePasquale becoming a candidate under the
8 Act.”⁴⁵

9 The Response addresses each vendor identified in the Complaint and asserts that none of
10 the work completed by the vendors was in support of a federal campaign. The Response states
11 that Rising Tide was hired “for email marketing and to design a social media plan focused on
12 DePasquale’s accomplishments as Auditor General.”⁴⁶ The Response also asserts that Think Big
13 was hired to “redesign DePasquale’s state campaign website to accentuate DePasquale’s work as
14 Auditor General. . . . The website was hosted at www.EugenePA.com, the same domain name
15 consistently used in DePasquale’s Auditor General campaigns.”⁴⁷ The Response states that
16 Stanford Campaigns created a research book on DePasquale, “without any focus on any specific
17 federal or state issue, potential future race, or potential future opponent,” which was later

⁴³ *Id.* at 3.

⁴⁴ It is unclear what state offices DePasquale may have been considering in 2019 and we have not located any information suggesting that DePasquale contemplated a state level campaign for the 2020 election cycle. An article cited by both the Complaint and the Response indicates that DePasquale was considering running for Governor of Pennsylvania in 2022, U.S. Senate in 2022 (no Pennsylvania Senate seats were up for re-election in 2020), or Congress in 2020. *See Cole Article.*

⁴⁵ *Resp.* at 2.

⁴⁶ *Id.*

⁴⁷ *Id.* at 2-3. *But see supra* notes 25, 26, 27, 28 and accompanying text (indicating that “eugenePA.com” may not have been used by the State Committee).

1 purchased by the Federal Committee.⁴⁸ The Response asserts that Jackson Media was hired for
2 “general communications consulting,” “researching, editing, and cataloging public materials for
3 use in future state campaigns,” and to “produce videos and photos for DePasquale’s state
4 campaign website and social media pages.”⁴⁹ Finally, the Response states that Every Action
5 provided a “data management and email tool to manage and email the state campaign’s
6 supporters.”⁵⁰ DePasquale and the Federal Committee assert that the facts here are similar to
7 those of other MURs where dismissal was warranted.⁵¹ Finally, the Response asserts that any
8 assets transferred to the Federal Committee were purchased for fair market value.⁵²

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⁴⁸ *Id.* at 3; DePasquale for PA 10, 2019 Year-End Report at 334 (Jan. 29, 2020), <https://docquery.fec.gov/pdf/047/202001299182369047/202001299182369047.pdf> (disclosing a payment of \$6,800 to the State Committee for “research materials”).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 5-6 (citing MUR 7267 (Hawley for Missouri), MUR 5761 (Madrid for Congress), MUR 6750 (Carl DeMaio for Congress), MUR 6784 (Lizbeth Benacquisto for Congress), MUR 7007 (Kyle McCarter for Congress Committee)).

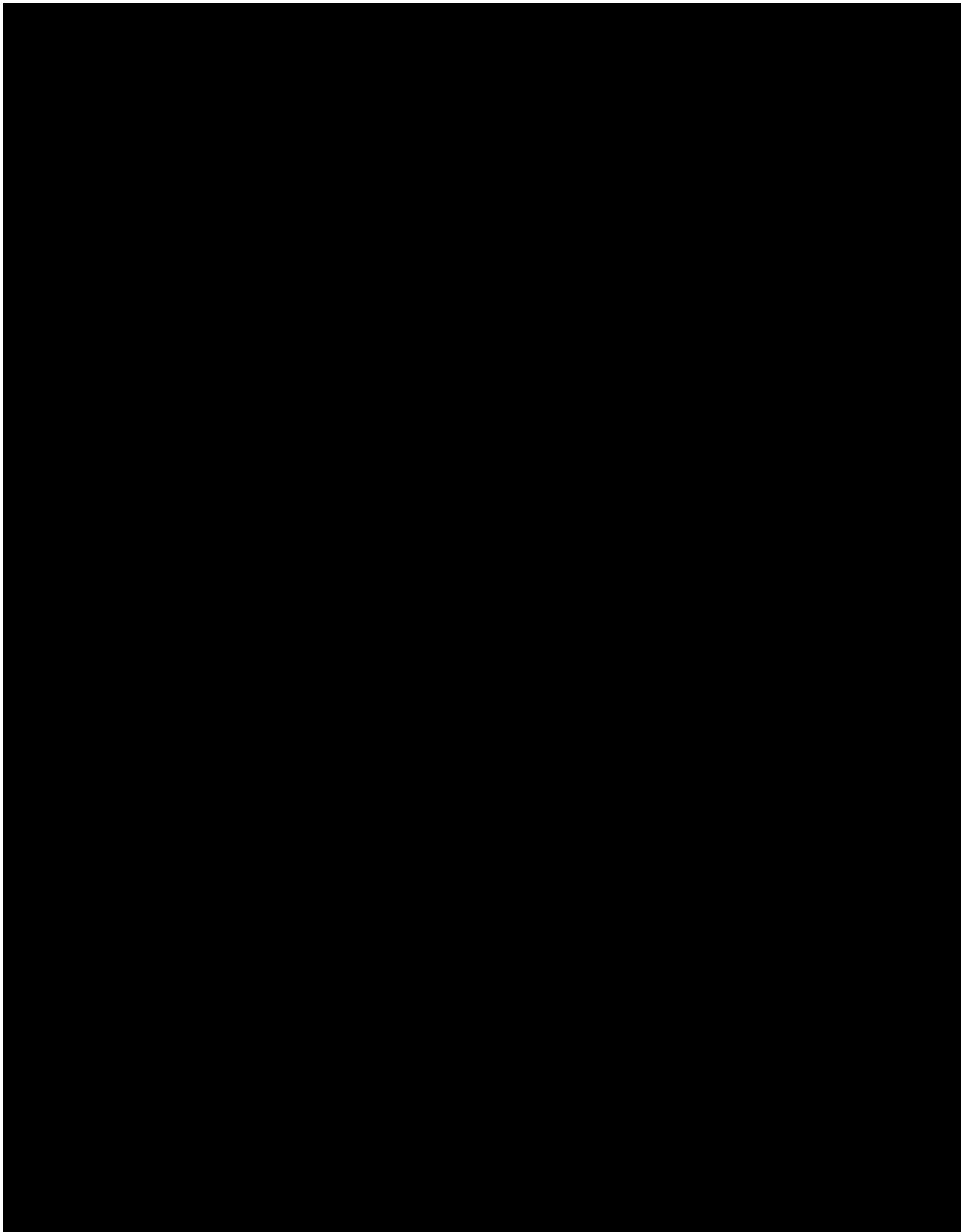
⁵² *Id.* at 7.

