

**FEDERAL ELECTION COMMISSION**  
**FIRST GENERAL COUNSEL'S REPORT**

**MUR 8144**

DATE COMPLAINT FILED: June 21, 2023

DATE OF NOTIFICATIONS: June 22, 2023

RESPONSE RECEIVED: August 7, 2023

DATE ACTIVATED: April 19, 2024

FIRST EXPIRATION OF SOL: January 23, 2028

FINAL EXPIRATION OF SOL: April 11, 2028

ELECTION CYCLE: 2024

**COMPLAINANTS:**

Foundation for Accountability and Civic Trust  
Kendra Arnold

**RESPONDENTS:**

Keith Gross for Florida and Jason D. Boles in his  
official capacity as treasurer<sup>1</sup>  
Keith Gross  
Advancing Florida, Inc.

**RELEVANT STATUTES  
AND REGULATIONS:**

52 U.S.C. § 30101(2), (4)(A), (8)(A), (9)(A)

52 U.S.C. § 30102(e)(1)

52 U.S.C. § 30103(a)

52 U.S.C. § 30104

52 U.S.C. § 30116(a)(1)(A), (f)

52 U.S.C. § 30118(a)

52 U.S.C. § 30125(e)

11 C.F.R. § 100.33

11 C.F.R. § 100.52

11 C.F.R. § 100.72

11 C.F.R. § 100.111

11 C.F.R. § 101.1(a)

11 C.F.R. § 109.20

11 C.F.R. § 109.21(a)-(d)

11 C.F.R. § 110.10

**INTERNAL REPORTS CHECKED:** Disclosure Reports

<sup>1</sup> At the time the Complaint in MUR 8144 was received, Chris Marston was the treasurer of Keith Gross for Florida, but the current treasurer is Jason D. Boles. Keith Gross for Florida, Statement of Organization at 1 (Apr. 11, 2023); Keith Gross for Florida, Amended Statement of Organization at 1 (Sept. 28, 2023).

1 **FEDERAL AGENCIES CHECKED:** None

2 **I. INTRODUCTION**

3 The Complaint alleges that 2024 Senate candidate Keith Gross and his principal  
 4 campaign committee, Keith Gross for Florida and Jason D. Boles in his official capacity as  
 5 treasurer (the “Committee”), violated the Federal Election Campaign Act of 1971, as amended  
 6 (the “Act”), by “us[ing] non-federal funds from an entity named Advancing Florida,” a 501(c)(4)  
 7 non-profit that Gross created approximately three months prior to declaring his candidacy, “for  
 8 campaign purposes.”<sup>2</sup> The Complaint further alleges that as a result of its campaign activities,  
 9 Advancing Florida has qualified as a political committee under the Act and failed to register and  
 10 file disclosure reports as such.<sup>3</sup> Finally, the Complaint alleges that Gross failed to timely file his  
 11 Statement of Candidacy.<sup>4</sup>

12 In support of the allegations, the Complaint points to Facebook ads paid for by  
 13 Advancing Florida that feature Gross (without referring to him as a candidate), promote his  
 14 policy positions, and invite viewers to provide contact information and indicate their support for  
 15 the “movement.”<sup>5</sup> The Complaint also points to the content of Advancing Florida’s website,  
 16 which allegedly consisted of two op-eds by Gross discussing policy concerns and criticizing the  
 17 positions and leadership of President Joe Biden, Secretary of Transportation Pete Buttigieg, and  
 18 particularly Gross’s future primary election opponent, Florida Senator Rick Scott.<sup>6</sup> Finally, the

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<sup>2</sup> Compl. at 1 (June 21, 2023) (internal quotations omitted).

<sup>3</sup> *Id.* at 1-2; *see* Articles of Incorporation, Advancing Florida Inc. (Jan. 23, 2023), <https://search.sunbiz.org/Inquiry/CorporationSearch/ConvertTiffToPDF?storagePath=COR%5C2023%5C0131%5C70550667.tif&documentNumber=N23000000974> (listing Gross as the incorporator).

<sup>4</sup> Compl. at 13.

<sup>5</sup> *Id.* at 3-6.

<sup>6</sup> *Id.*, Exs. A-B (reflecting screenshots of these op-eds on the Advancing Florida website).

1 Complaint notes that after becoming a candidate, the Committee used some of the same content  
2 on its website as appeared on Advancing Florida's website and that the Committee's Facebook  
3 page "initially stated Advancing Florida was responsible for the page."<sup>7</sup>

4 Gross, the Committee, and Advancing Florida filed a joint Response, together with a  
5 sworn affidavit from Gross, denying the allegations and stating that Advancing Florida  
6 functioned as Gross's "exploratory effort" and its activities were permissible testing-the-waters  
7 activities and not campaign activities that could either trigger Advancing Florida's status as a  
8 political committee or Gross's status as a candidate earlier than when he filed.<sup>8</sup> Specifically,  
9 Respondents state that Gross formed Advancing Florida, and was its sole funder, in order to  
10 facilitate his "issue advocacy and eventual testing-the-waters activity,"<sup>9</sup> and that after deciding to  
11 become a candidate, the Committee reported Gross's payment to Advancing Florida as an in-  
12 kind contribution from Gross to the Committee for testing-the-waters expenses.<sup>10</sup> Further, the  
13 Response states that these funds were Gross's personal funds and therefore were federal funds as  
14 required by the Act.<sup>11</sup>

15 Based on the available information, it appears that Advancing Florida's activities during  
16 the relevant time period at issue were testing-the-waters activities. These testing-the-waters  
17 activities were funded by Gross's payments to Advancing Florida, which were reported as in-  
18 kind contributions from Gross to the Committee after Gross registered as a candidate. Because

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<sup>7</sup> *Id.* at 8-9 (including a screenshot of Gross's Facebook page).

<sup>8</sup> Resp. at 5-6 (Aug. 7, 2023).

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.* at 2-3; Keith Gross for Florida, July Quarterly Report at 8, 14, 62, 64 (July 15, 2023),  
<https://docquery.fec.gov/pdf/598/202307159583571598/202307159583571598.pdf>.

<sup>11</sup> Resp. at 3.

1 the source of funds was Gross himself — who was permitted, as the eventual candidate, to make  
2 unlimited contributions — these activities do not appear to violate the Act's source prohibitions  
3 or amount limitations. Therefore, we recommend that the Commission dismiss the allegations  
4 that Advancing Florida made and Keith Gross or Keith Gross for Florida knowingly accepted or  
5 received excessive or prohibited corporate contributions in violation of 52 U.S.C.  
6 §§ 30116(a)(1)(A), (f), 30118(a), or 30125(e).

7 Further, because the major purpose of Advancing Florida appears to consist entirely of  
8 issue advocacy and testing the waters, it is not a political committee required to register and  
9 report under the Act and we recommend that the Commission dismiss this allegation that  
10 Advancing Florida violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register and  
11 report as a political committee. Finally, as the activity in question appears to have been for the  
12 purpose of testing the waters, rather than for the purpose of influencing an election, there is no  
13 information indicating that Gross became a candidate prior to his filing a Statement of Candidacy  
14 with the Commission, and we therefore recommend that the Commission dismiss this allegation  
15 that Gross violated 52 U.S.C. § 30102(e)(1) and 11 C.F.R. § 101.1(a) by failing to timely file his  
16 Statement of Candidacy.

