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September 5, 2019

Andrew Harris Werbrock  
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**VIA EMAIL AND U.S. MAIL**

Delbert K. Rigsby  
Federal Election Commission  
Office of Complaints Examination and Legal Administration  
Attn: Kathryn Ross, Paralegal  
Washington, DC 20463  
*drigsby@fec.gov*

**Re: MUR 7347**

Dear Mr. Rigsby:

We write on behalf of End Citizens United (the "Committee") in response to the Commission's letter, dated August 1, 2019 (the "Letter"), notifying the Committee that the Commission found reason to believe the Committee violated the Federal Election Campaign Act of 1971, as amended.

Under the Act and Commission regulations, if an unauthorized committee distributes 500 or more substantially similar emails in a 30-day period, the emails must contain a disclaimer identifying the committee that paid for them and whether the email was "authorized" by a candidate or candidate's

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committee.<sup>1</sup> But neither the Act nor Commission regulations (or for that matter, any other form of binding Commission guidance) define the term “authorized.” The only guidance that the regulated committee has received from the Commission to date on this point is contained in the two enforcement actions previously cited by the Committee, MUR 6037 and MUR 6044. Both matters involved television issue advertisements paid for by political party committees that featured video footage of the party’s candidate and were distributed more than 90 days before the candidate’s election. As three of five commissioners stated in MUR 6037:

Though the ads at issue also were not express advocacy communications, they were akin to independent expenditures since they did not constitute coordinated communications. Thus, since party independent expenditures require a “not authorized by” disclaimer, Respondent made a well-founded choice to include this disclaimer on its ads. Indeed, the “not authorized by” disclaimer is routinely used by party committees on all communications that qualify as neither coordinated communications nor independent expenditures (such as written solicitations, press releases, invitations, email communications, etc.).<sup>2</sup>

The same precise logic applies in the case of the Committee’s solicitation – it was not a coordinated communication or an independent expenditure and, therefore, lacking clear guidance from the Commission, the Committee made the “well-founded choice” to use the “not authorized by” disclaimer on the solicitation.

The Factual and Legal analysis asserts that the present case is “readily distinguishable” from the Merkley case, because here, “the Lamb campaign consented to the solicitation ‘from’ Lamb.”<sup>3</sup> But this attempt to distinguish the cases evaporates under scrutiny. First, the Merkley matter involved a 30-second ad, the entirety of which was spoken by the candidate. It is unclear why such a communication would not be considered “from” the candidate. Second, the Respondents in the Merkley matter acknowledged the candidate’s involvement in the advertisement, but did not provide detail about the extent of that

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<sup>1</sup> 52 U.S.C. § 30120(a)(2), (3); 11 C.F.R. § 110.11(b)(2), (3).

<sup>2</sup> MUR 6037 (Merkley for Oregon), Statement of Reasons of Vice Chair Hunter and Commissioners Petersen & McGahn, at 6 (citation omitted). In MUR 6044, five commissioners voted against pursuing enforcement in the case of a similar ad. Though the reasoning in that matter was sparser, it similarly reasoned that the communication was not a coordinated communication. MUR 6044 (Musgrove for U.S. Senate), Statement of Reasons of Chairman Walther, Vice Chairman Petersen, and Commissioners Bauerly, Hunter & McGahn, at 6.

<sup>3</sup> MUR 7347, Factual and Legal Analysis, at 5.

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involvement or whether the candidate had “viewed and/or approved the advertisements before they aired.”<sup>4</sup> So the Factual and Legal analysis is incorrect when it asserts that the Merkley matter is different from this case due to the level of candidate involvement; to the contrary, in the Merkley matter the Commission was aware of the candidate’s involvement, but did not know the precise level of candidate involvement, and declined to pursue enforcement anyway. And, third, in any case, the analysis in the Statement of Reasons quoted above does not hinge on the level of candidate involvement. It says plainly that if a communication is not a coordinated communication or an independent expenditure, it is “well-founded” to use the same disclaimer the committee would use for an independent expenditure. That is precisely what the Committee did here, in reliance on the only available Commission precedent.<sup>5</sup>