MUR 7773 (DePasquale for PA 10, *et al.*)

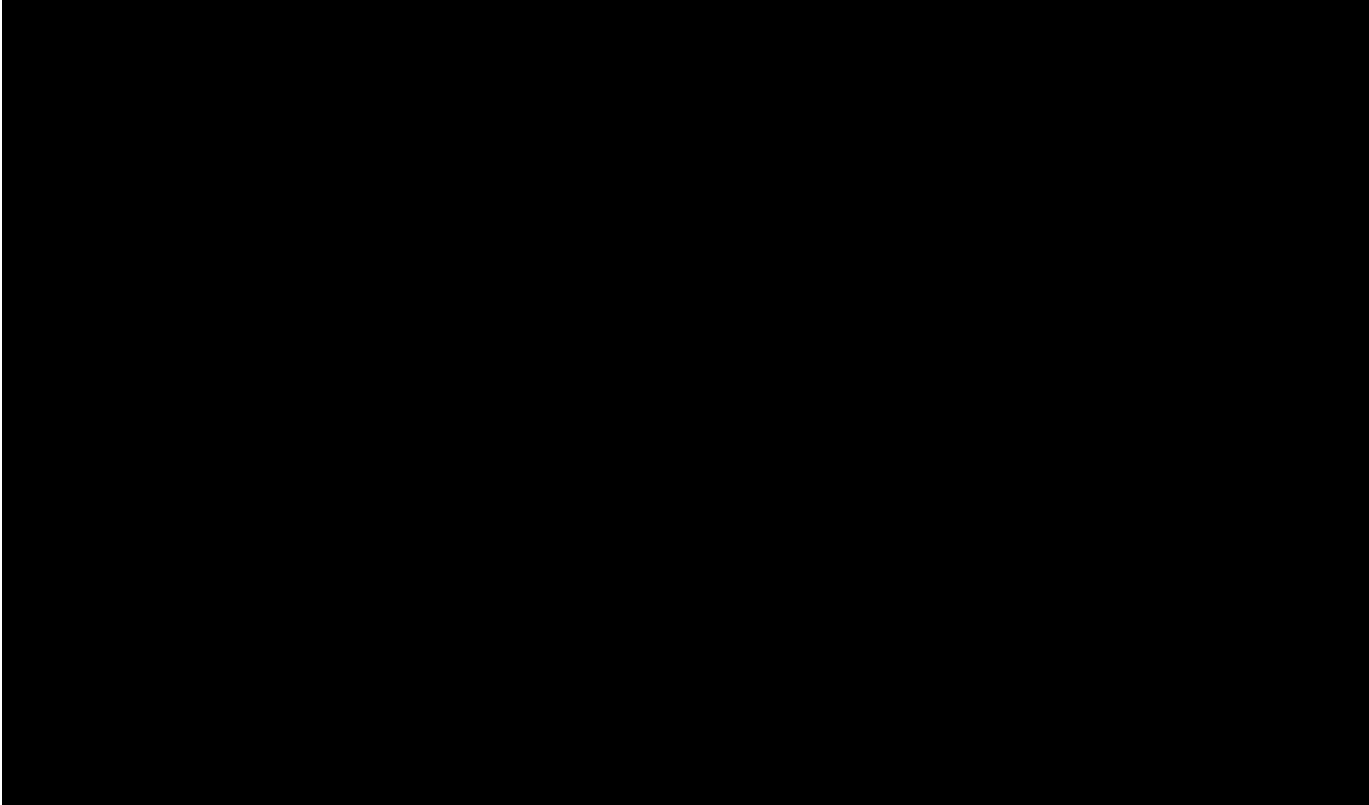
First General Counsel's Report

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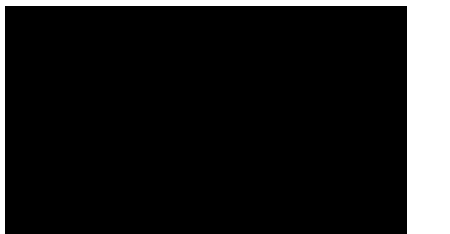


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12 [REDACTED] According to the Response, that video was for use by the State
13 Committee for the state committee website and its social media pages.⁶⁷ [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED] [REDACTED]
17 [REDACTED]



⁶⁷ Resp. at 3.

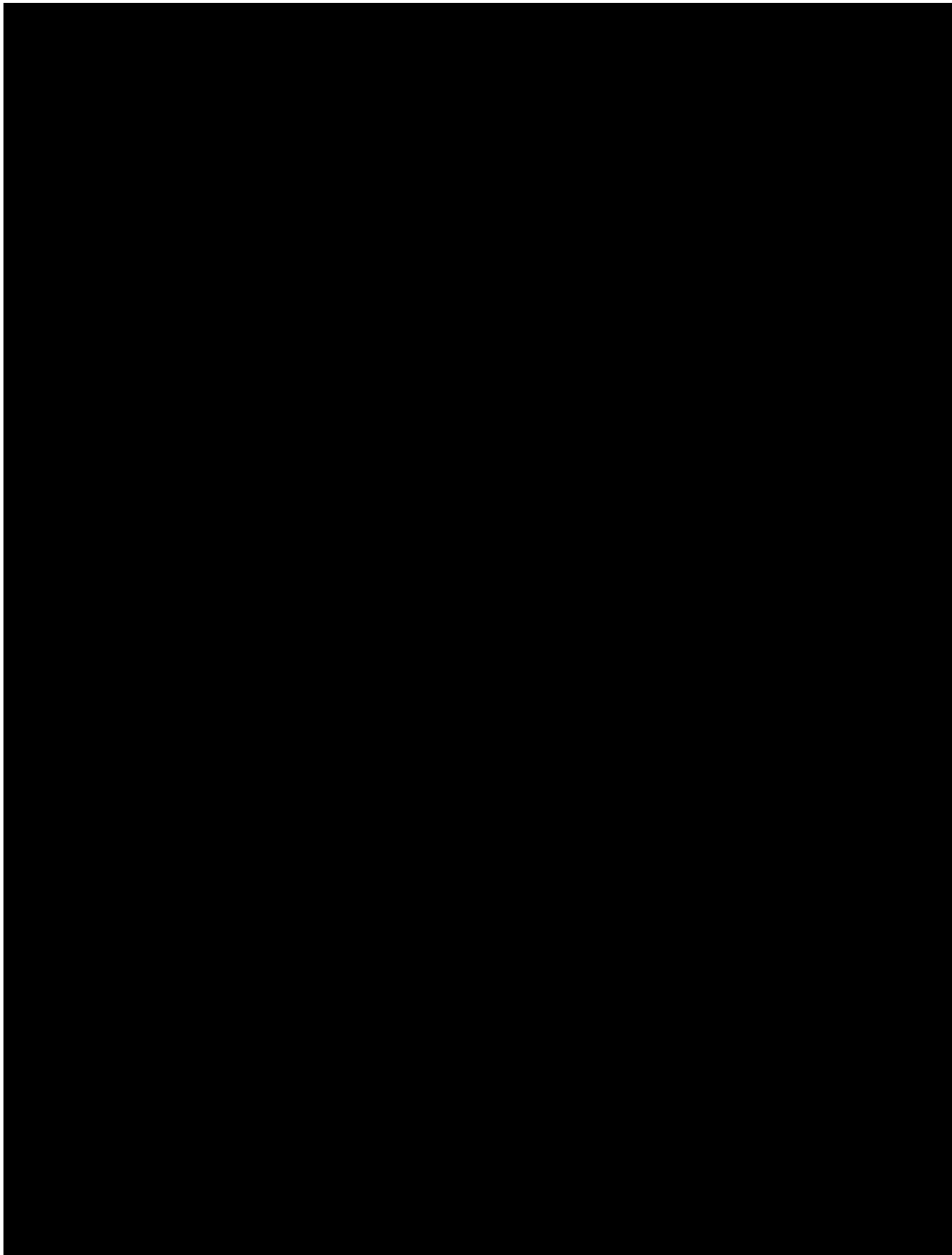
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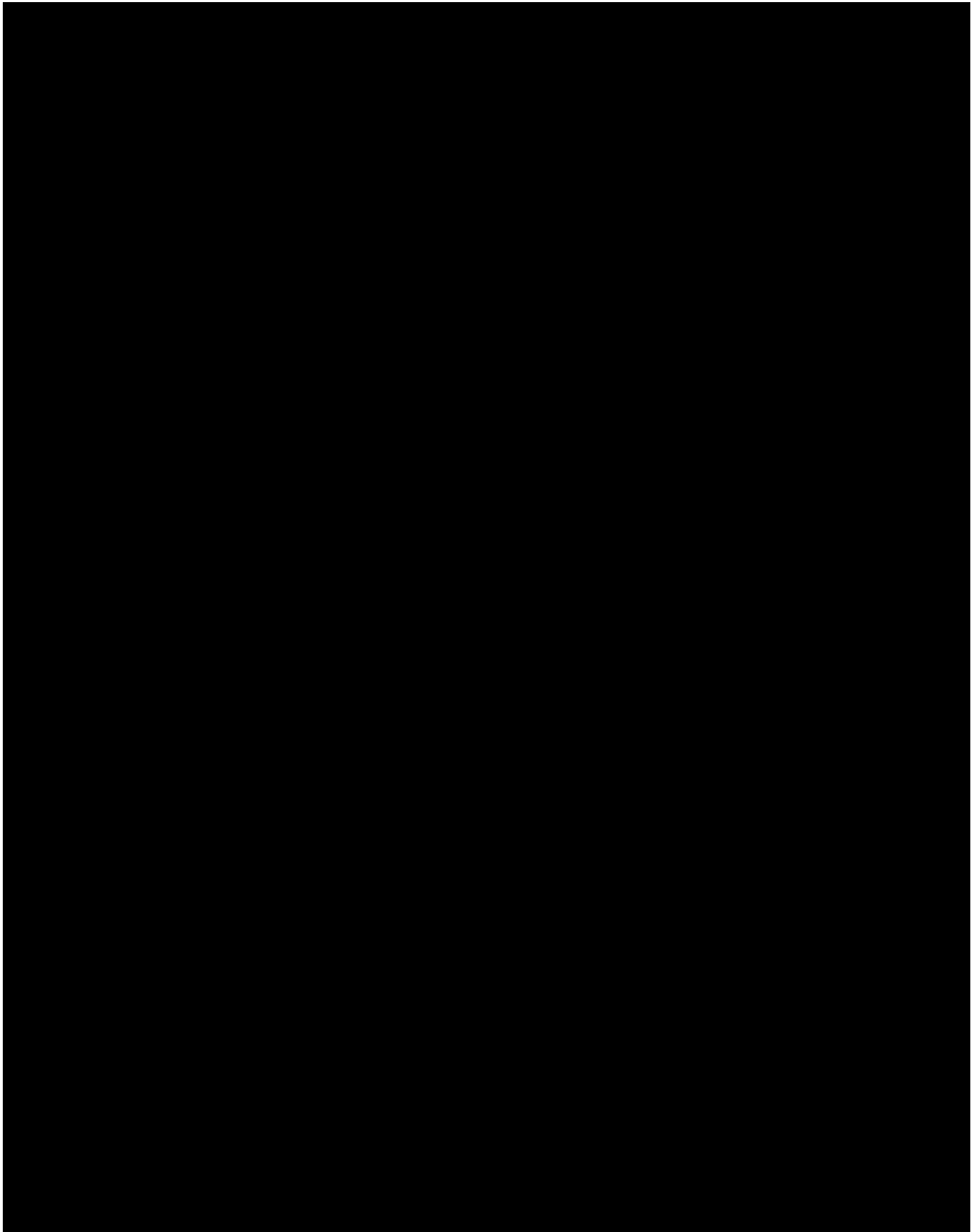


