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Michael G. Adams • T: 202-695-8300 • F: 202-695-8320 • www.cpblawgroup.com

2017 JAN -6 PM 2:03

January 6, 2017

CELA

Federal Election Commission
Office of Complaints Examination
and Legal Administration
Attn: Hon. Kathryn Ross
999 E Street, NW
Washington, DC 20436

Re: *MUR 7197 – Response of Respondents Eric Greitens, Greitens for Missouri, and Jeff Stuerman, its Treasurer*

SENT VIA EMAIL AND U.S. MAIL

Dear Commissioners and Staff:

Governor-Elect Eric Greitens, Greitens for Missouri, and Jeff Stuerman, its treasurer (hereinafter “Respondents”), hereby respond to the Complaint filed by Crystal Brinkley in Matter Under Review 7197. For the reasons set forth herein, the Commission should find no reason to believe that Respondents have violated the Federal Election Campaign Act, as amended (the “Act”), and accordingly should dismiss the Complaint.

Mr. Greitens was a candidate for Governor of Missouri in the 2016 election. His campaign committee, Greitens for Missouri, accepted contributions from sources and in amounts as permitted by Missouri law.

The Complaint alleges that, with such non-Federal funds, “Greitens for Missouri paid for a communication that include[d] a photograph of Vice Presidential candidate Mike Pence with¹ the following message: VOTE NOVEMBER 8TH [X] TRUMP [X] PENCE[.]” The Complaint selectively quotes the mailer’s content, neglecting to note that *Pence is pictured standing next to Greitens*, and further neglecting to note that “TRUMP” and “PENCE” are followed by “GREITENS [X] GOVERNOR,” “Mike Parson for Lieutenant Governor,” and then “ERIC GREITENS” in gigantic capital letters, followed in turn by extensive information about Greitens and his positions on state issues. In any event, the mailer as depicted in the Complaint’s Exhibit A speaks for itself.

The essence of the Complaint’s two claims, then, is that photographic depiction of Pence on the mailer was impermissible, as well as the stray reference to Trump and Pence in the mailer’s

¹ The photograph depicting Pence is “with” additional language referencing Trump and Pence, in the sense that both the photograph and the language appear on the same page of the mailer, in separate sections adjacent to one another.

1300 PENNSYLVANIA AVE

exhortation to vote for non-Federal candidates (in the context of a paid communication extensively discussing the non-Federal candidacy of Greitens).²

Indisputably, the Act prohibits a non-Federal candidate or agent of same from spending non-Federal funds for "a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office[.]"³ The question is whether the mailer should be deemed (consistent with Commission precedent) as having done so, and even if so, whether that constitutionally could be the basis for an enforcement action.

Prior advice and action by the Commission suggests that incidental reference to a Federal candidate does not violate the Act. First, as to the photograph of Greitens with Pence, in Advisory Opinions 2003-25 (Bayh) and 2007-34 (Jackson), the Commission opined that public communications (prominently) featuring Federal candidates supporting non-Federal candidates would not violate the Act. In *Bayh*, the Commission noted that "[u]nder the plain language of the FECA, the mere identification of an individual who is a Federal candidate does not automatically promote, support, attack, or oppose that candidate," and even quoted a principal sponsor of the legislation enacting the provision at issue, Senator Russ Feingold, who explained in congressional debate that this provision "would not prohibit 'spending non-Federal money to run advertisements that mention that [state candidates] have been endorsed by a Federal candidate or say that they publicly identify with a position of a named Federal candidate . . .'"⁴ The mailer's photograph of Pence appearing with Greitens should be seen in this light. It is simply a depiction of Greitens appearing with Pence, not an expression of support or promotion of Pence's candidacy.⁵

Concededly, the "VOTE NOVEMBER 8TH" language appearing over the words "TRUMP PENCE GREITENS GOVERNOR Mike Parsons for Lieutenant Governor" makes for a closer call. However, the Commission previously has opted against action in a similar circumstance. In Matter Under Review 6684, the Commission dismissed a complaint against Indiana gubernatorial candidate John Gregg and his campaign for a public communication that extensively attacked a Federal candidate *and* explicitly referred to his candidacy. Notwithstanding the Gregg

² The Complaint does not allege, and Respondents deny, that the mailer was authorized by or otherwise coordinated with any Federal candidate or committee.

³ 52 U.S.C. § 30101(20)(iii), as incorporated by § 30125(f)(1). The Complaint appears to misread § 30125(f)(1) as incorporating § 30101(20)(ii).

⁴ FEC Adv. Op. 2003-25 at 4 (quoting 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002)).

⁵ Pence campaigned actively in Missouri for the benefit of Greitens. See, e.g., "Pence, Greitens to hold rallies in Springfield, St. Louis," *The Missouri Times*, Sept. 6, 2016 (<http://themissouritimes.com/33308/pence-greitens-hold-rallies-springfield-st-louis>) ("Greitens will appear with presidential nominee Donald Trump's running mate in Springfield and St. Louis. The vice presidential hopeful has traveled across the country to bolster the Republican ticket and gather votes, though he has mostly stuck to swing states so far") (emphasis supplied). While the origin of the photograph at issue could not immediately be determined, it appears to have been taken during a stop in Missouri by Pence to assist Greitens' candidacy. As shown in public polls, Missouri was not a swing state at the presidential level, but was at the gubernatorial level. Compare http://www.realclearpolitics.com/epolls/2016/president/mo/missouri_trump_vs_clinton_vs_johnson_vs_stein-6009.html (Trump leading Clinton in Missouri by an average of 11 points) with http://www.realclearpolitics.com/epolls/latest_polls/governor (Missouri gubernatorial race polling showing range of Greitens losing by 16 points to winning by 1 point).

