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## BEFORE THE FEDERAL ELECTION COMMISSION

|   |   |          |
|---|---|----------|
| In the Matter of:                         | § |          |
| Senator Ted Cruz;                         | § |          |
| Cruz for President; Bradley S. Knippa,    | § | MUR 7048 |
| in his official capacity as Treasurer for | § |          |
| Cruz for President                        | § |          |

### RESPONSE TO THE COMPLAINT

Through counsel, Senator Ted Cruz, Cruz for President (the “Committee”) and Bradley S. Knippa, in his official capacity as the Committee’s Treasurer, provide the following response to the complaint filed by Crystal K. Perkins, Executive Director of the Texas Democratic Party (the “Complainant”), and designated by the Federal Election Commission (the “Commission”) as MUR 7048. Because the complaint fails to allege facts that would constitute a violation of any provision of the Federal Election Campaign Act of 1971, as amended (the “Act”), or Commission regulations, we respectfully request that the Commission dismiss this matter.

#### I. BACKGROUND

This matter involves a politically-motivated complaint filed by the Texas Democratic Party, relies on a faulty *Politico* article,<sup>1</sup> and is based on an unauthorized, albeit innocuous, recording of a private event. The Complainant falsely alleges that, at a campaign event, an attendee’s impromptu remarks are attributable to the campaign and amount to a solicitation when the remarks do not, in any way, constitute a solicitation. Even if they were so construed—contrary to Commission regulations—no violation would result because the Complainant’s allegations do not withstand even the most elementary scrutiny.

#### II. ANALYSIS

##### A. The Complaint Is Defective Because It Is Based On An Article And Anonymous Recording

As a preliminary matter, we note that the Complainant’s allegations are based on a *Politico* article citing an anonymous audio recording. The Act and Commission regulations contain specific requirements for a valid complaint. The Act provides that the “Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.”

<sup>1</sup> “Cruz fundraiser heard toeing donations rule,” *Politico*, April 7, 2016, available at <http://www.politico.com/story/2016/04/ted-cruz-keet-lewis-super-pac-donations-221656>.

Therefore, any action taken by the Commission (other than a vote to dismiss) on a complaint based on an anonymous recording would be contrary to the command of 52 U.S.C. § 30109(a)(1).

The complaint is also materially defective under the Commission's regulations because it fails to conform with 11 C.F.R. § 111.4(d). Pursuant to 11 C.F.R. § 111.4(d)(2), "[s]tatements which are not based on personal knowledge should be accompanied by an identification of the source of information which gives rise to the Complainant's belief in the truth of such statements." Here, the Complainant has failed to identify the least bit of information (e.g., name or address) regarding the source of the material being relied on, which renders the complaint facially deficient.

Furthermore, 11 C.F.R. § 111.4(d)(4) provides that the complaint "should be accompanied by any documentation supporting the facts alleged if such documentation is known of, or available to, the complainant." The Complainant's reference to a *Politico* article citing this YouTube video is insufficient supporting documentation, so the complaint is materially deficient for this reason as well. Simply put, the Commission may not proceed based on a "straw" complaint—an anonymous complaint made in the name of the Texas Democratic Party.

There is no question that the admissibility of the anonymous recording, if given *any* weight by the Commission, will face serious scrutiny if this matter were to proceed.<sup>2</sup> The recording has never been authenticated, and the full and complete original has not been provided to Respondents. Under any fundamental understanding of evidentiary standards, only the original can prove its contents. And given that the YouTube version is obviously edited and truncated, it is far from clear that the original is available or was provided to the Commission. Needless to say, the Complainant's allegations present the agency and Respondents with a complaint based on a news report relying on an anonymously-sourced recording.<sup>3</sup> For the same reason the Commission rejects anonymous complaints,<sup>4</sup> a straw complainant who bases allegations on anonymous sources must have their invalid complaint similarly rejected.