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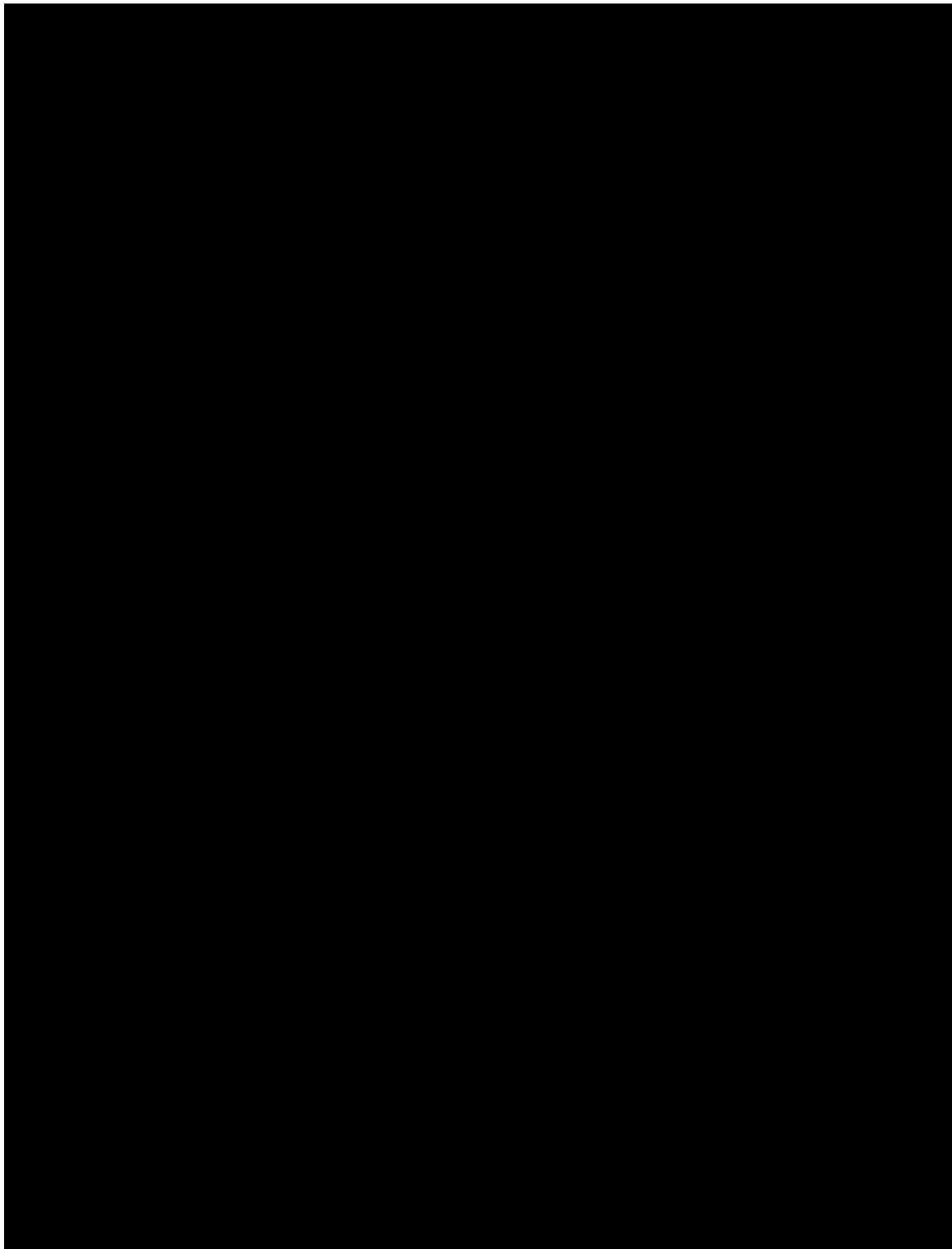