## 17 **II. FACTUAL BACKGROUND**

18 Keith Gross is a 2024 candidate for U.S. Senate in Florida; he filed his Statement of  
19 Candidacy on April 11, 2023.<sup>12</sup> Keith Gross for Florida is his principal campaign committee.<sup>13</sup>

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<sup>12</sup> Keith Gross, Statement of Candidacy (Apr. 11, 2023).

<sup>13</sup> Keith Gross for Florida, Amended Statement of Organization at 1 (Sept. 28, 2023).

Advancing Florida is a 501(c)(4) non-profit corporation that Gross created on January 23, 2023, approximately three months prior to declaring his candidacy.<sup>14</sup>

The Complaint alleges that Gross used non-federal funds from Advancing Florida for campaign purposes in violation of the Act, resulting in illegal in-kind contributions.<sup>15</sup> In support of its allegations, the Complaint points to between \$13,903 and \$17,692 that Advancing Florida paid to run 60 ads on Facebook.<sup>16</sup> These ads advocate Gross's positions on issues including social security, repealing regulations, and parental rights.<sup>17</sup> While none of the ads reference Gross as a candidate or encourage his election, many feature his name or image and include statements such as "he wants to hear from you," "Are you with us?" and "click below to join the movement now!"<sup>18</sup> The Complaint also states that the content of Advancing Florida's website

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<sup>14</sup> Articles of Incorporation, Advancing Florida Inc. (Jan. 23, 2023), <https://search.sunbiz.org/Inquiry/CorporationSearch/ConvertTiffToPDF?storagePath=COR%5C2023%5C0131%5C70550667.tif&documentNumber=N23000000974> (listing Gross as the incorporator); *see* Resp., Ex. A ¶ 4 ("Aff. of Gross") ("On January 23, 2023, I organized AFL as an organization under Section 501(c)(4) of the Internal Revenue Code established to finance legislative ideas, to conduct issue advocacy and to gather information about Florida preferences (including Social Security reform, which is a significant topic in the State of Florida), while also allowing me to segregate certain of my personal funds towards the financing of these efforts.").

<sup>15</sup> Compl. at 1.

<sup>16</sup> *Id.* at 2-6, 12. Of these 60 ads, 59 were allegedly run through Advancing Florida's Facebook page and one was allegedly run through the Committee's Facebook page. *Id.* at 2. The allegation that one of these ads was placed on the Committee's page, and any implication that this is further evidence that Advancing Florida was advocating Gross's election, is undermined by the fact that the page presently affiliated with the Committee appears to have been Gross's personal page at the time the ad was run. *See* About, Keith Gross, FACEBOOK AD LIBRARY, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=political\\_and\\_issue\\_ads&country=US&id=1478633989210444&view\\_all\\_page\\_id=107830128834941&search\\_type=page&media\\_type=all](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&id=1478633989210444&view_all_page_id=107830128834941&search_type=page&media_type=all) (last visited Apr. 23, 2024) (reflecting that the page was created on December 3, 2022, prior to Gross either becoming a candidate or creating Advancing Florida); Keith Gross, FACEBOOK, <https://www.facebook.com/keithgrossfi> (last visited Apr. 23, 2024) (reflecting that prior to his becoming a candidate, the page frequently posted personal and family photos in addition to political statements featuring a "Keith Gross" logo, which the Committee later used after he declared his candidacy by adding "—Senate—" under the candidate's name).

<sup>17</sup> Compl. at 3-6.

<sup>18</sup> *Id.* at 4-6 (reflecting screenshots of ads run by Advancing Florida on Facebook); *see* Advancing Florida, FACEBOOK AD LIBRARY, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=all&country=ALL&view\\_all\\_page\\_id=101823082813110&sort\\_data\[direction\]=desc&sort\\_data\[mode\]=relevancy\\_monthly\\_grouped&search\\_type=page&media\\_type=all](https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=ALL&view_all_page_id=101823082813110&sort_data[direction]=desc&sort_data[mode]=relevancy_monthly_grouped&search_type=page&media_type=all) (last visited Apr. 29, 2024).

1 consists entirely of two op-eds by Gross.<sup>19</sup> These op-eds discuss public policy concerns and  
 2 criticize the positions and leadership of President Joe Biden, Secretary of Transportation Pete  
 3 Buttigieg, and particularly Gross's future primary election opponent, Florida Senator Rick  
 4 Scott.<sup>20</sup> Finally, the Complaint notes that after becoming a candidate, the Committee used some  
 5 of the same content on its website that previously appeared on Advancing Florida's website and  
 6 that the Committee's Facebook page initially stated "Advancing Florida is responsible for the  
 7 page."<sup>21</sup>

8 The Response denies the allegations, stating that the activities of Advancing Florida were  
 9 permissible testing-the-waters activities pursuant to 11 C.F.R. § 100.72(a) and were properly  
 10 reported on the Committee's first quarterly report, which was timely filed less than a month after  
 11 the date of the Complaint.<sup>22</sup> Specifically, Respondents state that Gross formed Advancing  
 12 Florida in order to facilitate his "issue advocacy and eventual testing-the-waters activity."<sup>23</sup>  
 13 According to the Response, these activities included disseminating the Facebook ads cited by the  
 14 Complaint, which Respondents argue constituted "digital outreach (similar to old-fashioned  
 15 telephone calls)" and "engag[ing] public opinion."<sup>24</sup> On February 27, 2023, less than two

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<sup>19</sup> Resp. at 7; *id.*, Exs. A-B (reflecting screenshots of these op-eds on the Advancing Florida website).

<sup>20</sup> *Id.*, Exs. A-B. While these op-eds do not specifically urge voting against Senator Scott, they do question his leadership, trustworthiness, and state that "[w]e deserve more than someone who only pretends to work, someone who says many of the right things but accomplishes nothing." *Id.*, Ex. B.

<sup>21</sup> *Id.* at 8-9 (including a screenshot of Gross's Facebook page). It is unclear from the screenshot provided whether the Facebook page should be considered Gross's personally or the Committee's page. The title of the page is simply Keith Gross, but it currently references him as a candidate for the Senate in his "Intro" and includes a link to the Committee's website. As discussed above, it appears that prior to his candidacy the page was used for personal purposes. *Supra* note 16.

<sup>22</sup> Resp. at 1-3; *see* Keith Gross for Florida, July Quarterly Report (July 15, 2023), <https://docquery.fec.gov/pdf/598/202307159583571598/202307159583571598.pdf>.

<sup>23</sup> Resp. at 5.

