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November 2, 2018

Jeff S. Jordan  
Assistant General Counsel  
Complaints Examination & Legal Administration  
Federal Election Commission  
1050 First Street, NE  
Washington, DC 20463

**VIA EMAIL: [cela@fec.gov](mailto:cela@fec.gov)**

**Re: MUR 7510: Response to Complaint from Fix Our Flooding, Inc.**

Dear Mr. Jordan:

We are writing this letter on behalf of Fix Our Flooding, Inc. (“Fix Our Flooding” or the “Respondent”) in response to the Complaint filed in the above-referenced matter by Badge Humphries. The Complaint suggests that the Respondent’s policy interview of South Carolina State Representative Katie Arrington, regarding coastal flooding, was coordinated with Katie Arrington, a candidate for U.S. Congress in South Carolina, and her campaign committee.

This response affirmatively demonstrates the absence of coordination, and thus no in-kind contribution was made to Katie Arrington for Congress. Because the Respondent’s policy interview does not qualify as a public communication under Federal Election Commission (the “Commission”) regulations, and therefore there was no public communication to have been “coordinated,” the Commission should either dismiss the Complaint on its face, or find no reason to believe a violation of the Federal Election Campaign Act of 1971 (the “Act”) or the Commission’s regulations occurred.

The Commission may find “reason to believe” only if a Complaint sets forth sufficient, specific facts, which, if proven true, would constitute a violation of the Act.<sup>1</sup> Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true.<sup>2</sup> Moreover, the

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<sup>1</sup> See 11 C.F.R. § 111.4(a), (d).

<sup>2</sup> See MUR 4960, Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons (Dec. 21, 2001).

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Commission will dismiss a complaint when the allegations are refuted with sufficiently compelling evidence.<sup>3</sup> As explained in more detail below, the allegations made in the Complaint do not support a reason to believe finding in this matter. The Complaint should be immediately dismissed.

### **Factual Background**

The Respondent is a social welfare organization formed under Section 501(c)(4) of the Internal Revenue Code of 1986. As a Section 501(c)(4) organization, the Respondent devotes its resources to activities consistent with its tax-exempt purpose, including issue advocacy focused on educating citizens in coastal areas about sea level rise and the associated flooding, along with practical solutions that can be implemented to prevent it.

Respondent has engaged in a campaign to interview Charleston residents in order to highlight the problem of sea level rise and the flooding that results. As part of its efforts, Respondent interviewed Rep. Arrington (the “Arrington Interview”) about her near-death experience due to a vehicular collision with a drunk driver on June 22, 2018, in Charleston County, South Carolina. During the 32-minute interview, Rep. Arrington addressed the issue of coastal flooding and lamented that if the streets had been flooded on the night of June 22nd, she would not be alive today. There was no mention of her campaign for federal office, or anything beyond a lengthy discussion of the grave impacts of coastal flooding and sea level rise. Her discussion about flooding in the Lowcountry is consistent with national reports, as “[t]he projected increase in high tide flooding in 2018 may be as much as 60 percent higher across U.S. coastlines as compared to typical flooding about 20 years ago,” according to National Oceanic and Atmospheric Administration scientists.<sup>4</sup>

As part of Respondent’s effort to educate the citizens of the Lowcountry regarding the impacts of sea level rise and the need to build a flood wall, Respondent purchased a media buy to disseminate the Arrington Interview. Then, on August 22, 2018, Respondent cancelled the buy, as it decided resources would be better spent on other areas of policy advocacy. The Respondent’s media buyer has confirmed that no advertisement including the Arrington Interview was publicly aired.

### **The Complaint**

The Complainant incorrectly contends that the Respondent, Rep. Arrington and her campaign engaged in a coordinated communication, “and in so doing violated federal election laws and regulations when they jointly created, produced, and distributed a television advertisement.” In support of this claim, the Claimant cites the Arrington Interview, which

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<sup>3</sup> See *id.*

<sup>4</sup> See National Oceanic and Atmospheric Administration Press Release, *Coastal Communities Saw Record Number of High Tide Flooding Days Last Year* (June 6, 2018), <https://www.noaa.gov/news/coastal-communities-saw-record-number-of-high-tide-flooding-days-last-year>.

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supposedly ran on August 23, 2018. The Claimant alleges that because the Arrington Interview was a public communication broadcast within 90 days of a general election and because Rep. Arrington and her campaign were allegedly “materially involved in its creation, production, and distribution,” a coordinated communication occurred and thus, the campaign received a prohibited in-kind contribution from the Respondent. The Complaint also includes several other conclusory allegations and assumptions that are irrelevant to this analysis.