It is not just the Committee that has relied on this guidance; as Attachment A to this letter demonstrates, and a controlling group of Commissioners acknowledged in MUR 6037, many committees routinely use the “not authorized by” line on “all” communications that are neither coordinated communications nor independent expenditures, including email fundraising solicitations signed by federal candidates.<sup>6</sup>

In summary, the Committee acted in good faith here and relied on an approach that a controlling group of Commissioners called “well-founded.” The Commission now attempts to impose a new, contrary interpretation. In a case like this, consistent with the Administrative Procedure Act and due process, the Commission should have dismissed the matter, and instead of finding reason to believe, clarified the rule

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<sup>4</sup> See MUR 6037 (Merkley for Oregon), First General Counsel’s Report, at 16.

<sup>5</sup> Though the Factual and Legal Analysis cites to Advisory Opinion 2003-23 for the proposition that a “solicitation coordinated with a candidate must include in the disclaimer that the candidate authorized the communication,” this opinion did not deal with email solicitations and it predated the Commission’s 2006 internet rulemaking and the Commission’s current “public communication” analysis, see *Internet Communications; Final Rules and Transmittal to Congress*, 71 Fed. Reg. 18,589 (April 12, 2006), so it does not control the disposition of this case. See 52 U.S.C. § 30108(c)(1) (advisory opinion only controlling to transactions materially indistinguishable from the transaction or activity approved in the opinion).

<sup>6</sup> See Attachment A.

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prospectively, as it has done elsewhere.<sup>7</sup>

We appreciate the opportunity to expeditiously resolve this matter.

Very truly yours,



Andrew Harris Werbrock  
Counsel to End Citizens United

AHW:NL  
Attachment  
(00388594-4)

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<sup>7</sup> See MURs 7263 & 7264 (Luke Messer & Todd Rokita), Statement of Reasons of Chair Weintraub, Vice Chair Petersen, and Commissioners Hunter and Walther, at 2-3; *see also* MUR 5564 (Alaska Democratic Party), Statement of Reasons of Vice Chair Mason and Commissioner von Spakovsky, at 2-3 (when the Commission has not proceeded against a certain type of respondent previously, it should not proceed against similarly situated respondents unless the public has notice through a rulemaking); *CBS v. FCC*, 535 F.3d 167, 174-75 (3d Cir. 2008) (an agency cannot, in an enforcement action, take a substantial deviation from prior enforcement policies without sufficient notice of change in policy).

# ATTACHMENT A

From: **Kevin McCarthy** <[newsmax@latest.newsmax.com](mailto:newsmax@latest.newsmax.com)>  
Date: Sat, Aug 31, 2019 at 10:00 AM  
Subject: 500% Matching for This FEC Deadline  
To: <[REDACTED]>



Dear Newsmax Reader:

Please take a moment to read the special message from our advertising sponsor, Kevin McCarthy. Our sponsors help us keep our news service free, though we do not necessarily endorse this message.

[Newsmax.com](http://Newsmax.com)

I emailed you a couple days ago.

Then Newt Gingrich emailed you.

Then Steve Scalise emailed you.

I'm emailing you again.

**Tonight is our critical FEC End of Month Deadline.**



I've managed to secure 500% donation matching to make sure we hit our goal and match the money Democrats are raising. Every dollar raised will go to taking back our Conservative House Majority to support President Trump.

**Contribute \$250=\$1,250**

**Contribute \$100=\$500**

**Contribute \$50=\$250**

**Contribute \$25=\$125**

**Contribute Any Amount=5x Match**

We can't reach this critical FEC Deadline without your help. This is our last chance. You have until 11:59pm tonight. Will you stand with us?