## **B. Mr. Lewis Was Not A Fundraising Agent Acting On Behalf Of The Campaign For His Comments**

By misreading a campaign release, the Complainant has come to the incorrect conclusion that J. Keet Lewis had a campaign position or title related to fundraising. Contrary to Complainant's faulty extrapolation, the fact is the Mr. Lewis had none aside from being listed on the co-host list for the campaign event at issue. Section 300.2(b) of the Commission's regulations establish the definition of "agent". Mr. Lewis was not a fundraising

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<sup>2</sup> See Rule 901, Federal Rules of Evidence.

<sup>3</sup> "Ted Cruz Fundraiser", Video, available at <https://www.youtube.com/watch?v=N3dFpzANr5w&feature=youtu.be> (uploaded by "Arthur Grayson").

<sup>4</sup> 11 C.F.R. § 111.4.

agent of Cruz for President. In fact, the press release cited in the complaint clearly indicates that Mr. Lewis was named in an honorary capacity as a National Co-Chair of the campaign's Small Business for Cruz Coalition, a very different role than serving as the National Co-Chair of the presidential campaign as the complaint alleges. See "Ted Cruz Announces Small Business for Cruz Coalition Supporting Ted Cruz for President and his Economic Policies," available at <https://www.tedcruz.org/news/small-business-supports-cruz-simple-flat-tax-plan/>. Indeed, Mr. Lewis even states "So we're here just as volunteers" at the 45-second mark of the YouTube video, a fact that was conveniently excluded from the complaint.

The Complainant makes a muddled allegation that, by virtue of the appearance of Mr. Lewis's name on a placard listing "co-hosts", he was an agent of the campaign for all purposes. Under a plain reading of the Commission's definition of "agent" and its explanation for the definition, that is incorrect. A listing of the names of hosts and co-hosts on a campaign placard does not render those listed as agents acting on behalf of the campaign in all of their activities. Mr. Lewis, in his impromptu remarks, was not speaking, soliciting, or acting on behalf of the campaign: he lacked the "actual authority" required by the Commission's definition of "agent" and the agency's Explanation and Justification for the definition provided in 2006. *Definitions of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures*, 71 Fed. Reg. 4975 (Jan. 31, 2006) available at [http://www.fec.gov/law/cfr/ej\\_compilation/2006/2006-1.pdf](http://www.fec.gov/law/cfr/ej_compilation/2006/2006-1.pdf). Even if the Commission were to erroneously conclude he was an agent of the campaign, as the Commission explained in Advisory Opinion 2015-09,

[w]hile the Act "restricts the ability of Federal officeholders, candidates, and national party committees to raise non-Federal funds," it "does not prohibit individuals who are agents of the foregoing from also raising non-Federal funds for other political parties or outside groups." Definition of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975, 4979 (Jan. 31, 2006). Accordingly, an individual is subject to the Act's "soft money prohibitions" only when acting on behalf of a candidate, officeholder, or party committee.

*Id.* at 4979 n.9.

We contend that Mr. Lewis solicited neither for the campaign nor for a super PAC, as discussed below. Thus, although we argue that he was not an agent of the campaign or acting on behalf of the campaign in his remarks and his remarks do not constitute a solicitation, as discussed below, Mr. Lewis's comments did not violate any provision of the Act or Commission regulations.

### **C. The Alleged Recorded Comments, Which Were Not Made By An Agent Of The Campaign, Do Not Amount To A Solicitation**

Even if the Commission wrongly concludes that Mr. Lewis was an agent of the campaign acting on its behalf—which he was not—his mere reference to a super PAC does

not give rise to a violation of the Act or Commission regulations. And the recording certainly does not establish that Mr. Lewis solicited for the campaign or another group. As best can be transcribed, the recording indicates he said:

*[Beginning of sentence cut off] \$2,700 per person and then \$5,400 for the general.*

*If you hit your max, we have a table for you that is the unlimited table.*

*It can take corporate dollars, it can take partnership dollars, and that's the super PAC, Stand for Truth, so pick up some of that information.*

*The method to our madness is this: you max out and then get engaged in the super PAC. Hal Lambert runs that. It's totally separate from the super... from the campaign.*

Under 11 C.F.R. § 300.2(m), “to solicit” means:

to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value. A solicitation is an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value. A solicitation may be made directly or indirectly. The context includes the conduct of persons involved in the communication. A solicitation does not include mere statements of political support or mere guidance as to the applicability of a particular law or regulation.

