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October 19, 2018

BY ELECTRONIC MAIL

Federal Election Commission  
Office of Complaints Examination and  
Legal Administration  
Attn: Christal Dennis, Paralegal  
1050 First Street, NE  
Washington, D.C. 20436

Re: MUR 7465

Dear Ms. Dennis:

On behalf of Freedom Vote (“FV”), this letter responds to the Complaint filed by Citizens for Responsibility and Ethics in Washington and Noah Bookbinder against numerous Respondents, including FV.

The crux of the Complaint is that Freedom Vote failed to report an independent expenditure for a television advertisement it aired in July 2016 (Count I).<sup>1</sup> The Complaint also includes related claims, both of which hinge on the allegation that the ad was an independent expenditure: first, that FV failed to include a proper disclaimer on the advertisement (Count II)<sup>2</sup> and, second, that in light of the amount FV (allegedly) spent on the ad, FV’s “major purpose” is to support and oppose federal candidates and thus failed to register and report as a political committee (Counts III and IV).<sup>3</sup> Lastly, the Complaint alleges that FV engaged in a deliberate conduit scheme to conceal one or more contributions to Fighting for Ohio, a federal Super PAC (Count V).<sup>4</sup>

For the reasons set forth below, each of the claims is without merit and the Commission should dismiss the Complaint.

<sup>1</sup> Alleging a violation of 52 U.S.C. § 30104.

<sup>2</sup> Alleging a violation of 52 U.S.C. § 30120 and C.F.R. § 110.11.

<sup>3</sup> Alleging a violation of 52 U.S.C. § 30101 and 11 C.F.R. § 100.5 (registration); 52 U.S.C. § 30104 and 11 C.F.R. §§ 104.1(a), 104.8 (reporting).

<sup>4</sup> Alleging a violation of 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b).

**1. The advertisement did not expressly advocate the election or defeat of a candidate (Count I).**

The advertisement at issue is a thirty second TV ad about the number of jobs lost in Ohio during Ted Strickland's tenure as Ohio governor. Here is the complete script of the ad:

Audio	Visual
<p>While Ted Strickland was governor, Ohio lost jobs to Kentucky, Indiana, even Michigan</p> <p>350,000 Ohio jobs gone</p> <p>How many is that? If you assembled everyone who lost their job under Strickland, you'd have Ohio's third largest city.</p> <p>And you fill the OSU Horseshoe more than three times</p> <p>Now Ted Strickland wants to bring his job-killing policies to Washington</p> <p>We can't afford more lost jobs</p>	<p>Ohio Lost Jobs to Kentucky Indiana Michigan</p> <p>350,000 jobs gone</p> <p>Ohio's largest cities</p> <p>Columbus ... Cleveland 396,815 Jobs lost under Strickland 350,000 Cincinnati 296,943</p> <p>Strickland lost jobs: could fill the Horseshoe 3 times</p> <p>Ted Strickland: bringing job-killing policies to Washington</p> <p>We can't afford more lost jobs</p> <p>Paid for by Freedom Vote</p>

For the ad to trigger the filing of an independent expenditure report (and specific disclaimer requirements), it must contain "express advocacy." "Expressly advocating" is defined as "any communication that (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," ...; or (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because - (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action. 11 C.F.R. §100.22.

The ad does not satisfy subsection (a) of the regulation (as it contains no "magic words"), nor does the Complaint allege that it does. Instead, the Complaint alleges that the ad contains express advocacy under subsection (b), because "taken as a whole, it could only be interpreted

by a reasonable person as advocating for the defeat of a clearly identified candidate, former Gov. Strickland.” (Compl., at ¶ 48.)

To satisfy section 100.22(b), the “electoral portion” of the ad must be “unmistakable, unambiguous, and suggestive of only one meaning. The term “electoral portion” was not defined or explained in the Commission’s 1995 rulemaking that adopted section 100.22(b). It first appeared in *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987), the case in which the Ninth Circuit set forth the rule which, for the most part, section 100.22(b) mimics. See MUR 5842, *Statement of Reasons of Vice Chairman Petersen and Commissioner Hunter* (elaborating on the Ninth Circuit’s holding in *Furgatch*).

In their Statement of Reasons in MUR 5842, Commissioners Petersen and Hunter followed *Furgatch* and interpreted “electoral portion” as requiring “references to a candidacy, an election opponent, or any other language regarding the federal election process.” MUR 5842, *Statement of Reasons*, at 12. In a separate Statement of Reasons, Commissioners Bauerly and Weintraub viewed references to “election day” and “voting on election day” as providing an adequate “electoral nexus” under Section 100.22(b). MUR 5842, *Statement of Reasons of Commissioners Bauerly and Weintraub*, at 2. Under any analysis, the standards developed by the Commission consist of affirmative references to an “election” or “candidacy.”