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[REDACTED] .89 [REDACTED]

[REDACTED]

[REDACTED]

⁸⁹ [REDACTED] Federal Committee disclosure reports show that during the 2019-2020 election cycle, it paid a total of \$8,446.50 to Think Big for “website” and “webservices,” with the payments commencing on July 19, 2019. *FEC Disbursements: Filtered Results*, FEC.GOV https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00710533&recipient_name=THINK+BIG+CAMPAIGNS&two_year_transaction_period=2020&disbursement_description=web+services&disbursement_description=website (last visited Apr. 1, 2024) (showing \$8,446.50 in disbursements paid to Think Big for “website” and “web services”). According to the State Committee reports, it paid a total of \$8,000 to Think Big for “website” from March 5 through May 13, 2019. DePasquale for Pennsylvania, 2019 2d Friday Pre-Election Report at 18-22 (Oct. 25, 2019), <https://www.campaignfinanceonline.pa/Pages/ShowReport.aspx?ReportID=314045&isStatement=0&is24Hour=False>.

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[REDACTED]

[REDACTED] .¹⁰⁶ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] State Committee disclosure reports show that it paid EveryAction \$4,050 on April 11, 2019, for “software.”¹⁰⁹

[REDACTED]

[REDACTED]

¹⁰⁶ [REDACTED] Both Federal and State Committee reports disclose a \$1,000 payment from the Federal Committee to the State Committee in July 2019, in the amount of \$1,000 for “video licensing agreement.” DePasquale for PA 10, 2019 October Quarterly Report at 218, <https://docquery.fec.gov/pdf/945/202010159294503945/202010159294503945.pdf> (Oct. 15, 2019) (showing payment made on July 19, 2019). See also DePasquale for Pennsylvania, 2019 2d Friday Pre-Election Report at 18-22 (Oct. 25, 2019), <https://www.campaignfinanceonline.pa.gov/Pages/ShowReport.aspx?ReportID=314045&isStatement=0&is24Hour=False> (showing payment received on July 25, 2019).

[REDACTED]

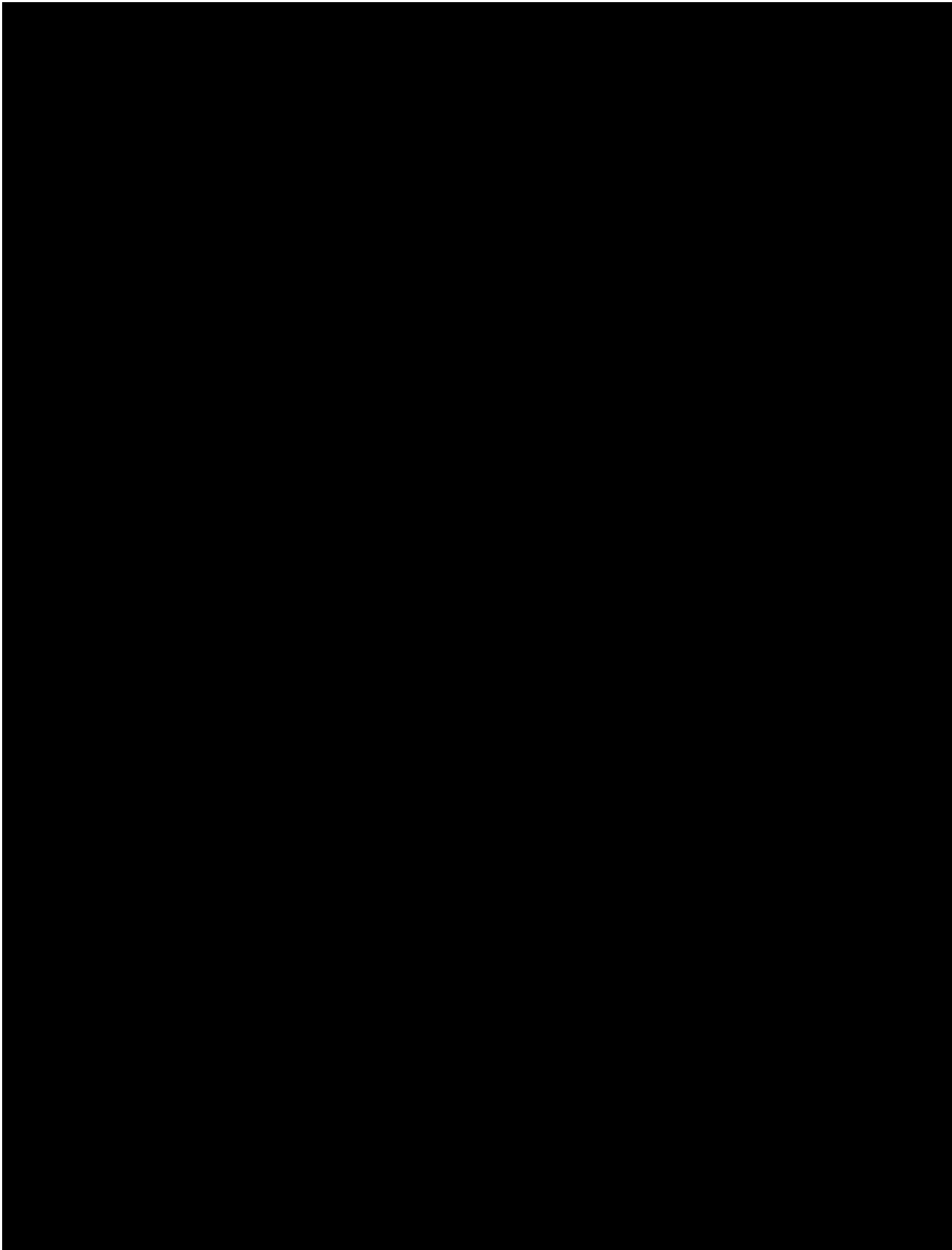
¹⁰⁹ DePasquale for Pennsylvania, 2019 2d Friday Pre-Election Report at 20 (Oct. 25, 2019), <https://www.campaignfinanceonline.pa.gov/Pages/ShowReport.aspx?ReportID=314045&isStatement=0&is24Hour=False>.