### **Legal Analysis**

Because the media buy surrounding the interview was cancelled on August 22, 2018, this Complaint should be dismissed on its face. However, notwithstanding the cancellation of the media buy, the Respondent’s filming of the 32-minute Arrington Interview did not result in a coordinated communication. The Act and Commission regulations provide that entities that are prohibited from making contributions to candidates for federal office are also prohibited from paying for a coordinated communication.<sup>5</sup> To determine whether a communication is a “coordinated communication,” Commission regulations provide a three-prong test, which relates to: (1) the person paying for the communication, (2) the content of the communication, and (3) the conduct occurring in the communication.<sup>6</sup> Under the regulations, a communication must satisfy all three prongs to be deemed a “coordinated communication.” “While no one of these elements standing alone fully answers the question of whether a communication is for the purpose of influencing a Federal election . . . the satisfaction of all three prongs of the test . . . justifies the conclusion that payments for the coordinated communication are made **for the purpose of influencing a Federal election**, and therefore constitute in-kind contributions.”<sup>7</sup>

The first prong of the test centers on payment of the communication. In this instance, the Respondent cancelled the media buy prior to public dissemination, and consequently there was no public communication. Though the Respondent decided to save the television broadcast of the Arrington Interview for post-election, a 30-second segment was nonetheless leaked, and publicized by critics on August 23, 2018. The leak of the Arrington Interview was neither authorized nor paid for by the Respondent.

The next prong of the test relates the content of the communication. The Complainant alleges that the content prong was met because the Arrington Interview aired within 90 days of a general election and refers to a clearly identified candidate for federal office.<sup>8</sup> In the Arrington Interview, Rep. Arrington is identified as “Katie Arrington, South Carolina Representative” and her campaign for federal office is never mentioned. The interview centers on her near-fatal accident and her thankfulness for the absence of rain or high tide, so that the emergency responders could transport her to the hospital quickly – as time was of the essence. Further, the Commission has made clear that the coordinated communication rules “are not intended to

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<sup>5</sup> 11 C.F.R. § 109.22.

<sup>6</sup> See 11 C.F.R. § 109.21(a), (c) (d).

<sup>7</sup> Explanation and Justification for Final Rules on Coordinated and Independent Expenditures, 68 Fed. Reg. 421,426 (Jan. 3, 2003) (internal citations omitted)(emphasis added).

<sup>8</sup> See 11 C.F.R. 109.21(c)(4)(i).

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restrict communications or discussions regarding pending legislation or other issues of public policy.”<sup>9</sup> Thus, the regulations provide a “safe harbor” for such discussions.<sup>10</sup> Specifically, “[a] candidate’s . . . response to an inquiry about that candidate’s . . . positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities or needs, does not satisfy any of the conduct standards.”<sup>11</sup> The Arrington Interview fits squarely within this safe harbor.

The last prong of the test relates to conduct. To meet this prong, a communication must satisfy one of several conduct standards in Commission regulations.<sup>12</sup> This includes, for example, the creation, production, or distribution of a communication at the request or suggestion of a candidate, or to which a candidate assents, or after substantial discussion about the communication between the person paying for the communication and the candidate clearly identified in it.<sup>13</sup> The Complainant asserts that there is “clear and convincing evidence that Arrington and her principal campaign committee were materially involved in numerous decisions regarding the advertisement’s creation, production, and distribution.” However, the only concrete fact the Complainant presents is that Rep. Arrington was interviewed “and looked directly into the camera.” Rep. Arrington did in fact look into the camera, as she was interviewed for 32 minutes, but had no control over which parts of the policy interview (if any) would or would not be used by Respondent to further its objectives in order to educate coastal regions about flooding.

The Commission’s analysis for determining whether a communication constitutes the “republishing of campaign materials” can provide useful guidance in this instance. The Commission has determined that when a party takes a portion of publicly available campaign footage and incorporates the footage into its own communication in order to “create its own message” there is no republishing of campaign materials” because it is not repeat[ing] verbatim the [candidate’s] message”.<sup>14</sup> In the present case, the Respondent interviewed Rep. Arrington for 32 minutes about various issues related to sea level rise, and at the conclusion of the interview, the Respondent had complete control over the use of all footage and was free to craft any type of message it preferred, including no message at all. Mere speculation that Rep. Arrington and Katie Arrington for Congress were involved in any decisions surrounding the leaked 30-second Arrington Interview is false, and thus, the conduct standard is not met.

## **Conclusion**

Badge Humpries’ attack on an interview documenting a woman’s personal experience regarding the potentially fatal impacts of Lowcountry flooding is nothing more than a political

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<sup>9</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 441 (Jan. 3, 2003).

<sup>10</sup> See 11 C.F.R. § 109.21(f).

<sup>11</sup> *Id.* § 109.21(f) (emphasis added).

<sup>12</sup> *Id.* § 109.21(a)(3), (d).

<sup>13</sup> See *id.* § 109.21(d)(1), (3).

<sup>14</sup> See MUR 6357 (American Crossroads), Statement of Reasons, Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, at 4.

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stunt. Ultimately, the Complaint failed to demonstrate that the Respondent created a coordinated communication with Rep. Arrington or Katie Arrington for Congress because none of the three prongs of the coordination analysis are satisfied, let alone all three. Further, the leaked 30-second television ad that the Complaint centers on was not authorized by the Respondent. We therefore respectfully request that the Commission recognize the legal and factual insufficiency of the Complaint on its face and immediately dismiss it.

Thank you for your prompt consideration of this matter, and please do not hesitate to contact us directly at (202) 572-8663 with any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles R. Spies".

Charles R. Spies  
Sloane S. Carlough  
*Counsel to Fix Our Flooding, Inc.*