A review of the Strickland ad reveals that it has no identifiable, affirmatively stated, or otherwise discernible “electoral portion.” The advertisement does not mention an election (or election day), voting, a candidacy, a political party, or a challenger. It does not include or refer to the federal election process. It does not question any candidate’s character, qualifications, or fitness for office. Simply put, no “electoral portion” exists in the Strickland ad, let alone one which is “unmistakable, unambiguous, and suggestive of only one meaning.” Without an “electoral portion,” the advertisement does not “expressly advocate” for or against a candidate under section 100.22(b).

Moreover, even if the ad’s reference to Strickland’s “job-killing policies” comments on his “character, qualifications, or accomplishments,” as long as “reasonable minds” can interpret an ad in some way other than as encouraging actions to elect or defeat a clearly identified federal candidate, the ad will not be considered to contain express advocacy, as defined in section 100.22(b). According to the Ninth Circuit in *Furgatch*, “speech may only be termed ‘advocacy’ if it presents a clear plea for action.” *Id.* at 864; *see also California Pro-Life Council, Inc. v. Gelman*, 328 F. 3d 1088, 1098 (9th Cir. 2003) (“a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit words of *advocacy*.”) (emphasis added). This standard is included in section 100.22(b)’s requirement that the speech must “encourage action” to elect or defeat a candidate.

The ad contains three basic messages (with the majority of both the audio and visual devoted to the first):

1. Ohio lost lots of jobs when Ted Strickland was governor;
2. Strickland wants “to bring his job-killing policies to Washington”; and
3. “We can’t afford more lost jobs.”

The ad not only fails to “encourage action” to elect or defeat a candidate, it fails to encourage *any* action. It contains no advocacy whatsoever—no “clear plea for action,” no express or implicit request or suggestion that the viewer *do* anything. The closest it comes to encouraging action is an implied suggestion that the viewers scratch their head, wondering why Strickland wants to go Washington or whether it was Strickland’s policies that led to 350,000 lost jobs in Ohio, or some other factor.

But even if the ad could somehow be construed to encourage action to elect or defeat Strickland, it is still not express advocacy unless reasonable minds can conclude that it encourages *only* that action. Clearly that standard is not met with this ad, as there are reasonable alternative readings. While there may be others, these are at least two reasonable alternatives to Complainant’s theory that the ad encourages the viewer to vote against Ted Strickland. Indeed, the statement in the ad that “Strickland wants to bring his job-killing policies to Washington” could reasonably be understood as expressing concern for Strickland going to Washington for reasons other than as an elected official, including, for example, as a political nominee to the United Nations<sup>5</sup> or to take a job with a Washington think tank.<sup>6</sup> Alternatively, even to the extent that the statement is found to include an “electoral portion,” it could reasonably be understood to be instructing Strickland, if elected, to support policies that will allow for the creation of more jobs, rather than policies that kill jobs. Because a reasonable viewer could understand the ad to communicate a message other than to elect or defeat Strickland, the express advocacy standard has not been met and the Commission should find no reason to believe a violation may have occurred.

Several decisions by the Commission in matters alleging a similar violation support a finding of no reason to believe.

In MUR 6612 (Crossroads GPS), the Office of General Counsel reviewed five advertisements, finding none contained express advocacy. The complaint alleged that because none of the candidates featured in the ads was a public official vested with legislative or policy-making authority, an advertisement that tells them to support or repeal the Affordable Care Act, support balanced budgets, or stop reckless spending must be construed as urging them to take certain positions if elected to the Senate. The General Counsel’s office disagreed stating, “As the Response points out, however, that is not a basis for finding express advocacy.” MUR 6612,

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<sup>5</sup>Strickland was nominated by President Obama to be one of the alternate representatives to the United Nations in Washington, D.C. Torry, Jack, *Strickland nominated as alternate U.N. rep*, The Columbus Dispatch (September 11, 2013).

<sup>6</sup> Strickland served as President of the Center for American Progress Action Fund, a progressive public policy research and advocacy organization headquartered in Washington, D.C. Koff, Stephen, *Ted Strickland earned \$250,000 at think tank*, Cleveland.com (August 11, 2015).