<sup>24</sup> *Id.*; *see* 11 C.F.R. § 100.72 (including in the list of permissible testing the waters activities to determine whether an individuals should become a candidate: conducting a poll and telephone calls).

months before declaring his candidacy, Gross made his first contribution to Advancing Florida in the amount of \$45,000 to pay for digital advertising and consulting.<sup>25</sup> The Committee's disclosure reports also reflect an additional payment by Gross to Advancing Florida for testing-the-waters activities ("digital consulting; advertising") in the amount of \$41,500 on April 12, 2023.<sup>26</sup> Respondents state that after deciding to become a candidate on April 11, 2023, the Committee reported Gross's payments to Advancing Florida as in-kind contributions to the Committee for testing-the-waters expenses.<sup>27</sup> The Response states that these funds were Gross's personal funds pursuant to 11 C.F.R. § 100.33 and therefore were federal funds as required by the Act.<sup>28</sup>

### III. LEGAL ANALYSIS

#### A. The Commission Should Dismiss the Allegation that Advancing Florida Made or that Gross or the Committee Knowingly Accepted Excessive or Prohibited Contributions

The Complaint contends that payments by Advancing Florida for Facebook ads, as well as content on Advancing Florida's website, are excessive and prohibited corporate in-kind contributions from Advancing Florida to Gross and the Committee.<sup>29</sup> The Complaint also

<sup>25</sup> Resp. at 2; *see* Keith Gross for Florida, July Quarterly Report at 8, 62, 64 (July 15, 2023), <https://docquery.fec.gov/pdf/598/202307159583571598/202307159583571598.pdf>.

<sup>26</sup> Keith Gross for Florida, July Quarterly Report at 8, 14 (July 15, 2023), <https://docquery.fec.gov/pdf/598/202307159583571598/202307159583571598.pdf>.

<sup>27</sup> Resp. at 2-3; Keith Gross for Florida, July Quarterly Report at 8, 14, 62, 64 (July 15, 2023), <https://docquery.fec.gov/pdf/598/202307159583571598/202307159583571598.pdf>. The Committee's report discloses both the \$45,000 and \$41,500 payments by Gross to Advancing Florida as in-kind contributions from Gross to the Committee and as disbursements from the Committee to Advancing Florida for "digital consulting; advertising." *Id.*

<sup>28</sup> Resp. at 3; *id.*, Ex. A, Aff. of Gross ¶ 10 ("The money I contributed to AFL that was later classified as testing-the-waters activities came from my personal funds as defined by the Federal Election Campaign Act and did not include any funds from my spouse or any corporation.").

<sup>29</sup> Compl. at 10-11.

frames the issue as a violation of the Act's soft money provisions, alleging that Gross used Advancing Florida's corporate funds for the purpose of supporting his campaign.<sup>30</sup>

As explained below, there does not appear to be a violation of the Act's contribution limits, corporate contribution prohibition, or soft money prohibition because Advancing Florida did not make a contribution to Gross or the Committee. Rather, it was Gross that made an in-kind contribution by paying Advancing Florida to engage in testing-the-waters activities on his behalf. His payments were properly reported as in-kind contributions to the Committee, with Advancing Florida listed as the payee, after Gross declared his candidacy. Moreover, because Gross was the candidate, he was permitted to make unlimited in-kind contributions from his personal funds.

The Act and Commission regulations prohibit any corporation from making contributions to a candidate's principal campaign committee.<sup>31</sup> Further, no person shall make contributions to any candidate, his or her authorized committee, or their agents with respect to any election for federal office which, in the aggregate, exceed \$3,300 during the 2024 election cycle.<sup>32</sup> However, federal candidates may make unlimited expenditures from personal funds in support of their own campaigns.<sup>33</sup>

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<sup>30</sup> *Id.*; see 52 U.S.C. § 30125(e) (prohibiting candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained, or controlled by or acting on behalf of one or more candidates or individuals holding federal office, from soliciting, receiving, directing, transferring, or spending funds in connection with an election for Federal office unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act).

<sup>31</sup> 52 U.S.C. § 30118(a).

<sup>32</sup> *Id.* § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1).

<sup>33</sup> 11 C.F.R. § 110.10; see *id.* § 100.33 (defining personal funds); *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (“[T]he First Amendment simply cannot tolerate [the Act’s] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy. We therefore hold that [the Act’s] restriction on a candidate’s personal expenditures is unconstitutional.”).



The Act defines a contribution as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”<sup>34</sup> The term “anything of value” includes all in-kind contributions,<sup>35</sup> including but not limited to coordinated expenditures<sup>36</sup> and coordinated communications.<sup>37</sup>

The Act defines a “candidate” as “an individual who seeks nomination for election, or election, to Federal office.”<sup>38</sup> Under the Act, an individual is deemed to seek nomination for election, or election, to Federal office when such individual “has received contributions aggregating in excess of \$5,000 or has made expenditures aggregating in excess of \$5,000.”<sup>39</sup> An individual who is not a “candidate” may decide to “test the waters” prior to declaring candidacy.<sup>40</sup> Money raised and spent solely to “test the waters” does not count towards the \$5,000 candidate threshold until the individual decides to run for federal office or conducts activities that indicate they have decided to become a candidate.<sup>41</sup> To test the waters, the

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<sup>34</sup> 52 U.S.C. § 30101(8)(A).

<sup>35</sup> 11 C.F.R. §§ 100.52(d)(1), 109.20, 109.21.

<sup>36</sup> A coordinated expenditure is one “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee” or an agent thereof. 11 C.F.R. § 109.20.

<sup>37</sup> Under Commission regulations, a communication is coordinated if it: (1) is paid for by a third party (the “payment prong”); (2) satisfies one of five content standards set forth at 11 C.F.R. § 109.21(c) (the “content prong”); and (3) satisfies one of six conduct standards set forth at 11 C.F.R. § 109.21(d) (the “conduct prong”). 11 C.F.R. § 109.21(a)-(b). All three prongs must be satisfied for a communication to be coordinated under the regulations. *Id.*; *see also* Explanation and Justification for Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003) (“Coordinated and Independent Expenditures E&J”).

<sup>38</sup> 52 U.S.C. § 30101(2).

<sup>39</sup> *Id.* § 30101(2)(A); *see id.* § 30101(8)(A) (defining contribution); 11 C.F.R. § 100.52(a) (same); 52 U.S.C. § 30101(9)(A) (defining expenditure); 11 C.F.R. § 100.111(a) (same). Until an individual has decided to run for federal office, the money they raise and spend for themselves cannot be “for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A), (9); 11 C.F.R. §§ 100.52(a), 100.111(a). Accordingly, an individual must have made this determination in order to cross the contribution or expenditure threshold at 52 U.S.C. § 30101(2).

<sup>40</sup> 11 C.F.R. §§ 100.72, 100.131.

<sup>41</sup> 11 C.F.R. §§ 100.72, 100.131.

individual may, among other things, conduct polls, make telephone calls, and travel to determine the viability of their potential candidacy.<sup>42</sup> While testing the waters, the individual need not file reports with the Commission disclosing money received and spent for the purpose of exploring their viability, although all funds received and spent for such activities remain subject to the Act's limits and prohibitions.<sup>43</sup> If the individual subsequently becomes a candidate, those funds must be reported in the first report filed by that candidate's principal campaign committee.<sup>44</sup>

In the present matter, the ads placed by Advancing Florida promoted Gross and his policy positions, but they never reference him as a candidate.<sup>45</sup> Instead, they seek support for his policies and to gather information to measure that support.<sup>46</sup> While Gross's op-eds, included on Advancing Florida's website, criticize several federal officeholders including his future electoral opponent, they do not promote Gross as a candidate or suggest that Gross had made a decision to become a candidate.<sup>47</sup> This activity is consistent with Gross's sworn statement that the purpose of Advancing Florida's activities was issue advocacy and testing the waters rather than campaigning.<sup>48</sup>

Additionally, those testing-the-waters payments appear to have been made using funds that were subject to the Act's amount limits, source prohibitions, and reporting requirements. While the Complaint, which was filed prior to the Committee's first disclosure report, alleges

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Compl. at 3-6; *see* Advancing Florida, FACEBOOK AD LIBRARY, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=all&country=ALL&view\\_all\\_page\\_id=101823082813110&sort\\_data\[direction\]=desc&sort\\_data\[mode\]=relevancy\\_monthly\\_grouped&search\\_type=page&media\\_type=all](https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=ALL&view_all_page_id=101823082813110&sort_data[direction]=desc&sort_data[mode]=relevancy_monthly_grouped&search_type=page&media_type=all) (last visited April 29, 2024).