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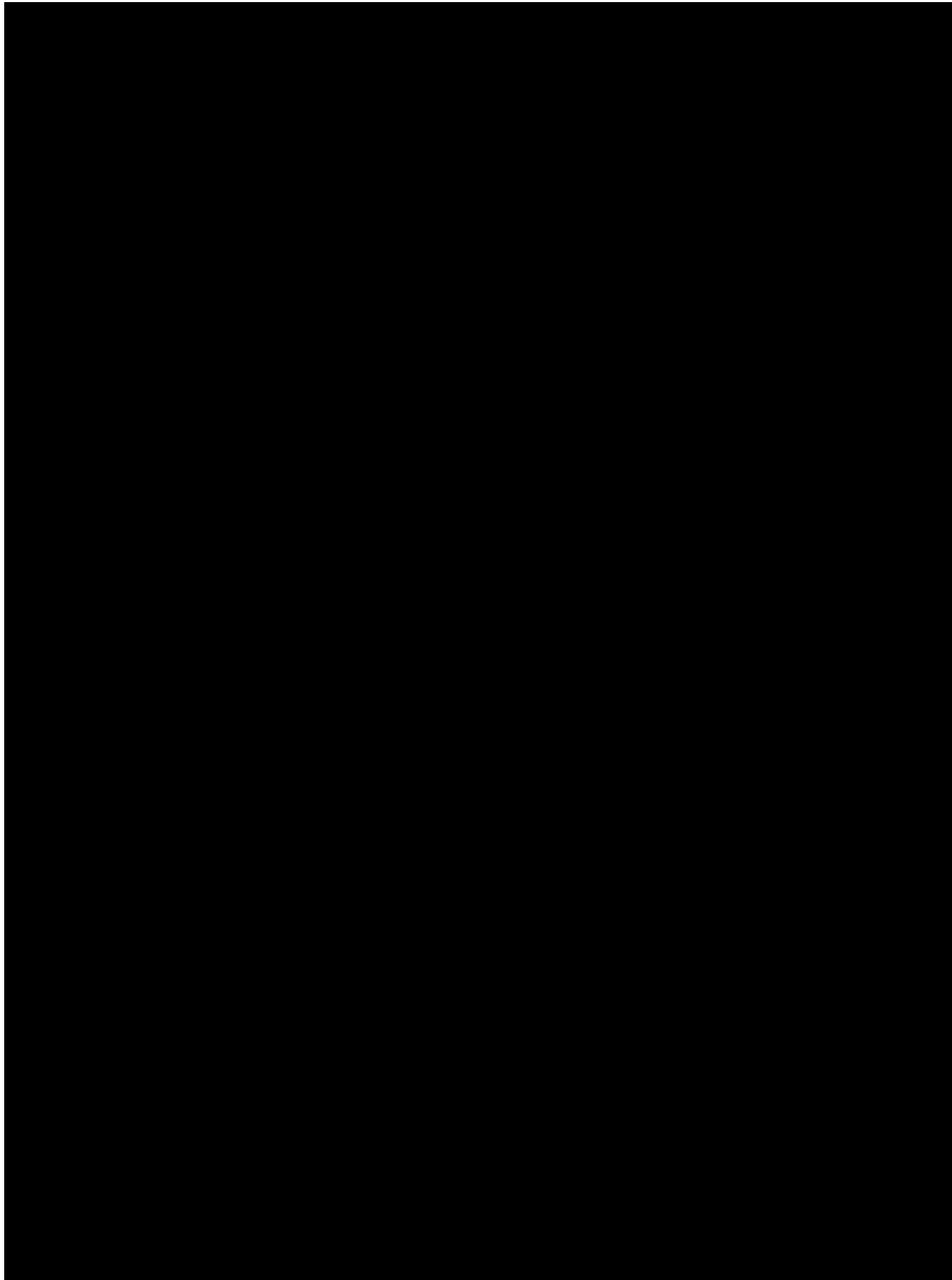


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3 III. LEGAL ANALYSIS

4 A. Relevant Law

5 The term “contribution” includes “any gift, subscription, loan, advance, or deposit of
 6 money or anything of value made by any person for the purpose of influencing any election for
 7 Federal office.”¹²⁴ An individual becomes a candidate under the Act if he or she receives
 8 contributions or makes expenditures in excess of \$5,000, or consents to another doing so on his or
 9 her behalf.¹²⁵ Within fifteen days of becoming a candidate, the individual must register with the
 10 Commission by filing a Statement of Candidacy and designate a principal campaign
 11 committee.¹²⁶

12 The Commission’s regulations create a limited exception to the definitions of contribution
 13 and expenditure — and therefore to the \$5,000 candidacy threshold — to allow individuals to
 14 conduct certain activities to evaluate a potential candidacy (*i.e.*, to “test the waters”).¹²⁷ An
 15 individual who is testing the waters need not register with the Commission unless and until the

¹²⁴ 52 U.S.C. § 30101(8)(A)(i); *see* 11 C.F.R. § 100.52(a); *see also* 52 U.S.C. § 30101(9)(A)(i) (“[A]n ‘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”); 11 C.F.R. §§ 100.110, 100.111.

¹²⁵ 52 U.S.C. § 30101(2) (definition of candidate); 11 C.F.R. § 100.3(a) (same).

¹²⁶ 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a).

¹²⁷ *See* 11 C.F.R. §§ 100.72(a), 100.131(a); *see also* Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9,992, 9,993 (Mar. 13, 1985) (“Testing the Waters E&J”); FED. ELECTION COMM’N, EXPLANATION AND JUSTIFICATION TO THE DISCLOSURE REGULATIONS, H.R. DOC. NO. 95-44, at 40 (1st Sess. 1977).

1 individual decides to run for federal office.¹²⁸ The regulations define testing the waters activities
2 as those “conducted to determine whether an individual should become a candidate,” and include,
3 but are not limited to, conducting a poll, telephone calls, and travel.¹²⁹ Only funds received and
4 payments made “solely for this purpose” are permissible under this exception; they are not
5 contributions and expenditures under the Act but are nonetheless still subject to the limitations
6 and prohibitions of the Act.¹³⁰

7 The Commission has opined that an individual who has crossed the \$5,000 threshold
8 becomes a candidate “when he or she makes a private determination that he or she will run for
9 federal office.”¹³¹ The Commission’s regulation enumerates circumstances that indicate when an
10 individual has decided to become a candidate. They include: (1) advertising to publicize an intent
11 to campaign for federal office; (2) fundraising in excess of what could reasonably expected to be
12 used for testing the waters activity; (3) making statements that refer to the individual as a
13 candidate; (4) conducting activities in close proximity to the election or over a protracted period
14 of time; or (5) taking action to qualify for the ballot.¹³²

15 Where those examples do not apply, the Commission has distinguished between activities
16 “directed to an evaluation of the feasibility of one’s candidacy,” and those “signifying that a
17 private decision to become a candidate has been made” or conducted “as a means of seeking some

¹²⁸ Advisory Opinion 1981-32 at 3 (Askew) (“AO 1981-32”) (“If and when the individual becomes a candidate the regulation has a retroactive effect in that the financing of all activity coming within the exemption must be reported and otherwise treated as contributions and expenditures for purposes of the Act and regulations.”).

¹²⁹ 11 C.F.R. §§ 100.72(a), 100.131(a).

¹³⁰ *Id.* §§ 100.72(a), 100.131(a). When an individual becomes a candidate, funds received or payments made during the course of testing the waters are to be reported as such on the first disclosure report filed by the candidate’s authorized committee. *Id.* § 101.3.

¹³¹ Advisory Opinion 2015-09 at 5 (Senate Majority PAC and House Majority PAC) (“AO 2015-09”); *accord* AO 1981-32 at 4; Advisory Opinion 1982-03 at 3 (Cranston) (“AO 1982-03”).

¹³² 11 C.F.R. §§ 100.72(b); 100.131(b).