*First General Counsel's Report*, at 4. The OGC further stated, "even the Complaint's proffered interpretation of the ads does not suggest that they contain advocacy of a candidate's election or defeat: the ads 'tell [the candidate] what her policies should be if she is elected to the Senate.' Telling a candidate what her policies should be may presume that the candidate will be elected, but it does not implicitly advocate the election or defeat of the candidate. And it certainly does not do so expressly." *Id.* at 4. Accordingly, the OGC recommended the Commission find no reason to believe that Crossroads GPS failed to report the ads as independent expenditures. *Id.* at 8.

In MUR 5854 (Lantern Project), the Commission evaluated a series of ads about Rick Santorum's policies and positions. One of these ads included the following language: "From privatizing Social Security to cutting student loans for the middle class, when Rick Santorum has to choose between siding with George Bush or middle-class Pennsylvanians, Santorum supports Bush. What was he thinking?" The Commission concluded:

A review of the ads reveals that each of them is critical of Santorum, but at the same time, they focus on issues, and never mention Santorum's candidacy or his political opponent. Finally, the ads contain no exhortations that a viewer would understand as urging action for Santorum's election. ... Moreover, the communication's electoral portion is not "unmistakable, unambiguous, and suggestive of only one meaning"; and reasonable minds could differ as to whether it encourages electoral, or some other action. See 11 C.F.R. § 100.22(b). While the ads appear to have been broadcast in the months preceding the general election, the overwhelming focus of the communication[s] is on issues and Santorum's policies or positions on those issues. ... Given the lack of any electoral directives in the various Lantern Project ads, and taking the communication as a whole, one can reasonably view each communication as criticizing Santorum's legislative or issues agenda, and not as encouraging voting for or against Santorum.

MUR 5854, *Factual and Legal Analysis*, at 5-6.

In MUR 6311 (Americans for Prosperity), AFP aired a series of television ads, entitled "We Won't Forget," that criticize three Democratic House members who supported healthcare reform. The ads directed viewers to a website, NovemberIsComing.com, to sign a petition that included the following language: "Make sure your elected officials, policymakers, and candidates know that they should not support big government programs or any other freedom-killing policies. ... We want you to oppose big government programs or any other freedom-killing policies or we will remember in November." MUR 6311, *Factual and Legal Analysis*, at 2-3. In addition, the opening and closing lines of the ads use the words, "voted" and "vote", both references to the named House members' votes. Despite this and the explicit reference to the November election and encouraging action to remember the November election, the Commission concluded that the advertisements "lack an unmistakable, unambiguous 'electoral portion.' ... The exhortation, therefore, does not direct viewers to vote against the incumbent and may

reasonably be understood to be requesting a different position on future legislative votes relating to the issue of healthcare.” *Id.* at 5-6.

In MUR 5842 (Economic Freedom Fund), the Commission reviewed a mailer which contained no reference to Congressman Marshall’s candidacy, his opponent, or anything else relating to a federal election or the election process. The Commission found that the mailer did not contain any clear plea for action. Instead, the mailer focused on the Congressman’s legislative record, specifically his votes on the issues of immigration and the estate tax and stated that Congressman Marshall voted with “liberal” Nancy Pelosi and “ultraliberal” Cynthia McKinney on these issues. The mailer concluded with the statement: “Jim Marshall does NOT represent Georgia values!” The Commission found that considering (i) the absence of any election references or any clear call to action in the mailer and (ii) the mailer’s focus on the Congressman’s votes on specific issues, they could not conclude that this statement—either on its own or in the overall context of the mailer—can “have no other reasonable meaning than to encourage actions to elect or defeat” Congressman Marshall. The Commission further concluded that one could reasonably interpret the Marshall mailer as suggesting that the reader contact Congressman Marshall and insist that he listen less to his party’s leadership and more to the constituents in his district on the issues of immigration law and the estate tax. Statement of Reasons of Vice Chairman Matthew S. Petersen And Commissioner Caroline C. Hunter, MUR 5842, p. 12.

Concerning the lack of a “plea for action,” the Commissioners stated that it

significantly expands the scope of plausible non-electoral interpretations and, thus, increases the likelihood that a reasonable person might interpret a communication as something other than expressly advocating the election or defeat of a federal candidate. And if there is an alternative interpretation that a reasonable person is capable of reaching, then the ad in question cannot, as a matter of law, be express advocacy. As mentioned above, both of the mailers at issue can be read by a reasonable person as containing non-electoral messages.