<sup>46</sup> *Supra* note 18 and accompanying text.

<sup>47</sup> *Supra* note 20 and accompanying text.

<sup>48</sup> *See* Resp. at 3; Aff. of Gross ¶¶ 4, 8.

1 there was an in-kind contribution from Advancing Florida to the Committee, it appears, instead,  
 2 that an in-kind contribution was made by Gross. In his sworn affidavit, Gross attests that he paid  
 3 Advancing Florida to provide these testing-the-waters services.<sup>49</sup> Likewise, Committee's  
 4 disclosure reports reflect that Gross made in-kind contributions to the Committee via his  
 5 payments to Advancing Florida.<sup>50</sup> There is no information contradicting the Committee's  
 6 disclosure reports or Gross's affidavit stating that Gross used his personal funds to pay  
 7 Advancing Florida for these expenses and that these payments were properly reported as in-kind  
 8 contributions to the Committee.<sup>51</sup> Accordingly, because Gross paid Advancing Florida to  
 9 perform these testing-the-waters activities using his personal funds there is no soft money  
 10 violation because Gross did not receive any funds not subject to the reporting requirements,  
 11 amount limitations, and source prohibitions of the Act.<sup>52</sup>

12 Therefore, because it appears that these testing-the-waters were paid for by the candidate  
 13 with his personal funds, which are not subject to the Act's contribution limits,<sup>53</sup> the relevant in-

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<sup>49</sup> Resp. at 2-3.

<sup>50</sup> Keith Gross for Florida, July Quarterly Report at 8, 14, 62, 64 (July 15, 2023), <https://docquery.fec.gov/pdf/598/202307159583571598/202307159583571598.pdf>.

<sup>51</sup> See Resp. at 3; Aff. of Gross ¶ 8. Because the payments at issue were made by Gross and not by a third party, the coordination provisions of the Commission's regulations, which require that a third party make the expenditure, are not satisfied. See 11 C.F.R. § 109.21(a)(1).

<sup>52</sup> See 52 U.S.C. § 30125(e). Arguably, it may be problematic that the Committee merely reported payments to Advancing Florida rather than to the ultimate payees, such as Facebook. See Advisory Opinion 1983-25 at 2 (Mondale) (setting out several factors to determine whether "further itemization of payments made by [vendors] to others is required"). However, that issue was not raised by the Complaint and to the extent that the reporting here raises potential issues under the Commission's ultimate payee analysis, that analysis has not previously been applied in the testing-the-waters context such as the present matter where Advancing Florida's role approximated that of an exploratory committee. See *e.g.*, Reporting Ultimate Payees of Political Committee Disbursements, 78 Fed. Reg. 40,625, 40,626-27 (July 8, 2013) (addressing the issue of reporting ultimate payees of political committee disbursements relating to reimbursements for out-of-pocket expenses, payments to credit card companies, and unreimbursed disbursements by candidates, but without discussion of any application to exploratory committees). Moreover, there is no information that the candidate or Committee attempted to disguise these payments through its reporting; indeed, the candidate has been transparent about his role as founder and sole funder of Advancing Florida.

<sup>53</sup> 11 C.F.R. § 110.10; see *id.* § 100.33 (defining personal funds).

kind contributions appear to have been made with federal funds consistent with the Act and not in violation of 52 U.S.C. §§ 30116(a)(1)(A), 30118(a), or 30125(e).

Accordingly, we recommend that the Commission dismiss the allegation that Advancing Florida made and that Gross or the Committee knowingly accepted, excessive or prohibited in-kind contributions in violation of 52 U.S.C. §§ 30116(a)(1)(A), (f), 30118(a), or 30125(e).

**B. The Commission Should Dismiss the Allegation that Advancing Florida Violated the Act by Failing to Register and Report as a Political Committee**

The Act defines a political committee as “any committee, club, association, or other group of persons” that receives aggregate contributions or makes aggregate expenditures in excess of \$1,000 during a calendar year.<sup>54</sup> Notwithstanding the threshold for contributions and expenditures, an organization is considered a political committee only if its “major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate).”<sup>55</sup> Political committees are required to register with the Commission, meet organizational and recordkeeping requirements, and file periodic disclosure reports.<sup>56</sup>

As discussed above, none of Advancing Florida’s activities appear to advocate Gross’s election. Even assuming *arguendo* that criticism of other candidates in Gross’s op-eds is for the purpose of influencing a federal election, the mere reposting of these op-eds on a website appears to be a modest portion of the entity’s activities including the Facebook ads. Therefore, rather than having the major purpose of influencing an election, Advancing Florida’s major purpose appears to be, as Respondents assert, issue advocacy and testing the waters of a potential

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<sup>54</sup> 52 U.S.C. § 30101(4)(A).

<sup>55</sup> Political Comm. Status, 72 Fed. Reg. 5,595, 5,597 (Feb. 7, 2007); *see Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

<sup>56</sup> *See* 52 U.S.C. §§ 30102, 30103, 30104.

candidacy (not the nomination or election of a candidate).<sup>57</sup> Accordingly, the Commission should dismiss the allegation that Advancing Florida violated 52 U.S.C. §§ 30102, 30103 and 30104 by failing to register and report as a political committee.

**C. The Commission Should Dismiss the Allegation that Keith Gross Failed to Timely File His Statement of Candidacy**

The Act defines a “candidate” as “an individual who seeks nomination for election, or election, to Federal office.”<sup>58</sup> Under the Act, an individual is deemed to seek nomination for election, or election, to Federal office when such individual “has received contributions aggregating in excess of \$5,000 or has made expenditures aggregating in excess of \$5,000.”<sup>59</sup> Once the \$5,000 threshold has been met, the candidate has 15 days to designate a principal campaign committee by filing a Statement of Candidacy with the Commission.<sup>60</sup>

The Complaint’s allegation that Gross failed to timely file is based on the premise that Advancing Florida’s disbursements were for the purpose of advancing his candidacy and therefore would count toward the Act’s \$5,000 expenditure threshold. To the contrary, as discussed above, these disbursements were for the purposes of issue advocacy or testing the waters and therefore are not expenditures.<sup>61</sup> Thus, the statutory threshold does not appear to

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<sup>57</sup> Resp. at 5.

<sup>58</sup> 52 U.S.C. § 30101(2).