1 affirmation or reinforcement of a private decision . . . to be a candidate.”¹³³

2 The Act also, with some exceptions, prohibits federal candidates, their agents, and entities
3 established, financed, maintained, or controlled (“EFMC’d”) by federal candidates from
4 soliciting, receiving, directing, transferring, or spending funds in connection with any election
5 unless the funds are subject to the limitations, prohibitions, and reporting requirements of the
6 Act.¹³⁴ The Commission has determined that the state campaign committee of a federal
7 candidate is, as a matter of law, established, financed, maintained or controlled by the federal
8 candidate and is acting on the candidate’s behalf.¹³⁵ Federal candidates are prohibited from
9 transferring funds from their state campaign committees to their federal committees.¹³⁶ The
10 Commission has explained that this prohibition is intended to prevent a federal committee’s
11 indirect use of impermissible funds in federal elections.¹³⁷ The prohibition on transferring funds
12 applies broadly and includes payment by the state committee for services to the federal
13 committee.¹³⁸

14 The Commission has concluded that an organization’s “use of funds raised outside of the
15 Act’s limitations and prohibitions to pay for individuals’ testing-the-waters activities would

¹³³ AO 1981-32 at 4.

¹³⁴ 52 U.S.C. § 30125(e)(1); 11 C.F.R. § 300.62. The Act provides an exception to the soft money prohibition in certain circumstances where a federal candidate “is or was also a candidate for State or local office.” 52 U.S.C. § 30125(e)(2). Such a candidate may solicit, receive, or spend nonfederal funds as long as that solicitation, receipt, or spending: (1) is “solely in connection with such election for State or local office,” (2) “refers only” to him or her, to other candidates for that same state or local office, and (3) is permitted under state law. *See id.*; 11 C.F.R. § 300.63.

¹³⁵ *See* Advisory Opinion 2009-26 (Coulson) at 5; Advisory Opinion 2007-26 (Schock) at 4.

¹³⁶ 11 C.F.R. § 110.3(d).

¹³⁷ Explanation and Justification, Transfers of Funds from State to Federal Campaigns, 58 Fed. Reg. 3474, 3475 (Jan. 8, 1993).

¹³⁸ *See id.* at 3475.

1 violate Commission regulations if those individuals decide to become candidates.”¹³⁹ Consistent
 2 with this, the Commission has previously considered funds spent by a state candidate’s campaign
 3 committee for the purpose of exploring federal candidacy to be a transfer from the state
 4 committee to the subsequent candidate’s eventual federal committee.¹⁴⁰

5 **B. The Commission Should Dismiss the Allegations that Respondents Directed or**
 6 **Spent Funds in Connection With a Federal Election That Were not Subject to**
 7 **the Limitations, Prohibitions, and Reporting Requirements of the Act, or that**
 8 **the State Committee Transferred Assets to the Federal Committee**

9 Here, the Complaint alleges that the State Committee’s increased spending in close
 10 proximity to the time DePasquale was testing the waters of a federal candidacy indicates that the
 11 State Committee paid for DePasquale’s testing-the-waters activities.¹⁴¹ The Complaint further
 12 states that DePasquale was not a candidate for state office and therefore the State Committee had
 13 no reason for the increased payments shortly before DePasquale became a federal candidate.¹⁴²
 14 In Response, DePasquale and the Federal Committee deny the allegations and state that
 15 DePasquale did not make any payments for his federal testing-the-waters activities.¹⁴³ In
 16 addition, they state that any payments by the State Committee during the period shortly before

¹³⁹ AO 2015-09 at 5 (concluding that 527 organizations’ payment for testing-the-waters activities with soft money would violate 11 C.F.R. §§ 100.72(a) and 100.131(a)).

¹⁴⁰ F&LA at 4-5, MUR 6267 (Jonathan Paton, *et al.*) (finding reason to believe that a candidate violated 2 U.S.C. § 441i(e)(1)(A) [now 52 U.S.C. § 30125(e)(1)(A)] and 11 C.F.R. § 110.3(d) where the candidate’s state committee advanced funds to pay “for survey and polling that benefitted the testing the waters phase of Paton’s federal candidacy”); *see also* F&LA at 2-6, MUR 5480 (Liane Levetan for Congress) (finding reason to believe that a poll paid for by a state committee to evaluate a candidate’s options for future state and federal elections was a prohibited transfer in violation of 2 U.S.C. § 441i(e)(1)(A) [now 52 U.S.C. § 30125(e)(1)(A)] and 11 C.F.R. § 110.3(d)); F&LA at 7-8, MUR 6773 (Brian Nestande, *et al.*); *see also* First Gen. Counsel’s Report at 7, MUR 7076 (Richard Tisei, *et al.*) (“Respondents acknowledge that Tisei was actively exploring a federal candidacy, among other options . . . Because the State Committee paid for federal activity, Respondents violated 52 U.S.C. § 30125 by receiving non-federal funds from the State Committee.”); Certification, MUR 7076 (approving conciliation of § 30125 violations in a *sua sponte* matter in connection with testing-the-waters activity).

¹⁴¹ Compl. at 6-10.

¹⁴² *Id.*

¹⁴³ Resp. at 1-2.

1 DePasquale became a federal candidate were to raise his profile generally and provide generic
2 political support that was not linked to any specific election.¹⁴⁴ Further, for the items that the
3 State Committee purchased and later transferred to the Federal Committee, Respondents state that
4 the Federal Committee paid the State Committee in accordance with advice from counsel.¹⁴⁵

5 As explained below, the bulk of the State Committee's payments do not appear to have
6 been related to a federal election or testing the waters of a federal election. However, the State
7 Committee's purchase of self-research appears to have been related to DePasquale's federal
8 testing-the-waters activities. Thus, it should have been allocated between the State Committee
9 and DePasquale's federal testing-the-waters efforts (the Federal Committee did not exist at the
10 time of the purchase and thus DePasquale himself, a federal exploratory committee if he had one,
11 or some other person permitted to make contributions and within the amount limitations could
12 have paid for the federal share). Yet, the cost of the research allocable to DePasquale's federal
13 activity was relatively modest.

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17 From March 5 through April 22, 2019, the State Committee paid \$58,000 to Rising Tide for

18 Facebook ads, commissions, and monthly retainer services.¹⁴⁷ [REDACTED]

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¹⁴⁴ *Id.* at 1-3.

¹⁴⁵ *Id.* at 7.

¹⁴⁷ *See Resp.* at 2; Child Abuse Audit.

1 [REDACTED] [REDACTED]
 2 [REDACTED]¹⁴⁸ [REDACTED]
 3 [REDACTED] [REDACTED]
 4 [REDACTED] the activity here does not appear to relate to a
 5 federal election or testing the waters of a federal election and therefore would not qualify as a
 6 contribution. Rather, DePasquale was communicating to the public about his activities as Auditor
 7 General without mentioning a potential federal election.¹⁵⁰

8 As for the email list that was apparently generated by the social media ads paid for by the
 9 State Committee, it is unclear whether the State Committee ultimately provided the email list to
 10 the Federal Committee and, if so, whether the Federal Committee paid for the list. [REDACTED]

11 [REDACTED]
 12 [REDACTED] The Response does not address the issue. Although the Federal
 13 Committee disclosed a \$4,500 payment to the State Committee on July 19, 2019, for "Data
 14 Purchase," without more information, there is no telling whether this was for the email list. In

¹⁴⁸ [REDACTED] The Complaint alleges that the State Committee paid for social media ads that linked to the state campaign website which ultimately redirected to the federal campaign website. Compl. at 2, 6, 10. However, it is unclear when the state campaign website began linking to the federal committee website. As discussed below, the State Committee paid Think Big to work on its website until around May 2019 and that the Federal Committee then paid Think Big to work on its website shortly before DePasquale announced his candidacy. *See infra* notes 155 - 157 and accompanying text. It is thus unclear when the State Committee website began redirecting to the Federal Committee website and, as such, possible that the redirection did not occur until after the State Committee was paying for the social media ads.