*Id.* at 13. The Commissioners further stated that “when a communication . . . contains neither references to a candidacy or election nor a call to action, we fail to see how such a communication justifiably can be said to contain an electoral portion that ‘is unmistakable, unambiguous, and suggestive of only one meaning,’ especially where, as here, the predominant focus in each of the communications was the legislative record of the respective federal officeholders. *Id.* at 13.

In MUR 6122 (National Association of Home Builders), the Commission reviewed brochures sent by the NAHB praising a Congressman’s votes and found that when taken as a whole and with limited reference to external events, such as the proximity to the election, found that the mailer at issue did not contain an electoral portion. MUR 6122, *Factual and Legal Analysis*. Despite the fact that the mailer was sent immediately prior to the general election, the focus of the communication was on issues and the Congressman’s positions on those issues. The

OGC found that given the lack of any clear directive other than to “Thank” the Congressman for his positions, and taking the communication as a whole, one could reasonably view the mailer as praising his positions and encouraging him to maintain those positions in the future, and not as encouraging the reader to vote for or against him in the upcoming election. *Id.* at 7-8.

Like many of the MURs discussed above, Freedom Vote’s ad mentions no election, no candidate, no political party, and no opponent. The closest it comes is mentioning “Washington,” and that surely is not enough to constitute an unmistakable and unambiguous “electoral portion” under section 100.22(b)(1). Moreover, the ad does not “encourage actions” of any kind, let alone actions to elect or defeat a candidate. Lastly, even if the ad does contain an electoral portion, and even if the ad implicitly encourages action related to a candidate (even though Strickland isn’t identified as a candidate), reasonable minds could differ whether the ad is encouraging his election or defeat, or some other kind of action, such as encouraging Strickland, *if he is elected*, to abandon his “job-killing policies” in favor of policies that will allow for more jobs to be created.

Based on the above, there is no reason to believe Freedom Vote violated 52 U.S.C. § 30104 and Count I of the Complaint should be dismissed.

## **2. No disclaimer was required (Count II).**

Because Freedom Vote’s ad did not include express advocacy, no disclaimer was required under 52 U.S.C. § 30120(d)(2) or 11 C.F.R. §§ 110.11(a)-(b), (c)(4). Thus, Count II of the Complaint should be dismissed.

## **3. Freedom Vote is not a political committee (Counts III and IV).**

Similar to the allegation in Count II, the allegation that Freedom Vote failed to register and report as a political committee largely hinges on the ad being an independent expenditure, which it isn’t. However, the Complaint also alleges that FV was a political committee starting in 2014, when it made (and reported) independent expenditures in excess of \$1,000.

According to FV’s tax returns, below is a chart of FV’s spending for its entire existence:

Fiscal Year	Gross Receipts	Total Expenses	Program Service Expenses	Management and General Expenses	Fundraising Expenses	Political Campaign Intervention
2010	1,325,000	1,265,384	1,178,423	41,961	45,000	0

2011	1,848,061	1,886,457	1,648,594	132,563	105,300	0
2012	200,000	191,416	160,270	31,146	0	0
2013	200,000	150,430	125,347	25,083	0	0
2014	255,000	284,754	270,906	10,025	3,823	174,607 (64.4%)
2015	28,000	58,578	21,839	[not reflected on 990-EZ]	[not reflected on 990-EZ]	0
2016	4,375,000	3,575,475	3,505,133	17,902	52,440	1,744,267 (48.7%)
2017	90,000	721,094	565,056	[not reflected on 990-EZ]	[not reflected on 990-EZ]	275,000 (38.1%)
<b>TOTAL</b>	<b>8,321,061</b>	<b>8,133,588</b>	<b>7,475,568</b>			<b>2,019,266 (24.8%)</b>

Based on these amounts, over its entire existence, Freedom Vote has spent less than 25% on political campaign activities, as that term is defined by the IRS. Even assuming the entirety of its spending on such activities have constituted “expenditures” under the FECA, the total is far below the “major purpose” threshold. Granted, in one year (fiscal year 2014), FV’s political spending exceeded its non-political spending. However, for that election cycle (2013-14), it was well under the threshold (40%), and for every other election cycle, it has been under the threshold.

While the amount that Freedom Vote spent is not the only relevant factor, with the exception of one paragraph in Count III (¶ 58), the Complaint focuses entirely on the amounts spent by Freedom Vote (which, as evidenced above, fall well short of the major purpose standard). The one exception is an allegation that in 2010, “an advisor to FV confirmed that FV’s organizational purpose was to elect or nominate candidates for federal office.” This is not, however, what the “advisor” said, according to the story. And in any event, a Politico story offering a beat writer’s opinion about the “express purpose” of Freedom Vote is hardly a credible source for the allegation in the complaint to be accorded any merit, other than for what it is: one person’s (uninformed and arguably biased) opinion about Freedom Vote’s purpose.