See “Definitions of ‘Solicit’ and ‘Direct’,” 71 Fed. Reg. 13,926 (March 20, 2006) available at [http://www.fec.gov/law/cfr/ej\\_compilation/2006/notice\\_2006-6.pdf](http://www.fec.gov/law/cfr/ej_compilation/2006/notice_2006-6.pdf). This is an ‘objective test’ and does not turn on ‘subjective interpretations.’” *Id.* at 13,928. The application of this regulation proves that there are several important reasons why the recorded statements are not a solicitation. First, the statement is not a “clear message” of exhortation for a contributory act, as required by the regulation. While Mr. Lewis, in his unscripted remarks, potentially asks listeners to “engage,” he never uses the words “give,” “contribute,” or “donate.”

The examples noted 11 C.F.R. § 300.2(m) provide no support for the conclusion that Mr. Lewis solicited funds. Each example is distinguishable from the facts in the instant matter as follows:

| <b>Examples in 300.2(m)</b>   | <b>Distinguishing Factor of Mr. Lewis's Comments</b>  |
|---|---|
| (i) "Please give \$100,000 to Group X."   | Mr. Lewis made no request for a specific amount.  |
| (ii) "It is important for our State party to receive at least \$100,000 from each of you in this election."   | Mr. Lewis made no request or request for action or consequence of action and did not mention a specific amount.   |
| (iii) "Group X has always helped me financially in my elections. Keep them in mind this fall."  | This example implies a candidate speaker, which Mr. Lewis is obviously not. Mr. Lewis gave no indication that the group has helped a candidate in comments. |
| (iv) "X is an effective State party organization; it needs to obtain as many \$100,000 donations as possible."  | Mr. Lewis gave no indication of the effectiveness or consequence of action.   |
| (v) "Giving \$100,000 to Group X would be a very smart idea."   | Mr. Lewis gave no explicit meaning ascribed to comments.  |
| (vi) "Send all contributions to the following address * * *."   | Mr. Lewis never identified how to remit contributions.  |
| (vii) "I am not permitted to ask for contributions, but unsolicited contributions will be accepted at the following address * * *."   | Mr. Lewis never noted what he was not permitted to do, and never identified how to remit contributions.   |
| (viii) "Group X is having a fundraiser this week; you should go."   | Mr. Lewis made no reference to any other event requiring a donation or suggested listeners should attend.   |
| (ix) "You have reached the limit of what you may contribute directly to my campaign, but you can further help my campaign by assisting the State party."                              | Mr. Lewis is obviously not a candidate, as this statement implies.  |
| (x) A candidate hands a potential donor a list of people who have contributed to a group and the amounts of their contributions. The candidate says, "I see you are not on the list." | There is no allegation of any candidate action or statement whatsoever.   |
| (xi) "I will not forget those who contribute at this crucial stage."  | There is no allegation of any candidate statement.  |
| (xii) "The candidate will be very pleased if we can count on you for \$10,000."   | Mr. Lewis never referred to anyone else on the campaign.  |
| (xiii) "Your contribution to this campaign would mean a great deal to the entire party and to me personally."   | Mr. Lewis never referred to anyone else on the campaign and this implies a candidate or official speaker, which was not alleged here.                       |
| (xiv) Candidate says to potential donor: "The money you will help us raise will allow us to   | There is no allegation of candidate statement.  |

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| communicate our message to the voters through Labor Day.”  |  |
| (xv) “I appreciate all you’ve done in the past for our party in this State. Looking ahead, we face some tough elections. I’d be very happy if you could maintain the same level of financial support for our State party this year.”                                 | There is no reference to future financial support.     |
| (xvi) The head of Group X solicits a contribution from a potential donor in the presence of a candidate. The donor asks the candidate if the contribution to Group X would be a good idea and would help the candidate’s campaign. The candidate nods affirmatively. | This factual scenario is not alleged in the complaint. |

Finally, the recorded statement evidences “mere guidance as to the applicability of a particular law or regulation,” and is thus excluded from the definition of a solicitation. A description of some of the types of contributions other groups may accept cannot amount to a solicitation under any commonsense reading of the explicit language of 11 C.F.R. § 300.2(m).