<sup>59</sup> *Id.* § 30101(2)(A); *see id.* § 30101(8)(A) (defining contribution); 11 C.F.R. § 100.52(a) (same); 52 U.S.C. § 30101(9)(A) (defining expenditure); 11 C.F.R. § 100.111(a) (same). Until an individual has decided to run for federal office, the money they raise and spend for themselves cannot be “for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A), (9); 11 C.F.R. §§ 100.52(a), 100.111(a). Accordingly, an individual must have made this determination in order to cross the contribution or expenditure threshold at 52 U.S.C. § 30101(2).

<sup>60</sup> 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a).

<sup>61</sup> Advisory Opinion 1981-32 at 3 (Askew) (“Activities which are conducted within the [testing the waters] exemption do not result in the occurrence of a contribution or expenditure, and therefore do not by themselves cause the person to become a candidate under the Act.”)

1 have been met prior to when Gross ultimately registered as a candidate by filing his Statement of  
2 Candidacy. Accordingly, we recommend that the Commission dismiss the allegation that Gross  
3 failed to timely file his Statement of Candidacy, in violation of 52 U.S.C. § 30102(e)(1) and  
4 11 C.F.R. § 101.1(a).

5 **IV. RECOMMENDATIONS**


- 6 1. Dismiss the allegation that Advancing Florida made and Keith Gross or Keith Gross  
7 for Florida knowingly accepted or received excessive or prohibited corporate  
8 contributions in violation of 52 U.S.C. §§ 30116(a)(1)(A), (f), 30118(a), or 30125(e);
- 9 2. Dismiss the allegation that Advancing Florida violated 52 U.S.C. §§ 30102, 30103  
10 and 30104 by failing to register and report as a political committee;
- 11 3. Dismiss the allegation that Keith Gross violated 52 U.S.C. § 30102(e)(1) and  
12 11 C.F.R. § 101.1(a) by failing to timely file his Statement of Candidacy;
- 13 4. Approve the attached Factual and Legal Analysis;
- 14 5. Approve the appropriate letters;

- 1           6. Close the file effective 30 days from the date of certification of this vote (or on the  
2           next business day after the 30th day, if the 30th day falls on a weekend or holiday).

3  
4                           Lisa J. Stevenson  
5                           Acting General Counsel

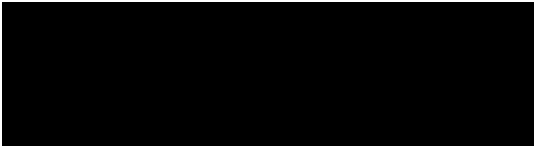
6                           Charles Kitcher  
7                           Associate General Counsel for Enforcement

8           6/27/2024  
9           Date

  
\_\_\_\_\_  
Claudio J. Pavia  
Deputy Associate General Counsel for Enforcement

11                           *Ana J. Peña-Wallace*  
12                           \_\_\_\_\_  
13                           Ana J. Peña-Wallace  
                              Assistant General Counsel

14                           *Nicholas O. Mueller*  
15                           \_\_\_\_\_  
16                           Nicholas O. Mueller  
                              Attorney



**FEDERAL ELECTION COMMISSION****FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** Keith Gross for Florida **MUR 8144**  
and Jason D. Boles in his official  
capacity as treasurer  
Keith Gross  
Advancing Florida, Inc.

**I. INTRODUCTION**

The Complaint alleges that 2024 Senate candidate Keith Gross and his principal campaign committee, Keith Gross for Florida and Jason D. Boles in his official capacity as treasurer (the “Committee”), violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by “us[ing] non-federal funds from an entity named Advancing Florida,” a 501(c)(4) non-profit that Gross created approximately three months prior to declaring his candidacy, “for campaign purposes.”<sup>1</sup> The Complaint further alleges that as a result of its campaign activities, Advancing Florida has qualified as a political committee under the Act and failed to register and file disclosure reports as such.<sup>2</sup> Finally, the Complaint alleges that Gross failed to timely file his Statement of Candidacy.<sup>3</sup>

In support of the allegations, the Complaint points to Facebook ads paid for by Advancing Florida that feature Gross (without referring to him as a candidate), promote his policy positions, and invite viewers to provide contact information and indicate their support for

<sup>1</sup> Compl. at 1 (June 21, 2023) (internal quotations omitted).

<sup>2</sup> *Id.* at 1-2; *see* Articles of Incorporation, Advancing Florida Inc. (Jan. 23, 2023), <https://search.sunbiz.org/Inquiry/CorporationSearch/ConvertTiffToPDF?storagePath=COR%5C2023%5C0131%5C70550667.tif&documentNumber=N23000000974> (listing Gross as the incorporator).

<sup>3</sup> Compl. at 13.



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1 the “movement.”<sup>4</sup> The Complaint also points to the content of Advancing Florida’s website,  
2 which allegedly consisted of two op-eds by Gross discussing policy concerns and criticizing the  
3 positions and leadership of President Joe Biden, Secretary of Transportation Pete Buttigieg, and  
4 particularly Gross’s future primary election opponent, Florida Senator Rick Scott.<sup>5</sup> Finally, the  
5 Complaint notes that after becoming a candidate, the Committee used some of the same content  
6 on its website as appeared on Advancing Florida’s website and that the Committee’s Facebook  
7 page “initially stated Advancing Florida was responsible for the page.”<sup>6</sup>

8 Gross, the Committee, and Advancing Florida filed a joint Response, together with a  
9 sworn affidavit from Gross, denying the allegations and stating that Advancing Florida  
10 functioned as Gross’s “exploratory effort” and its activities were permissible testing-the-waters  
11 activities and not campaign activities that could either trigger Advancing Florida’s status as a  
12 political committee or Gross’s status as a candidate earlier than when he filed.<sup>7</sup> Specifically,  
13 Respondents state that Gross formed Advancing Florida, and was its sole funder, in order to  
14 facilitate his “issue advocacy and eventual testing-the-waters activity,”<sup>8</sup> and that after deciding to  
15 become a candidate, the Committee reported Gross’s payment to Advancing Florida as an in-  
16 kind contribution from Gross to the Committee for testing-the-waters expenses.<sup>9</sup> Further, the

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<sup>4</sup> *Id.* at 3-6.

<sup>5</sup> *Id.*, Exs. A-B (reflecting screenshots of these op-eds on the Advancing Florida website).

<sup>6</sup> *Id.* at 8-9 (including a screenshot of Gross’s Facebook page).

<sup>7</sup> Resp. at 5-6 (Aug. 7, 2023).

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.* at 2-3; Keith Gross for Florida, July Quarterly Report at 8, 14, 62, 64 (July 15, 2023),  
<https://docquery.fec.gov/pdf/598/202307159583571598/202307159583571598.pdf>.

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Response states that these funds were Gross's personal funds and therefore were federal funds as required by the Act.<sup>10</sup>

Based on the available information, it appears that Advancing Florida's activities during the relevant time period at issue were testing-the-waters activities. These testing-the-waters activities were funded by Gross's payments to Advancing Florida, which were reported as in-kind contributions from Gross to the Committee after Gross registered as a candidate. Because the source of funds was Gross himself — who was permitted, as the eventual candidate, to make unlimited contributions — these activities do not appear to violate the Act's source prohibitions or amount limitations. Therefore, the Commission dismisses the allegations that Advancing Florida made and Keith Gross or Keith Gross for Florida knowingly accepted or received excessive or prohibited corporate contributions in violation of 52 U.S.C. §§ 30116(a)(1)(A), (f), 30118(a), or 30125(e).

