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October 14, 2020

Federal Election Commission
Office of Complaints Examination
& Legal Administration
Attn: Trace Keeys, Paralegal
1050 First Street, NE
Washington, DC 20002

Re: MUR 7806

Dear Mr. Keeys,

This response is submitted by the undersigned counsel on behalf of Senator Cory Gardner, Cory Gardner for Senate, and Lisa Lisker, in her capacity as Treasurer of Cory Gardner for Senate, in connection with MUR 7806.

Background

The Complainant alleges that two television advertisements aired by Cory Gardner for Senate “failed to comply with the FEC’s disclaimer requirements.” Complaint at 1. According to the Complainant, the images of Senator Gardner that appeared on screen during the advertisements’ “stand by your ad” disclaimers “occupied less than 80 percent of the vertical screen height.” *Id.* at 2. The Complainant contends this violates the requirement in the Act and Commission regulations that a television advertisement include “[a] clearly identifiable photographic or similar image of the candidate.” *Id.* at 4. Contrary to the Complainant’s claims, both advertisements fully complied with the requirements of the Act and Commission regulations.

The Complaint includes screen-shot images of the alleged violations. In each photographic image, Senator Gardner is plainly and obviously “clearly identifiable.” The Complainant does not contend that it had any difficulty in identifying these two images of Senator Gardner and, in fact, the Complaint refers repeatedly to “the image of Senator Gardner,” “his image,” the “video clip of Senator Gardner,” and “the video of Senator Gardner.” *Id.* at 2, 3, 4. As the Complaint itself demonstrates, the Complainant “clearly identified” Senator Gardner and there was no possibility whatsoever that any viewer would not know who paid for and approved the two advertisements.

The Complainant challenges *only* the size of the photographic images and claims, incorrectly, that the law provides that “[t]he candidate is ‘clearly identifiable’ only if the photograph or similar image is ‘at least eighty (80) percent of the vertical screen height.’” *Id.* at

4. The Complainant mistakes the 80% safe harbor for a requirement. *Id.* The advertisements at issue fully complied with the requirements of the Act.

The Commission Has Repeatedly Dismissed Complaints of this Nature

In MUR 7517 (Mast for Congress), the Commission unanimously dismissed allegations that the accompanying photographic image of a candidate was “indistinct” and too small. The matter was “rated as low priority” and the General Counsel’s Office noted an “unlikeliness the general public would have been confused as to whether the television ad was authorized by Mast.” MUR 7517, General Counsel’s Report at 2.

In MUR 6782, the complainant alleged that “the postage-stamp sized image of Mark Pryor at the end of the two ads in question is not the clearly identifiable image or full screen-view of the candidate that is required by law.” The General Counsel’s Report explained that “[t]he advertisements’ disclaimers as originally aired ... include[d] ... a photographic image of Pryor which appears to be twice the height of the written disclaimer.” MUR 6783, General Counsel’s Report at 4-5. The General Counsel concluded:

It appears that the original televised advertisements contained sufficient information to clearly identify who paid for the communications, as well as an apparently adequate spoken message of approval by the candidate.

Id. at 5. The General Counsel recommended dismissing the complaint as an exercise of prosecutorial discretion and the Commission voted 6-0 to approve that recommendation. The same result was reached in MUR 6284 (Denham), MUR 6116 (Tim Cunha for Congress), MUR 6042 (Roberts), and MUR 6016 (Ose for Congress). Thus, in prior matters involving the same alleged violation, including cases involving far smaller candidate images, the Commission has declined to find a violation and instead dismissed the complaint.

The Advertisements Complied with the Requirements of the Act

While established Commission precedent calls for dismissing this Complaint as a low-rated matter without addressing the merits, we note that both advertisements are fully compliant with the Act and Commission regulations, and no violation occurred.

The Act’s stand-by-your-ad provision requires the candidate’s statement to be “conveyed by ... (I) an unobscured, full-screen view of the candidate making the statement, or (II) *the candidate in voice-over, accompanied by a clearly identifiable photographic or similar image of the candidate.*” 52 U.S.C. § 30120(d)(1)(B)(i) (emphasis added). The images referenced in the Complaint are “clearly identifiable” on any normal sized television screen and are “clearly identifiable photographic ... image[s] of the candidate” that plainly satisfy the requirements of the Act.

Commission regulations reiterate the “clearly identifiable photographic or similar image of the candidate” standard and also add the 80% standard as **a safe harbor**: “A photographic or similar image of the candidate shall be considered clearly identified if it is at least eighty (80)

percent of the vertical screen height.” 11 C.F.R. § 110.11(c)(3)(ii)(B). The Explanation and Justification accompanying the Commission’s final rule expressly refers to the 80% standard as a “safe harbor provision.” Final Rule on Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,966 (Dec. 13, 2002) (“Therefore, the Commission is establishing a **safe harbor provision** whereby a still picture of the candidate shall be considered ‘clearly identifiable’ if it occupies at least 80% of the vertical screen height.”) (emphasis added). A safe harbor is not a requirement. *See id.* at 76,966 (noting that disclaimer color contrast examples “are safe harbors, not mandatory requirements”); MUR 5526 (Graf), First General Counsel’s Report at 4 (referring to 12-point disclaimer type size as “a ‘safe harbor,’ not a specific requirement”). The requirement is expressed in the Act and in the regulation that repeats the statutory language verbatim.

The Commission also observed “that although Congress specifically required a full-screen view when the candidate is shown making the statement, Congress did not require a full-screen view for the still picture.” *Id.* The Commission characterized a “a still picture of the candidate” that “occupies at least 80% of the vertical screen height” as “a meaningful alternative to the full-screen requirement.” However, the statute only *requires* “a clearly identifiable photographic or similar image of the candidate” and contains no sizing requirement whatsoever.

Conclusion

Both advertisements contained “a clearly identifiable photographic ... image of the candidate” that complied with the plain language of the Act and the Commission’s regulation. In at least six prior matters involving virtually identical facts and allegations, the Commission has exercised its prosecutorial discretion and voted to dismiss. In this matter, the Commission should either find no reason to believe a violation of the Act occurred or make no findings and simply dismiss as a matter of prosecutorial discretion.

Sincerely,

Jessica Johnson
Elizabeth Ellington
Counsel to Cory Gardner for Senate

Enclosure



FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

STATEMENT OF DESIGNATION OF COUNSEL

Provide one form for each Respondent/Witness

EMAIL: cela@fec.gov FAX: 202-219-3923

MUR # **7806**

Name of Counsel: Jessica Johnson; Elizabeth Ellington

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Telephone: 540-341-8808 Fax: 540-341-8809

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The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

10/13/2020

Date

Lisa R. Lisker

Signature (Respondent/Agent)

Treasurer

Title

Cory Gardner for Senate
Lisa Lisker, Treasurer

RESPONDENT:

(Committee Name/ Company Name/Individual Named in Notification Letter)

Mailing Address: 9227 E. Lincoln Ave., #200-234
(Please Print)

Lone Tree, CO 80124

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E-mail: llisker@hdafec.com

This form relates to a Federal Election Commission matter that is subject to the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A). This section prohibits making public any notification or investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.



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10/13/2020

Date

Signature (Respondent/Agent)

Title

Cory Gardner

RESPONDENT: _____
(Committee Name/ Company Name/Individual Named in Notification Letter)

Mailing Address: 9227 E. Lincoln Ave., #200-234
(Please Print)

Lone Tree, CO 80124

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