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December 14, 2016

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Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 7153

Dear Mr. Jordan:

On behalf of Hillary for America and Jose H. Villarreal, in his official capacity as Treasurer (collectively, "Respondents"), we submit this letter in response to the complaint filed by Tony Dane ("Complainant") on October 17, 2016 (the "Complaint"). The Commission should dismiss the complaint and close the file.

This Complaint arises directly from an operation by a foreign power "to sow confusion and undermine Americans' faith in their government" during the 2016 presidential general election, and even "to steer the election's outcome" itself.¹ It relies exclusively on personal emails that Russian security agencies stole from Respondents' campaign chair, John Podesta, and provided to Wikileaks through intermediaries for publication.² The theft, publication and manipulation of these emails remains under active government review.³

As a threshold matter, the Commission should exercise its discretion to avoid initiating an investigation wholly reliant on information obtained and distributed through a hostile foreign intelligence operation.⁴ As one Commissioner has stated: "The purpose of the Federal Election

¹ See Max Fisher, *Russia and the U.S. Election: What We Know and Don't Know*, N.Y. Times (Dec. 12, 2016), available at <http://www.nytimes.com/2016/12/12/world/europe/russia-trump-election-cia-fbi.html>.

² *Id.*

³ See David E. Sanger, *Obama Orders Intelligence Report on Russian Election Hacking*, N.Y. Times (Dec. 9, 2016), available at <http://www.nytimes.com/2016/12/09/us/obama-russia-election-hack.html?smid=tw-share&r=0>; see also Jennifer Steinhauer, *Senate and House Leaders Call for Inquiry of Russian Hacking in Election*, N.Y. Times (Dec. 12, 2016), available at <http://www.nytimes.com/2016/12/12/us/politics/mcconnell-supports-inquiry-of-russian-hacking-during-election.html>.

⁴ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

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Commission is to safeguard the integrity of our elections.”⁵ And yet the purpose of the Russian operation was, among other things, to “undercut confidence in the integrity of the vote.”⁶

For the Commission to treat the Wikileaks material like any other source of documentation would further promote foreign objectives and detract from the FEC’s core purpose of ensuring election integrity. It would also create an incentive for others to steal confidential information from political committees like Respondents, knowing that they could compound the victims’ injury by triggering mandatory legal processes against them, no matter how meritless the complaint. Certainly the Commission can consider these factors when deciding whether an enforcement action “best fits the agency’s overall policies” and fits within a “proper ordering of its priorities.”⁷ Because of the spurious provenance of the information on which this Complaint entirely relies, the Commission should exercise its prosecutorial discretion and dismiss it.

Even if the Commission were to treat the Complaint like any other, and even if it were to assume the integrity of the supporting documentation, the Complaint would still be wholly meritless.⁸ The Complaint alleges that Respondents engaged in “coordination” through an op-ed piece published by *The Hill*; a series of unspecified films on which Respondents proposed to work with various filmmakers; foreknowledge of a question asked at a March 2016 debate; a series of news reports in *The New York Times* and *The Boston Globe*, and on CNBC and Univision; and finally, through legal advice provided to Respondents regarding interactions with third parties. *See* Compl. at 1-2. The Complaint relies on one news article from *The Intercept*, a fragment of a second article from *The Observer*, and the Complainant’s own recasting of three emails published online by hackers linked to a foreign intelligence service, as explained above.

In each case, the Complaint’s allegation of “coordination” is unsupported and insufficient. A communication is coordinated with a candidate or her authorized committee, and thereby treated as an in-kind contribution, when: (1) it is paid for by a third party; (2) it satisfies at least one “content” standard; and (3) it satisfies at least one “conduct” standard.⁹ However, according to Commission regulations, if the communication is exempt from the Commission’s definitions of “contribution” and “expenditure,” then no in-kind contribution results.¹⁰

⁵ FEC Matter Under Review 6952 (Fox News Network, LLC), Statement of Reasons of Commissioner Ann M. Ravel at 1 (Jun. 30, 2016).

⁶ David E. Sanger & Scott Shane, *Russian Hackers Acted to Aid Trump in Election, U.S. Says*, N.Y. Times (Dec. 9, 2016), available at <http://www.nytimes.com/2016/12/09/us/obama-russia-election-hack.html>.

⁷ *Heckler*, 470 U.S. at 831-32.

⁸ The Complaint does not even present any of the Wikileaks emails in their native form. Instead, they are apparently produced as Word documents that the Complainant himself created. *But see* 11 C.F.R. § 111.4(c)(4) (requiring the Complaint to “be accompanied by any documentation” known to the Complainant).

⁹ *See* 11 C.F.R. § 109.21(a).

¹⁰ *See* 11 C.F.R. § 109.20(b).

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This is particularly true in the case of the Act's "media exemption," which excludes from regulation "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party committee, political committee, or candidate ..."¹¹ As one Commissioner put it: "Whether the media entities communicated with political parties or candidates before the airing of the broadcasts is similarly irrelevant. Indeed, it is difficult to fathom how journalists could cover campaigns if they had to worry that communicating with campaign workers could trigger a government investigation into supposed improper coordination. Merely investigating such allegations would intrude upon Constitutional guarantees of freedom of the press."¹²

Yet the Complaint hinges almost entirely on claims of media coordination. It alleges that Respondents coordinated an op-ed that was written by Peter Huffman, who once worked for the Clinton Health Access Initiative, and published in *The Hill*. Compl. at 1. The Complaint continues to allege that Respondents coordinated multiple news stories with the *New York Times*, *Boston Globe* and Univision, and that they coordinated with John Harwood of CNBC. Compl. at 2-3. Yet, the Commission has already determined that "[a]llegations of coordination are of no import when applying the press exemption. What a press entity says in broadcasts, news stories and editorials is absolutely protected under the press exemption, regardless of whether any activities occurred that might otherwise constitute coordination..."¹³

The remaining scattershot allegations in the Complaint fare no better. The Complaint misreads the Act to allege that Respondents coordinated by *receiving* advance information about a planned debate, even though coordination occurs when a campaign *provides* information about its plans, projects, activities or needs to a third party.¹⁴ The Complaint also concludes that Respondents coordinated through internal discussions about how to encourage filmmakers to become involved in the campaign, yet the mere discussion of these activities presents no apparent violation of the Act, which provides ample exemptions to permit their undertaking.¹⁵

¹¹ 52 U.S.C. §30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

¹² FEC Matter Under Review 5540 (CBS Broadcasting, Inc.), 5545 (CBS News), 5562 (Sinclair Broadcast Group) and 5570 (Sinclair Broadcast Group, Inc.), Statement of Reasons of Commissioner Ellen L. Weintraub (Jul. 12, 2005).

¹³ FEC Matter Under Review 5540 (CBS Broadcasting, Inc.) and 5545 (CBS News), Statement of Reasons of Vice Chairman Toner and Commissioners Mason and Smith (Jul. 15, 2005).

¹⁴ See generally 11 C.F.R. § 109.21(c).

¹⁵ See, e.g., 52 U.S.C. § 30101(8)(B)(i) (personal volunteer activity); 11 C.F.R. § 100.94 (uncompensated Internet activity).

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For these reasons, the Commission should close the file in this matter and take no further action with respect to Respondents.

Very truly yours,

A handwritten signature in blue ink, appearing to read "M. Elias", with a stylized flourish at the end.

Marc E. Elias
Brian G. Svoboda
Counsel to Respondents