Thank you,  
Kevin McCarthy,  
House GOP Leader

**5X Your Donation Now**

Paid for by the NRCC and not authorized by any candidate or candidate's committee. [NRCC.org](http://NRCC.org)

NRCC  
320 First St SE  
Washington, DC 20003

The National Republican Congressional Committee (NRCC) is the only committee exclusively devoted to increasing the number of Republicans in the U.S. House of Representatives, but we cannot do it without your support. If you would like to donate, please visit our website [here](#). If you instead prefer to donate by mail, please visit [here](#).

If any of the above information isn't correct or this isn't the best email address at which to reach you, please [update your record here](#).

P.S. be sure to follow the campaign on [Facebook](#) and [Twitter](#). If you have any suggestions, comments, complaints or feedback please send us your ideas [here](#) or by replying to this email.

[Privacy Policy](#)

----- Forwarded message -----

From: **Mitch McConnell** <[info@dedicatedpatriot.com](mailto:info@dedicatedpatriot.com)>

Date: Sat, Oct 13, 2018 at 11:16 AM

Subject: Unintimidated

To: [REDACTED]

[REDACTED],

The Senate voted to confirm Brett Kavanaugh to the Supreme Court. This historic vote came despite a despicable smear campaign from the far left. Senate Democrats orchestrated an outrageous search-and-destroy campaign against a good man, and it is only thanks to our Republican majority that they were ultimately unsuccessful.

Many Democrats declared their opposition to Kavanaugh's nomination BEFORE President Trump had even named him as the nominee. Their goal was clearly not to seek justice, but rather to ruin the lives of Brett Kavanaugh, his wife, and his daughters. Contribute today to send a message to Democrats that this kind of behavior is absolutely unacceptable.

***Our Republican Senate Majority is the ONLY thing stopping Chuck Schumer, Dianne Feinstein, Elizabeth Warren, Bernie Sanders, and the radical left from turning the Senate into a circus.***

The past few months have illustrated why it is absolutely VITAL for Republicans to defend and strengthen our majority in the 2018 midterms. We can't afford to let Chuck Schumer and his gang of liberal obstructionists gain the majority and turn the Senate into a circus. Pitch in today to defeat Democrats and elect more Republicans in the 2018 midterms!

**All donations made before 11:59 PM tonight will be 4x matched!**

4x match \$1000 to defeat Democrats >>>

4x match \$500 to defeat Democrats >>>

4x match \$250 to defeat Democrats >>>

4x match \$100 to defeat Democrats >>>

4x match \$50 to defeat Democrats >>>

4x match another amount to defeat Democrats >>>



Democrats have shown their true character over the past few months. It's time for conservatives to stand together against liberal obstructionists and vote them out of office once and for all. Don't sit on the sidelines any longer, get involved by making a 4x matched donation today.

Thank you for standing up and doing what is right,

Senator Mitch McConnell

**TAKE A STAND**

If you agree that President Trump and Republicans are MAKING AMERICA GREAT AGAIN, text MAGA to 55404 to receive mobile alerts! Message and data rates may apply. Text "STOP" to opt-out. T&C/Privacy Policy: [55404-info.com](http://55404-info.com)

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[www.NRSC.org](http://www.NRSC.org)

Contributions to the NRSC are not deductible as charitable contributions for federal income tax purposes.

----- Forwarded message -----  
From: **John Cornyn** <[info@nrsc.org](mailto:info@nrsc.org)>  
Date: Sun, Oct 30, 2016 at 12:12 PM  
Subject: Betrayed  
To: [REDACTED]

Friend,

We are on the verge of being massively outraised and outspent by our liberal Senate Democratic opponents and the Clinton Machine.

The clock is ticking. **Our last End-of-Month deadline before Election Day is only 9 days away.**

We need leaders in Washington that fight for YOU, not liberal special interests.

*We need YOUR support before we hit our final End-of-The-Month deadline before Election Day, to help us get the truth out to voters. Can we count on you to help us win this fight?*

**Chip in \$25, \$50, \$100 or any amount you can to help our Republican Senate campaigns fight back against the Obama-Clinton Machine and the Senate Democrats' vicious attacks >>>**

Millions of Americans feel betrayed by the Obama administration and its liberal policies. Unfortunately, Senate Democrats have only helped advance the devastating Obama agenda, rather than stand up to it.