Further, because the major purpose of Advancing Florida appears to consist entirely of issue advocacy and testing the waters, it is not a political committee required to register and report under the Act and the Commission dismisses this allegation that Advancing Florida violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register and report as a political committee. Finally, as the activity in question appears to have been for the purpose of testing the waters, rather than for the purpose of influencing an election, there is no information indicating that Gross became a candidate prior to his filing a Statement of Candidacy with the Commission, and therefore the Commission dismisses this allegation that Gross violated 52 U.S.C. § 30102(e)(1) and 11 C.F.R. § 101.1(a) by failing to timely file his Statement of Candidacy.

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<sup>10</sup> Resp. at 3.

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## II. FACTUAL BACKGROUND

Keith Gross is a 2024 candidate for U.S. Senate in Florida; he filed his Statement of Candidacy on April 11, 2023.<sup>11</sup> Keith Gross for Florida is his principal campaign committee.<sup>12</sup> Advancing Florida is a 501(c)(4) non-profit corporation that Gross created on January 23, 2023, approximately three months prior to declaring his candidacy.<sup>13</sup>

The Complaint alleges that Gross used non-federal funds from Advancing Florida for campaign purposes in violation of the Act, resulting in illegal in-kind contributions.<sup>14</sup> In support of its allegations, the Complaint points to between \$13,903 and \$17,692 that Advancing Florida paid to run 60 ads on Facebook.<sup>15</sup> These ads advocate Gross's positions on issues including social security, repealing regulations, and parental rights.<sup>16</sup> While none of the ads reference Gross as a candidate or encourage his election, many feature his name or image and include

<sup>11</sup> Keith Gross, Statement of Candidacy (Apr. 11, 2023).

<sup>12</sup> Keith Gross for Florida, Amended Statement of Organization at 1 (Sept. 28, 2023).

<sup>13</sup> Articles of Incorporation, Advancing Florida Inc. (Jan. 23, 2023), <https://search.sunbiz.org/Inquiry/CorporationSearch/ConvertTiffToPDF?storagePath=COR%5C2023%5C0131%5C70550667.tif&documentNumber=N23000000974> (listing Gross as the incorporator); *see* Resp., Ex. A ¶ 4 (“Aff. of Gross”) (“On January 23, 2023, I organized AFL as an organization under Section 501(c)(4) of the Internal Revenue Code established to finance legislative ideas, to conduct issue advocacy and to gather information about Florida preferences (including Social Security reform, which is a significant topic in the State of Florida), while also allowing me to segregate certain of my personal funds towards the financing of these efforts.”).

<sup>14</sup> Compl. at 1.

<sup>15</sup> *Id.* at 2-6, 12. Of these 60 ads, 59 were allegedly run through Advancing Florida's Facebook page and one was allegedly run through the Committee's Facebook page. *Id.* at 2. The allegation that one of these ads was placed on the Committee's page, and any implication that this is further evidence that Advancing Florida was advocating Gross's election, is undermined by the fact that the page presently affiliated with the Committee appears to have been Gross's personal page at the time the ad was run. *See* About, Keith Gross, FACEBOOK AD LIBRARY, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=political\\_and\\_issue\\_ads&country=US&id=1478633989210444&view\\_all\\_page\\_id=107830128834941&search\\_type=page&media\\_type=all](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&id=1478633989210444&view_all_page_id=107830128834941&search_type=page&media_type=all) (last visited Apr. 23, 2024) (reflecting that the page was created on December 3, 2022, prior to Gross either becoming a candidate or creating Advancing Florida); Keith Gross, FACEBOOK, <https://www.facebook.com/keithgrossfl> (last visited Apr. 23, 2024) (reflecting that prior to his becoming a candidate, the page frequently posted personal and family photos in addition to political statements featuring a “Keith Gross” logo, which the Committee later used after he declared his candidacy by adding “—Senate—” under the candidate's name).

<sup>16</sup> Compl. at 3-6.

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statements such as “he wants to hear from you,” “Are you with us?” and “click below to join the movement now!”<sup>17</sup> The Complaint also states that the content of Advancing Florida’s website consists entirely of two op-eds by Gross.<sup>18</sup> These op-eds discuss public policy concerns and criticize the positions and leadership of President Joe Biden, Secretary of Transportation Pete Buttigieg, and particularly Gross’s future primary election opponent, Florida Senator Rick Scott.<sup>19</sup> Finally, the Complaint notes that after becoming a candidate, the Committee used some of the same content on its website that previously appeared on Advancing Florida’s website and that the Committee’s Facebook page initially stated “Advancing Florida is responsible for the page.”<sup>20</sup>

The Response denies the allegations, stating that the activities of Advancing Florida were permissible testing-the-waters activities pursuant to 11 C.F.R. § 100.72(a) and were properly reported on the Committee’s first quarterly report, which was timely filed less than a month after the date of the Complaint.<sup>21</sup> Specifically, Respondents state that Gross formed Advancing Florida in order to facilitate his “issue advocacy and eventual testing-the-waters activity.”<sup>22</sup> According to the Response, these activities included disseminating the Facebook ads cited by the

<sup>17</sup> *Id.* at 4-6 (reflecting screenshots of ads run by Advancing Florida on Facebook); *see* Advancing Florida, FACEBOOK AD LIBRARY, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=all&country=ALL&view\\_all\\_page\\_id=101823082813110&sort\\_data\[direction\]=desc&sort\\_data\[mode\]=relevancy\\_monthly\\_grouped&search\\_type=page&media\\_type=all](https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=ALL&view_all_page_id=101823082813110&sort_data[direction]=desc&sort_data[mode]=relevancy_monthly_grouped&search_type=page&media_type=all) (last visited Apr. 29, 2024).

<sup>18</sup> Resp. at 7; *id.*, Exs. A-B (reflecting screenshots of these op-eds on the Advancing Florida website).

<sup>19</sup> *Id.*, Exs. A-B. While these op-eds do not specifically urge voting against Senator Scott, they do question his leadership, trustworthiness, and state that “[w]e deserve more than someone who only pretends to work, someone who says many of the right things but accomplishes nothing.” *Id.*, Ex. B.

<sup>20</sup> *Id.* at 8-9 (including a screenshot of Gross’s Facebook page). As discussed above, it appears that prior to his candidacy the page was used for personal purposes. *Supra* note 15.

<sup>21</sup> Resp. at 1-3; *see* Keith Gross for Florida, July Quarterly Report (July 15, 2023), <https://docquery.fec.gov/pdf/598/202307159583571598/202307159583571598.pdf>.

<sup>22</sup> Resp. at 5.