Freedom Vote’s tax returns, on the other hand, are a very credible source of information. They are sworn under penalty of perjury by an officer of Freedom Vote. Each year, Freedom Vote publicly states its mission. In fiscal year 2015, for example, Freedom Vote’s tax return



reflected its mission and primary exempt purpose as: “To further the common good and general welfare of the people of Ohio by providing education to the Ohio public regarding economic policy issues, including state and local government fiscal responsibility, job growth and retention, and employment.” *See* FV 2014 Form 990.<sup>7</sup> And in the prior fiscal year: “To further the common good and general welfare of the people of Ohio by providing education to the Ohio public on economic policy issues including Obamacare and federal budget.” (See FV 2013 Form 990.) Each year, with slight variations to its primary exempt purpose, Freedom Vote’s purpose is reflected in its tax return. And while Freedom Vote periodically uses its funds for political activities (as shown in the above chart), these activities are secondary to its primary purpose of furthering the common good and general welfare of the people of Ohio by educating them on economic and other regulatory issues.

Based on the foregoing, Freedom Vote is not, and never has been, a political committee. Accordingly, Counts III and IV of the Complaint should be dismissed.

**4. Freedom Vote did not permit its name to be used for a contribution in the name of another (Count V)**

The Complaint alleges that FV acted as a conduit for one or more contributions to Fighting for Ohio Fund, a Super PAC (the “Fund”). In support of this claim, the Complaint alleges that (i) Freedom Vote and the Fund employed the same fundraising consultant; (ii) Freedom Vote reported on its 2015 tax return that the fundraising consultant raised \$2,090,000 for Freedom Vote, “a sum almost equal to and sufficient to cover all of FV’s transfers to Fighting for Ohio during the 2016 election cycle”; and (iii) “five of the six transfers FV made to Fighting for Ohio Fund during the time period covered by the organization’s 2015 tax return correspond to exact amounts FV reported receiving on its Schedule of Contributors.” (Compl., at ¶70.) Based solely on these allegations, Complainant concludes, illogically, that FV knowingly received a donation from a person that was earmarked for the Fund and that FV did, in fact, make the contribution in its name to the Fund rather than in the donor’s name.

It is pure speculation to conclude from the allegations in the Complaint—even if they are assumed to be true—that FV accepted earmarked donations that were intended for the Fund. Simply because FV and the Fund shared a fundraising consultant, and that consultant raised funds well in excess of the amount that FV donated to the Fund, does not mean that FV received earmarked funds. Likewise, the fact that a few of the gifts reported on FV’s tax return “match” the amount that FV contributed to the Fund (\$500,000 and \$250,000) does not mean that those gifts were earmarked, especially since FV’s tax return does not state when the gifts were received by FV. (And even if the gifts were received by FV and then “in turn” were contributed to the Fund, as the Complaint alleges, this still does not mean FV received and forwarded an earmarked contribution. In sum, the allegations, even if true, do not substantiate the legal claim

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<sup>7</sup> Similarly, the purpose statement on Freedom Vote’s website, [www.freedomvote.net](http://www.freedomvote.net), states: “Freedom Vote provides education to the Ohio public regarding economic policy issues, including state and local government fiscal responsibility, job growth and private sector expansion.”

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that FV knowingly permitted its name to be used to conceal the true source of any donations. Indeed, the Commission has repeatedly taken the position that unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true. See, *e.g.*, MUR 4960, *Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas* (Dec. 21, 2001). Thus, the Complaint affords no basis for the Commission to conclude there is reason to believe a violation occurred, and Count V of the Complaint should be dismissed.

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The allegations in the Complaint fail to demonstrate that the ad distributed by FV meets the definition of express advocacy thus triggering an independent expenditure report, disclaimer and registration as a committee. Further, the allegations do not approach the threshold requirements as found by the Commission pursuant to the requirements of the Act that FV engaged in a conduit contribution scheme and/or accepted or made a contribution in the name of another. The Commission may find “reason to believe” only if the Complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act. The Complaint here fails that standard and should be dismissed.

If the Commission requires any additional information or clarifications from FV to evaluate the allegations in this matter, please do not hesitate to contact me.

Sincerely,

LANGDON LAW LLC

David R. Langdon  
Counsel for Freedom Vote