¹⁵⁰ *See* First Gen. Counsel's Rpt. at 26-27, MUR 5260 (Talent for Senate) (concluding that the fact that a state leadership PAC served as a candidate's "platform" to "keep up his political profile and support Republican candidates and causes," does not indicate that the PAC assisted with the candidate's testing-the-waters or federal election activities) (dispositive Commission opinion); Factual and Legal Analysis at 11 (Josh Hawley, *et al.*) (finding no reason to believe that a state committee's disbursements for advertisements related to candidate's duties as a state office were expenditures for federal campaign or testing-the-waters activities).

1 sum, there is not enough information on record to conclude that the State Committee transferred
 2 an email list of the Federal Committee.¹⁵²

3 Regarding the State Committee's payments to EveryAction for software in the amount of
 4 \$4,050, there is limited information. [REDACTED]

5 [REDACTED] The Response states that the
 6 State Committee utilized EveryAction's data management and email tool to manage and email the
 7 State Committee's supporters.¹⁵⁴ There is no information to indicate that the software was used in
 8 connection with DePasquale's efforts to test the waters of a federal election or that the data
 9 generated through this software was transferred to the Federal Committee.

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¹⁵² The Response says that the Federal Committee "paid fair market value for data from the state campaign committee" and disclosed the payment on its disclosure report. Resp. at 7, and note 23. The relevant disclosure report shows the Federal Committee paid \$4,500 to the State Committee on July 19, 2019, for "data purchase." DePasquale for PA 10, 2019 October Quarterly Report at 218 (Oct. 15, 2019), <https://docquery.fec.gov/pdf/945/202010159294503945/202010159294503945.pdf>. See also, Eugene DePasquale for Pennsylvania, 2019 2d Friday Pre-Election Report at 13 (Oct. 25, 2019), <https://www.campaignfinanceonline.pa.gov/Pages/ShowReport.aspx?ReportID=314045&isStatement=0&is24Hour=False> (showing receipt of \$4,500 from Federal Committee for "purchase of data").

[REDACTED]
¹⁵⁴ Resp. at 3.
 [REDACTED]

1 [REDACTED] [REDACTED]
2 [REDACTED] Thus, it appears that the State
3 Committee's payments for website work were not related to a federal election or testing the
4 waters of a federal election.

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 [REDACTED] From March 19 through April 1, 2019, the State Committee paid \$10,000 to Stanford
12 Campaigns for research, and the self-research book was later purchased by the Federal Committee
13 for \$6,800.¹⁶⁰ According to the Response, the Federal Committee's payment represented a
14 portion of the book which it later used.¹⁶¹ While the Federal Committee's \$6,800 payment to the
15 State Committee is less than the "usual or normal" charge for the entire self-research book, given
16 that the Federal Committee appears to have paid for just a portion of the materials, there is a basis
17 to conclude that the Federal Committee paid the fair market value of the portion of the materials
18 that it received. Moreover, as discussed below, it appears that the research was actually an in-

¹⁶⁰ Resp. at 3 (citing FEC Form 3, DePasquale for PA 10, 2019 Year-End Report at 334 (Jan. 29, 2020), <https://docquery.fec.gov/pdf/047/202001299182369047/202001299182369047.pdf>). The Response did not explain how the Federal Committee arrived at the diminished value.

¹⁶¹ See Resp. at 5.

1 kind contribution to DePasquale that should have been allocated.

2 It appears that the payment for research should have been treated as a testing-the-waters
 3 expense from the outset which DePasquale, his exploratory committee if he had one, or some
 4 other person permitted to make candidate contributions within the applicable limit should have
 5 paid for rather than the State Committee which is prohibited from making testing-the-water
 6 expenditures. [REDACTED]

7 [REDACTED]
 8 [REDACTED] Further, the self-research was also useful for exploring a
 9 state candidacy.¹⁶³ Thus, the payment should likely have been allocated between the State
 10 Committee and DePasquale according to the benefit reasonably expected to be derived (the
 11 Federal Committee did not exist at the time).¹⁶⁴ Since the research was equally useful to a state or
 12 federal candidacy, a reasonable allocation would have been \$5,000 for the State Committee and

¹⁶³ Resp. at 3, 7. *Cf.* Factual and Legal Analysis at 8-9, MUR 5761 (Madrid for Congress, *et al.*) (finding no reason to believe that a poll designed overwhelmingly to test the feasibility of a state candidacy was an expenditure for federal testing-the-waters activity). Here, unlike in MUR 5761, the self-research was helpful for any candidacy, state or federal.

¹⁶⁴ See 11 C.F.R. § 106.1 (Expenditures, including in-kind contributions, independent expenditures, and coordinated expenditures made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived. . . . These methods shall also be used to allocate payments involving both expenditures on behalf of one or more clearly identified Federal candidates and disbursements on behalf of one or more clearly identified non-Federal candidates.”). Although 11 C.F.R. § 106.1 contemplates that the individual is both a state and federal *candidate* and DePasquale was neither a state nor federal candidate at the time the research was purchased, this allocation is relevant since the payment was purchased by a committee apparently testing the waters of a candidacy and used by an individual testing the waters of a federal candidacy. To the extent that 11 C.F.R. § 106.1 does not control the allocation here, the rules of allocating polling costs are instructive. See 11 C.F.R. § 106.4. That regulation provides that committee committees may split the costs of the poll equally, proportionally, or any other method which reasonably reflects the benefits derived. *Id.* Under either method, since the self-research was equally beneficial to any candidate, the result would be \$5,000 for the State Committee and \$5,000 for DePasquale.

1 \$5,000 for DePasquale.¹⁶⁵ Accordingly, it appears that the State Committee made a prohibited
 2 \$5,000 payment for testing-the-waters activities that should have also been reported by the
 3 Federal Committee as an in-kind contribution. Yet, this amount does not appear to be significant
 4 enough to warrant further use of the Commission's limited resources, especially given that the
 5 Federal Committee ultimately reimbursed the State Committee to purchase the research as soon as
 6 DePasquale became a candidate in an amount that exceeded the in-kind contribution.

7 Regarding the State Committee's payments for media production to Jackson Media, the
 8 information suggests that the work it performed was not specific to a potential federal or state
 9 candidacy. [REDACTED]

10 [REDACTED]
 11 [REDACTED] From April 1 through May 10, 2019, the State Committee paid \$22,000 to Jackson
 12 Media for "media production/consulting" and \$11,000 for "video production."¹⁶⁷ [REDACTED]

13 [REDACTED]
 14 [REDACTED] Once DePasquale became a candidate, the Federal Committee purchased licensing
 15 rights for video footage from the State Committee for \$1,000.¹⁶⁹ This is less than what the State
 16 Committee paid to Jackson Media, but it is unclear whether the Federal Committee paid less than

¹⁶⁵ In Advisory Opinion 2022-05, the Commission approved a national party committee's request to purchase research on an opponent candidate for \$30,000 and the provide the research to two potential contenders for \$10,000 each, dividing the cost of the research by the number of committees. *Id.* at 4.

[REDACTED]
¹⁶⁷ Compl. at 4.