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1 Complaint, which Respondents argue constituted “digital outreach (similar to old-fashioned  
2 telephone calls)” and “engag[ing] public opinion.”<sup>23</sup> On February 27, 2023, less than two  
3 months before declaring his candidacy, Gross made his first contribution to Advancing Florida in  
4 the amount of \$45,000 to pay for digital advertising and consulting.<sup>24</sup> The Committee’s  
5 disclosure reports also reflect an additional payment by Gross to Advancing Florida for testing-  
6 the-waters activities (“digital consulting; advertising”) in the amount of \$41,500 on April 12,  
7 2023.<sup>25</sup> Respondents state that after deciding to become a candidate on April 11, 2023, the  
8 Committee reported Gross’s payments to Advancing Florida as in-kind contributions to the  
9 Committee for testing-the-waters expenses.<sup>26</sup> The Response states that these funds were Gross’s  
10 personal funds pursuant to 11 C.F.R. § 100.33 and therefore were federal funds as required by  
11 the Act.<sup>27</sup>

<sup>23</sup> *Id.*; see 11 C.F.R. § 100.72 (including in the list of permissible testing the waters activities to determine whether an individuals should become a candidate: conducting a poll and telephone calls).

<sup>24</sup> Resp. at 2; see Keith Gross for Florida, July Quarterly Report at 8, 62, 64 (July 15, 2023), <https://docquery.fec.gov/pdf/598/202307159583571598/202307159583571598.pdf>.

<sup>25</sup> Keith Gross for Florida, July Quarterly Report at 8, 14 (July 15, 2023), <https://docquery.fec.gov/pdf/598/202307159583571598/202307159583571598.pdf>.

<sup>26</sup> Resp. at 2-3; Keith Gross for Florida, July Quarterly Report at 8, 14, 62, 64 (July 15, 2023), <https://docquery.fec.gov/pdf/598/202307159583571598/202307159583571598.pdf>. The Committee’s report discloses both the \$45,000 and \$41,500 payments by Gross to Advancing Florida as in-kind contributions from Gross to the Committee and as disbursements from the Committee to Advancing Florida for “digital consulting; advertising.” *Id.*

<sup>27</sup> Resp. at 3; *id.*, Ex. A, Aff. of Gross ¶ 10 (“The money I contributed to AFL that was later classified as testing-the-waters activities came from my personal funds as defined by the Federal Election Campaign Act and did not include any funds from my spouse or any corporation.”).

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1     **III.     LEGAL ANALYSIS**

2             **A.     The Commission Dismisses the Allegation that Advancing Florida Made or**  
3                   **that Gross or the Committee Knowingly Accepted Excessive or Prohibited**  
4                   **Contributions**

5             The Complaint contends that payments by Advancing Florida for Facebook ads, as well  
6     as content on Advancing Florida’s website, are excessive and prohibited corporate in-kind  
7     contributions from Advancing Florida to Gross and the Committee.<sup>28</sup> The Complaint also  
8     frames the issue as a violation of the Act’s soft money provisions, alleging that Gross used  
9     Advancing Florida’s corporate funds for the purpose of supporting his campaign.<sup>29</sup>

10            As explained below, there does not appear to be a violation of the Act’s contribution  
11   limits, corporate contribution prohibition, or soft money prohibition because Advancing Florida  
12   did not make a contribution to Gross or the Committee. Rather, it was Gross that made an in-  
13   kind contribution by paying Advancing Florida to engage in testing-the-waters activities on his  
14   behalf. His payments were properly reported as in-kind contributions to the Committee, with  
15   Advancing Florida listed as the payee, after Gross declared his candidacy. Moreover, because  
16   Gross was the candidate, he was permitted to make unlimited in-kind contributions from his  
17   personal funds.

18            The Act and Commission regulations prohibit any corporation from making contributions  
19   to a candidate’s principal campaign committee.<sup>30</sup> Further, no person shall make contributions to

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<sup>28</sup> Compl. at 10-11.

<sup>29</sup> *Id.*; see 52 U.S.C. § 30125(e) (prohibiting candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained, or controlled by or acting on behalf of one or more candidates or individuals holding federal office, from soliciting, receiving, directing, transferring, or spending funds in connection with an election for Federal office unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act).

<sup>30</sup> 52 U.S.C. § 30118(a).

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any candidate, his or her authorized committee, or their agents with respect to any election for federal office which, in the aggregate, exceed \$3,300 during the 2024 election cycle.<sup>31</sup> However, federal candidates may make unlimited expenditures from personal funds in support of their own campaigns.<sup>32</sup>

The Act defines a contribution as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”<sup>33</sup> The term “anything of value” includes all in-kind contributions,<sup>34</sup> including but not limited to coordinated expenditures<sup>35</sup> and coordinated communications.<sup>36</sup>

The Act defines a “candidate” as “an individual who seeks nomination for election, or election, to Federal office.”<sup>37</sup> Under the Act, an individual is deemed to seek nomination for election, or election, to Federal office when such individual “has received contributions

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<sup>31</sup> *Id.* § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1).

<sup>32</sup> 11 C.F.R. § 110.10; *see id.* § 100.33 (defining personal funds); *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (“[T]he First Amendment simply cannot tolerate [the Act’s] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy. We therefore hold that [the Act’s] restriction on a candidate’s personal expenditures is unconstitutional.”).

<sup>33</sup> 52 U.S.C. § 30101(8)(A).

<sup>34</sup> 11 C.F.R. §§ 100.52(d)(1), 109.20, 109.21.

<sup>35</sup> A coordinated expenditure is one “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or a political party committee” or an agent thereof. 11 C.F.R. § 109.20.

<sup>36</sup> Under Commission regulations, a communication is coordinated if it: (1) is paid for by a third party (the “payment prong”); (2) satisfies one of five content standards set forth at 11 C.F.R. § 109.21(c) (the “content prong”); and (3) satisfies one of six conduct standards set forth at 11 C.F.R. § 109.21(d) (the “conduct prong”). 11 C.F.R. § 109.21(a)-(b). All three prongs must be satisfied for a communication to be coordinated under the regulations. *Id.*; *see also* Explanation and Justification for Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003) (“Coordinated and Independent Expenditures E&J”).

<sup>37</sup> 52 U.S.C. § 30101(2).



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aggregating in excess of \$5,000 or has made expenditures aggregating in excess of \$5,000.”<sup>38</sup>

An individual who is not a “candidate” may decide to “test the waters” prior to declaring

candidacy.<sup>39</sup> Money raised and spent solely to “test the waters” does not count towards the

\$5,000 candidate threshold until the individual decides to run for federal office or conducts

activities that indicate they have decided to become a candidate.<sup>40</sup> To test the waters, the

individual may, among other things, conduct polls, make telephone calls, and travel to determine

the viability of their potential candidacy.<sup>41</sup> While testing the waters, the individual need not file

reports with the Commission disclosing money received and spent for the purpose of exploring

their viability, although all funds received and spent for such activities remain subject to the

Act’s limits and prohibitions.<sup>42</sup> If the individual subsequently becomes a candidate, those funds

must be reported in the first report filed by that candidate’s principal campaign committee.<sup>43</sup>

In the present matter, the ads placed by Advancing Florida promoted Gross and his policy

positions, but they never reference him as a candidate.<sup>44</sup> Instead, they seek support for his

policies and to gather information to measure that support.<sup>45</sup> While Gross’s op-eds, included on

<sup>38</sup> *Id.* § 30101(2)(A); *see id.* § 30101(8)(A) (defining contribution); 11 C.F.R. § 100.52(a) (same); 52 U.S.C. § 30101(9)(A) (defining expenditure); 11 C.F.R. § 100.111(a) (same). Until an individual has decided to run for federal office, the money they raise and spend for themselves cannot be “for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A), (9); 11 C.F.R. §§ 100.52(a), 100.111(a). Accordingly, an individual must have made this determination in order to cross the contribution or expenditure threshold at 52 U.S.C. § 30101(2).