**We need strong conservative leadership in the U.S. Senate.**

Now, with only 9 days left until Election Day, it's more important than ever that conservatives stand up to Senate Democrats and fight for our Republican Senate majority.

***Help us make a difference and fight back today:***

**Chip in \$25 now >>>**

**Chip in \$50 now >>>**

**Chip in \$100 now >>>**

**Chip in \$200 now >>>**

If you donate before midnight tonight, your donation will be quadruple-matched by a generous group of donors. Please take advantage of this opportunity to maximize your impact.

OR

[Donate another amount >>>](#)

We cannot win this election without support from grassroots conservatives like you.

Thank you,

Senator John Cornyn

**DONATION MATCH**

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[www.NRSC.org](http://www.NRSC.org)



NRSC, 425 2nd Street NE, Washington D.C. 20002

The NRSC is the sole national committee dedicated to strengthening our Republican Senate majority. We believe that emails are a vital way for us to communicate with supporters like you through breaking news alerts on issues and events critical to the future of our country and our Republican Senate majority. This committee is 100% committed to defeating Hillary Clinton and all Democrat Senate candidates this cycle, but we rely on the generosity of supporters like you. 99% of the NRSC's donations come from small donations from our grassroots supporters.

This message reflects our committee's views and opinions. You are receiving this email because you signed up as a member of our online grassroots community. If you would like to make a contribution, [please visit our website here](#). While it is more cost-effective for our committee and our Senate campaigns to receive donations online, we do accept donations through mail, if you would prefer to mail in your donation, you can print off our [donation form here](#) and send it to our committee.

If you would prefer not to receive future emails from the NRSC, [visit here](#). You can also view our [Privacy Policy here](#). We thank you for your continued support this cycle.

From: **Speaker Paul Ryan** <[info@nrcevictory.com](mailto:info@nrcevictory.com)>

Date: Thu, Jul 27, 2017 at 6:07 PM

Subject: It comes down to one thing, [REDACTED]

To: [REDACTED]

**Pitch in to help defend our majority.**

**Contribute Now**

[REDACTED],  
Our ability to enact our president's agenda comes down to one thing:

Your dedication and commitment to protecting our majority.

I don't have to remind you what it was like under Obama with his big government, anti-growth policies -- but if we lose the midterms, the Democrats will do everything possible to revert back to that.

We have the White House, the Senate, and the House -- and if we have you, I truly believe America's best days are ahead of us. If you agree -- help us reach our goal before our important deadline: The FEC Monthly Deadline.

The upcoming midterms will test us -- and we must be prepared.

Will you step up and pitch in \$25 now so we can keep moving forward?

**ALL CONTRIBUTIONS ARE  
DOUBLED-MATCHED**

Pitch in \$25 gift now >>>

Pitch in \$50 gift now >>>

Pitch in \$100 gift now >>>

[Pitch in \\$250 gift now >>](#)

[Pitch in Another Amount](#)

Thanks to you and your support, we will move America forward.

Best,

Paul Ryan, Speaker

Prefer to donate by mail? [Visit here](#). Contributions to the NRCC are not tax deductible as charitable contributions for federal income tax purposes.

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NRCC  
320 First St SE  
Washington, DC 20003

The National Republican Congressional Committee (NRCC) is the only committee exclusively devoted to increasing the Republican majority in the U.S. House of Representatives, but we cannot do it without your support. If you would like to donate, please visit our website [here](#). If you instead prefer to donate by mail, please visit [here](#).

This email was sent to [REDACTED]. You are receiving this email because you signed up for the NRCC online community. Email is one of the most important tools for us to reach grassroots supporters such as you and update them about important issues. If you want to update or change your information or email address, visit [here](#). If you would like to receive less emails visit [here](#). Thank you for all your support in helping us increase the Republican majority in Congress.

P.S. be sure to follow the campaign on [Facebook](#) and [Twitter](#). If you have any suggestions, comments, complaints or feedback please send us your ideas [here](#) or by replying to this email.