[REDACTED]
¹⁶⁹ DePasquale for PA 10, 2019 October Quarterly Report at 218 (Oct. 15, 2019), <https://docquery.fec.gov/pdf/323/201910159163908323/201910159163908323.pdf> (disclosing payment to the State Committee of \$1,000 for "licensing"); *see also* Eugene DePasquale for Pennsylvania, 2019 2d Friday Pre-Election Report at 13 (Oct. 25, 2019), <https://www.campaignfinanceonline.pa.gov/pages/ShowReport.aspx?ReportID=314045&isStatement=0&is24Hour=False> (State Committee disclosing receipt \$1,000 for "video licensing agreement" from the Federal Committee).

1 the “usual and normal charge” since it is unknown whether the Federal Committee purchased
2 some or all of the footage the State Committee’s footage.¹⁷⁰ Assuming that the State Committee
3 provided all of its footage and that it retained its original value, the amount of the in-kind
4 contribution here would be \$9,000, added to the potential in-kind contribution above regarding
5 research (\$5,000), would equal a total \$14,000 potential aggregate in-kind contribution from the
6 State Committee to the Federal Committee.¹⁷¹ Again, this amount does not appear to be sufficient
7 to warrant further use of the Commission’s limited resources.

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12 As stated above, there were only two items, research
13 and video footage, that the State Committee ultimately transferred to the Federal Committee and
14 the amount of these items is relatively modest.

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¹⁷⁰ F&LA at 5, MUR 6784 (Lizbeth Benacquisto for Congress, *et al.*) (citing Transfer of Funds from State to Federal Campaigns, 58 Fed. Reg. 3,474, 3,475 (Jan. 8, 1993). The Commission’s regulations define “usual and normal charge” as “the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution.” 11 C.F.R. § 100.52(d)(2).

¹⁷¹ Above, we analyzed that the purchase of research could be a testing-the-water expense that DePasquale or his exploratory committee, if he had one, should have paid for. Yet, here, it does not appear that the video footage was necessarily related to a federal election or DePasquale’s evaluation of a potential federal candidacy. Rather, it appears that the State Committee purchased generic footage that it could use in a future state campaign.

■ [REDACTED]

1 In sum, regarding the State Committee's payments for social media ads, website work,
2 research, and video footage, it appears that the payments were either unrelated to a federal
3 campaign or testing the waters of a federal campaign. In the one instance regarding research
4 where, arguably, the State Committee did pay for a testing-the-waters expense, the amount was
5 modest and the Federal Committee reimbursed the State Committee as soon as DePasquale
6 became a federal candidate. Similarly, regarding video footage, although the Federal Committee
7 paid the State Committee for footage, even if it did not pay the usual and normal amount, the
8 amount of the potential in-kind contribution would be modest. Therefore, we do not believe the
9 potential small amount in violation merits the additional expenditure of the Commission's limited
10 resources.¹⁷³

11 Accordingly, we recommend that the Commission exercise its prosecutorial discretion and
12 dismiss the allegations that (1) DePasquale, the State Committee, and the Federal Committee
13 violated 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 300.61 by directing or spending funds in
14 connection with a federal election that were not subject to the limitations, prohibitions, and
15 reporting requirements of the Act, when the State Committee made in-kind contributions for
16 DePasquale's testing-the-waters expenditures; and (2) the State Committee and Federal
17 Committee violated 11 C.F.R. § 110.3(d) by transferring assets to the Federal Committee in
18 connection with its testing-the-waters activities.¹⁷⁴

¹⁷³ *See Heckler v. Chaney*, 470 U.S. 821 (1985).

¹⁷⁴ *See* SOR at 5-7, *Comr.'s Lindenbaum, Cooksey, Dickerson, & Trainor*, MUR 7938 (*Greitens for US Senate, et al.*) (finding no reason to believe respondents violated the soft money ban by transferring the state committee website to the federal committee where the federal committee paid fair market value and reported the payments, and exercising its prosecutorial discretion to dismiss the allegations that the committee violated the soft money ban by using state committee funds for pay for strategic planning for federal testing-the-waters expenses given the small amount in violation and the need for an investigation); SOR at 5-7 *Comr.'s Petersen, Bauerly, Hunter, McGahn & Weintraub*, MUR 6216 (*Martha Coakley*) (exercising its prosecutorial discretion to dismiss the allegations that the

C. The Commission Should Dismiss the Allegation That the Federal Committee Failed to Report Contributions and Expenditures

1 When an individual becomes a candidate under the Act, any funds received or payments
2 made for testing-the-waters activities become contributions or expenditures subject to the
3 reporting requirements of the Act and are to be reported as such on the first disclosure report by
4 the candidate's authorized committee.¹⁷⁵ As discussed above, the available information indicates
5 that the bulk of the State Committee's payments were not related to a federal election or testing
6 the water of a federal election. However, it appears that the State Committee did make a \$5,000
7 in-kind contribution to DePasquale in the form of the portion of self-research allocable to his
8 federal testing-the-waters activities. This should have been reported as an in-kind contribution
9 from the State Committee to DePasquale by the Federal Committee when DePasquale became a
10 candidate. Further, the Federal Committee paid \$1,000 for video footage that could have
11 potentially been worth as much as \$10,000, resulting in a \$9,000 in-kind contribution that should
12 have been reported when DePasquale became a candidate. However, it is possible that the Federal
13 Committee only paid for a portion of the footage. In any event, the amounts of these potential in-
14 kind contributions totaling \$14,000 is not worth the use of the Commission's limited resources to
15 pursue a reporting violation.¹⁷⁶

purchase of assets from the state committee to the federal committee and the potential use of state committee consultants by the federal committee in close proximity to the candidate's announcement for federal office, where there was no information to suggest that the asset was transferred at less than fair market value and any payments for the consultants attributable to the federal committee would be minimal).

¹⁷⁵ 11 C.F.R. § 101.3.

¹⁷⁶ *See Heckler v. Chaney*, 470 U.S. 821 (1985).

1 Therefore, we recommend that the Commission exercise its prosecutorial discretion and
2 dismiss the allegation that the Federal Committee violated 52 U.S.C. § 30104(b) and 11 C.F.R.
3 § 104.3 by failing to report in-kind contributions from the State Committee.

4 **IV. RECOMMENDATIONS**

- 5 1. Dismiss pursuant to prosecutorial discretion the allegations that Eugene
6 DePasquale, Eugene DePasquale for Pennsylvania, and DePasquale for PA 10 and
7 Rick Galena in his official capacity as treasurer violated 52 U.S.C.
8 § 30125(e)(1)(A) and 11 C.F.R. § 300.61 by directing or spending funds in
9 connection with a federal election that were not subject to the limitations,
10 prohibitions, and reporting requirements of the Act, when the State Committee
11 made in-kind contributions for DePasquale's testing-the-waters expenditures;
- 12 2. Dismiss pursuant to prosecutorial discretion the allegations that Eugene
13 DePasquale for Pennsylvania and DePasquale for PA 10 and Rick Galena in his
14 official capacity as treasurer violated 11 C.F.R. § 110.3(d) by transferring assets to
15 the DePasquale for PA 10 and Rick Galena in his official capacity as treasurer in
16 connection with its testing-the-waters activities;
- 17
18 3. Dismiss pursuant to prosecutorial discretion the allegation that DePasquale for PA
19 10 and Rick Galena in his official capacity as treasurer violated 52 U.S.C.
20 § 30104(b) and 11 C.F.R. 104.3 by failing to disclose in-kind contributions from
21 the Eugene DePasquale for Pennsylvania;
- 22
23 4. Approve the attached Factual and Legal Analysis; and
24