Complainant has not indicated that there were any non-verbal cues or peripheral actions to indicate a solicitation. The Commission may not establish, via enforcement matter, that Mr. Lewis’s comments amount to a solicitation as they were unprompted verbal communications that were not spoken, authorized, or approved by the Committee or its agents. As Commissioners Smith, Mason, and Toner explained:

This Commission cannot set standard—exposing respondents to potential criminal sanctions—based on a listener’s perception, intuition or inference that a covered person’s statements amount in some way to a solicitation. Liability cannot rest upon the “varied understanding” of members of an audience. “In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.”

Advisory Opinion 2003-03 (Cantor), Concurrence of Commissioners Smith, Mason, and Toner at 1. (quoting *Buckley v. Valeo*, 424 U.S. 1, 43 (1976)).

In addition, it would be arbitrary and capricious, in light of the agency’s enforcement history, to pursue an impromptu remark outside of the context of a specific amount. In MUR 5711 (Dianne Feinstein), the Commission failed to pursue a matter where a website clearly presented an opportunity for a donor to “contribute” and a webpage explicitly asked for non-federal funds. See MUR 5711 (Dianne Feinstein), Complaint, Exs. A and B. The Commission concluded that this language did not constitute a solicitation. *Id.*, Cert. dated Feb 21, 2007. Thus, the Commission has shown that no enforcement action is warranted in the absence of a mention of a specific amount, notwithstanding use of the word “contribute”.

Finally, we would be remiss not to mention that the Committee had a well-established policy, which the Committee's actual employees and agents followed, providing that no super PAC would be allowed to publicly address the crowd or solicit funds at a Committee-sponsored event. And the Committee does not have reason to believe, much less knowledge contradicting such belief, that this policy was not adhered to at the specific event in question. If, for some reason such activities occurred, then such an occurrence would have overstepped our Committee's commonplace policies and procedures.

**D. The Commission's Joint Fundraising Rules Are Not Implicated By The Alleged Facts**

Finally, Complainant's baseless allegation that the Committee failed to comply with joint fundraising rules in 11 C.F.R. § 102.17 also fails because these rules are not implicated by any of the events of that day. As concluded above, the allegations in the complaint establish that Mr. Lewis was neither an agent of the campaign nor did he solicit funds. Thus, the Commission's joint fundraising rules would not be triggered, even if they were compulsory for such situations. Furthermore, application of the Commission's joint fundraising rules would be strikingly inappropriate given Mr. Lewis's fleeting reference to a "table" distinctly separate and apart from campaign activity in another part of a personal residence. Clearly, the joint fundraising rules cannot require strict adherence to the burdens of agreements, forms, and paperwork, based on a transitory reference by an event attendee to another group or campaign. We urge the Commission to reject Complainant's position.

### **III. CONCLUSION**

The Commission cannot find reason to believe that a violation occurred in this matter because, under the common formulation of that standard, such a finding is appropriate "only if a complaint set forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented . . . Unwarranted legal conclusions from asserted facts, *see* SOR in MUR 4869 (American Postal Workers Union), or mere speculation, *see* SOR of Chairman Wold and Commissioners Mason and Thomas in MUR 4850 (Fossella), will not be accepted as true. In addition, . . . a complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint . . ."<sup>5</sup>

For the foregoing reasons, we request that the Commission dismiss MUR 7048 and find no reason to believe that Senator Ted Cruz, Cruz for President, and Bradley Knippa, in his official capacity as treasurer, violated any provision of the Federal Election Campaign Act of 1971 or Commission regulations in this matter. Please note that, although Senator Cruz was named as a respondent, the Complainant presents no allegation against him and, for this

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<sup>5</sup> MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1-2.

reason alone, the Commission must find no reason to believe he violated any provision of the Act or Commission regulations in this matter.

Dated: June 17, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Chris K. Gober", with a long horizontal flourish extending to the right.

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