<sup>39</sup> 11 C.F.R. §§ 100.72, 100.131.

<sup>40</sup> 11 C.F.R. §§ 100.72, 100.131.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Compl. at 3-6; *see* Advancing Florida, FACEBOOK AD LIBRARY, [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=all&country=ALL&view\\_all\\_page\\_id=101823082813110&sort\\_data\[direction\]=desc&sort\\_data\[mode\]=relevancy\\_monthly\\_grouped&search\\_type=page&media\\_type=all](https://www.facebook.com/ads/library/?active_status=all&ad_type=all&country=ALL&view_all_page_id=101823082813110&sort_data[direction]=desc&sort_data[mode]=relevancy_monthly_grouped&search_type=page&media_type=all) (last visited April 29, 2024).

<sup>45</sup> *Supra* note 17 and accompanying text.



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Advancing Florida’s website, criticize several federal officeholders including his future electoral opponent, they do not promote Gross as a candidate or suggest that Gross had made a decision to become a candidate.<sup>46</sup> This activity is consistent with Gross’s sworn statement that the purpose of Advancing Florida’s activities was issue advocacy and testing the waters rather than campaigning.<sup>47</sup>

Additionally, those testing-the-waters payments appear to have been made using funds that were subject to the Act’s amount limits, source prohibitions, and reporting requirements. While the Complaint, which was filed prior to the Committee’s first disclosure report, alleges there was an in-kind contribution from Advancing Florida to the Committee, it appears, instead, that an in-kind contribution was made by Gross. In his sworn affidavit, Gross attests that he paid Advancing Florida to provide these testing-the-waters services.<sup>48</sup> Likewise, Committee’s disclosure reports reflect that Gross made in-kind contributions to the Committee via his payments to Advancing Florida.<sup>49</sup> There is no information contradicting the Committee’s disclosure reports or Gross’s affidavit stating that Gross used his personal funds to pay Advancing Florida for these expenses and that these payments were properly reported as in-kind contributions to the Committee.<sup>50</sup> Accordingly, because Gross paid Advancing Florida to perform these testing-the-waters activities using his personal funds there is no soft money

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<sup>46</sup> *Supra* note 19 and accompanying text.

<sup>47</sup> *See* Resp. at 3; Aff. of Gross ¶¶ 4, 8.

<sup>48</sup> Resp. at 2-3.

<sup>49</sup> Keith Gross for Florida, July Quarterly Report at 8, 14, 62, 64 (July 15, 2023), <https://docquery.fec.gov/pdf/598/202307159583571598/202307159583571598.pdf>.

<sup>50</sup> *See* Resp. at 3; Aff. of Gross ¶ 8. Because the payments at issue were made by Gross and not by a third party, the coordination provisions of the Commission’s regulations, which require that a third party make the expenditure, are not satisfied. *See* 11 C.F.R. § 109.21(a)(1).

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violation because Gross did not receive any funds not subject to the reporting requirements, amount limitations, and source prohibitions of the Act.<sup>51</sup>

Therefore, because it appears that these testing-the-waters were paid for by the candidate with his personal funds, which are not subject to the Act's contribution limits,<sup>52</sup> the relevant in-kind contributions appear to have been made with federal funds consistent with the Act and not in violation of 52 U.S.C. §§ 30116(a)(1)(A), 30118(a), or 30125(e).

Accordingly, the Commission dismisses the allegation that Advancing Florida made and that Gross or the Committee knowingly accepted, excessive or prohibited in-kind contributions in violation of 52 U.S.C. §§ 30116(a)(1)(A), (f), 30118(a), or 30125(e).

**B. The Commission Dismisses the Allegation that Advancing Florida Violated the Act by Failing to Register and Report as a Political Committee**

The Act defines a political committee as “any committee, club, association, or other group of persons” that receives aggregate contributions or makes aggregate expenditures in excess of \$1,000 during a calendar year.<sup>53</sup> Notwithstanding the threshold for contributions and expenditures, an organization is considered a political committee only if its “major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate).”<sup>54</sup> Political committees are required to register with the Commission, meet organizational and recordkeeping requirements, and file periodic disclosure reports.<sup>55</sup>

<sup>51</sup> See 52 U.S.C. § 30125(e).

<sup>52</sup> 11 C.F.R. § 110.10; see *id.* § 100.33 (defining personal funds).

<sup>53</sup> 52 U.S.C. § 30101(4)(A).

<sup>54</sup> Political Comm. Status, 72 Fed. Reg. 5,595, 5,597 (Feb. 7, 2007); see *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

<sup>55</sup> See 52 U.S.C. §§ 30102, 30103, 30104.

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As discussed above, none of Advancing Florida’s activities appear to advocate Gross’s election. Therefore, rather than having the major purpose of influencing an election, Advancing Florida’s major purpose appears to be, as Respondents assert, issue advocacy and testing the waters of a potential candidacy (not the nomination or election of a candidate).<sup>56</sup> Accordingly, the Commission dismisses the allegation that Advancing Florida violated 52 U.S.C. §§ 30102, 30103 and 30104 by failing to register and report as a political committee.

**C. The Commission Dismisses the Allegation that Keith Gross Failed to Timely File His Statement of Candidacy**

The Act defines a “candidate” as “an individual who seeks nomination for election, or election, to Federal office.”<sup>57</sup> Under the Act, an individual is deemed to seek nomination for election, or election, to Federal office when such individual “has received contributions aggregating in excess of \$5,000 or has made expenditures aggregating in excess of \$5,000.”<sup>58</sup> Once the \$5,000 threshold has been met, the candidate has 15 days to designate a principal campaign committee by filing a Statement of Candidacy with the Commission.<sup>59</sup>

The Complaint’s allegation that Gross failed to timely file is based on the premise that Advancing Florida’s disbursements were for the purpose of advancing his candidacy and therefore would count toward the Act’s \$5,000 expenditure threshold. To the contrary, as discussed above, these disbursements were for the purposes of issue advocacy or testing the

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<sup>56</sup> Resp. at 5.

<sup>57</sup> 52 U.S.C. § 30101(2).

<sup>58</sup> *Id.* § 30101(2)(A); *see id.* § 30101(8)(A) (defining contribution); 11 C.F.R. § 100.52(a) (same); 52 U.S.C. § 30101(9)(A) (defining expenditure); 11 C.F.R. § 100.111(a) (same).

<sup>59</sup> 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a).

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1 waters and therefore are not expenditures.<sup>60</sup> Thus, the statutory threshold does not appear to  
2 have been met prior to when Gross ultimately registered as a candidate by filing his Statement of  
3 Candidacy. Accordingly, the Commission dismisses the allegation that Gross failed to timely  
4 file his Statement of Candidacy, in violation of 52 U.S.C. § 30102(e)(1) and 11 C.F.R.  
5 § 101.1(a).

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<sup>60</sup> Advisory Opinion 1981-32 at 3 (Askew) (“Activities which are conducted within the [testing the waters] exemption do not result in the occurrence of a contribution or expenditure, and therefore do not by themselves cause the person to become a candidate under the Act.”)