This email is sent to [REDACTED] by the NRCC. To unsubscribe from future NRCC emails use this [link](#).

[Privacy Policy](#)

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----- Forwarded message -----

From: **Steve Scalise** <[info@dedicatedpatriot.com](mailto:info@dedicatedpatriot.com)>

Date: Wed, Sep 5, 2018 at 11:36 AM

Subject: I'm counting on you

To: [REDACTED]

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I emailed you.

Devin Nunes emailed you.

Newt Gingrich emailed you.

Paul Ryan emailed you.

We all told you the same thing: Either we reach the extended end of month goal, or Conservatives are put at a huge risk of losing to the Democrats in November.

That's why I need you to contribute BEFORE MIDNIGHT!

**All contributions worth 5x as much**

[Contribute \\$100>>>](#)

[Contribute \\$75>>>](#)

[Contribute \\$50>>>](#)

[Contribute \\$25>>>](#)

**If we don't get 2,572 more people to give BEFORE MIDNIGHT, we simply won't make it.**

Failing to meet our goal would put Conservatives at a great danger of losing in November.

Nancy Pelosi and her deep-pocketed liberal friends are already miles ahead in fundraising. If they raise more than us for another consecutive month, we may NEVER catch up.

We MUST protect your House majority from being overtaken by liberals. Otherwise, they'll try to block and reverse all of the incredible progress President Trump and your Conservative majority have made to make our country great.

**Hurry -- rush aid before the urgent MIDNIGHT DEADLINE so we can beat the Democrats and defend your Conservative House majority.**

To victory,  
Steve Scalise  
Majority Whip



**Take A Stand**

Prefer to donate by mail? [Visit here.](#) Contributions to the NRCC are not tax deductible as charitable contributions for federal tax purposes.

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P.S. be sure to follow the campaign on [Facebook](#) and [Twitter](#).

[Privacy Policy](#)

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From: **Mitch McConnell** <[info@dedicatedpatriot.com](mailto:info@dedicatedpatriot.com)>  
 Date: Sat, Oct 13, 2018 at 11:16 AM  
 Subject: Unintimidated  
 To: [REDACTED]

Justice Brett Kavanaugh will be an outstanding Supreme Court Justice. Make a 4x matched donation today to celebrate his successful confirmation!

[REDACTED],

The Senate voted to confirm Brett Kavanaugh to the Supreme Court. This historic vote came despite a despicable smear campaign from the far left. Senate Democrats orchestrated an outrageous search-and-destroy campaign against a good man, and it is only thanks to our Republican majority that they were ultimately unsuccessful.

Many Democrats declared their opposition to Kavanaugh's nomination BEFORE President Trump had even named him as the nominee. Their goal was clearly not to seek justice, but rather to ruin the lives of Brett Kavanaugh, his wife, and his daughters. Contribute today to send a message to Democrats that this kind of behavior is absolutely unacceptable.

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4x match \$100 to defeat Democrats >>>

**4x match \$50 to defeat Democrats >>>**

**4x match another amount to defeat Democrats >>>**

Democrats have shown their true character over the past few months. It's time for conservatives to stand together against liberal obstructionists and vote them out of office once and for all. Don't sit on the sidelines any longer, **get involved by making a 4x matched donation today.**

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Senator Mitch McConnell

**TAKE A STAND**

If you agree that President Trump and Republicans are MAKING AMERICA GREAT AGAIN, text MAGA to 55404 to receive mobile alerts! Message and data rates may apply. Text "STOP" to opt-out. T&C/Privacy Policy: [55404-info.com](http://55404-info.com)

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[www.NRSC.org](http://www.NRSC.org)

Contributions to the NRSC are not deductible as charitable contributions for federal income tax purposes.

This message was intended for: [REDACTED]  
You were added to the system April 26, 2017.  
For more information [click here](#). [Update your preferences](#)  
[Unsubscribe](#) | [Unsubscribe via email](#)