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Federal Election Commission
Office of Complaints Examination and Legal Administration
Attn: Christal Dennis, Paralegal
1050 First Street, NE
Washington, DC 20463**Re: MUR 7521**

Dear Mr. Jordan:

We write as counsel to Swing Left, Ethan Todras-Whitehill in his official capacity as treasurer (collectively, the "Committee"), and Abby Karp (collectively, the "Respondents") in response to the complaint filed by Dallas Woodhouse on October 24, 2018. Because the Complaint fails to set forth sufficient facts which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971 ("FECA" or "the Act"), as amended, the Commission should immediately dismiss the Complaint and close the file.

The Complaint erroneously alleges that the Committee made prohibited coordinated expenditures with Kathy Manning for Congress (the "Campaign"). Yet, the Complaint is devoid of any real facts. The conclusory allegations of impermissible coordination among the Respondents and the Campaign are rooted in a fundamental misreading of the Act and its accompanying regulations, as interpreted by the Federal Election Commission ("Commission" or "FEC"). For the reasons that follow, the Commissions should swiftly dismiss the Complaint.

FACTUAL BACKGROUND

The Committee is a multicandidate *Carey* PAC¹, which are nonconnected political committees registered with the FEC that are allowed to engage in both "coordinated" and "independent" activity, as long as a firewall exists to prevent the flow of information from the "coordinated side" to the "independent" side.² During the 2017-2018 election cycle, the Committee coordinated with congressional campaign committees in adherence with federal campaign finance law, including adherence to the source restrictions and contribution limits from federal

¹ FEC Form 1, Swing Left, Statement of Organization at 7 (amended Aug. 20, 2018), <http://docquery.fec.gov/pdf/378/201808209121460378/201808209121460378.pdf>.

² See *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); see also *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011).

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political committees to federal candidate committees. In its coordinated efforts, Committee volunteers worked in conjunction with campaigns. Abby Karp is one such volunteer, leading the Committee's Greensboro, North Carolina volunteer efforts. During the general election, Abby conferred with the Campaign about Committee volunteers canvassing on behalf of the Campaign and use of Campaign material while canvassing.

The Campaign was the authorized candidate committee for Kathy Manning, the Democratic congressional candidate for North Carolina's 13th congressional district.³ The Committee made expenditures totaling \$205 for printing and get-out-the-vote services on behalf of the Campaign.⁴ These expenditures were well below the \$5,000 contribution limit and were reported in accordance with the Act's requirements.

Lastly, the Committee serves as a conduit, accepting contributions that individuals and political action committees have earmarked for candidates and forwarding such contributions to candidates. The Committee does not exercise any direction or control over these contributions.

The Complaint alleges that the following activities by Committee constitute violations of the Act:

- Its volunteers coordinating door-knocking efforts with the Campaign;
- Statements to the press by the Committee's Treasurer that the Committee would be coordinating with campaigns; and
- Accepting contributions earmarked for the Campaign and failure to report additional contributions.⁵

LEGAL ANALYSIS

The Complainant cursorily cites to the definition of "coordinated" to allege that the Committee has engaged in coordinated expenditures, but none of the scant activities discussed in the Complaint meet the definition of coordinated expenditures. A public communication must satisfy a three-prong test to be considered a coordinated communication: it must (1) be paid for by a person other than a candidate, authorized committee or political party committee with which it is

³ FEC Form 1, Statement of Organization, Kathy Manning for Congress (amended Oct. 15, 2018) <http://docquery.fec.gov/pdf/938/201810159125210938/201810159125210938.pdf>.

⁴ Swing Left, FEC Form 3 2018 Post-General Report 9970, 11422, 13741 (amended Dec. 17, 2018), <http://docquery.fec.gov/pdf/270/201812179143526270/201812179143526270.pdf>.

⁵ See Compl. ¶ 1.

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coordinated; (2) satisfy one or more content standards; and (3) satisfy one or more of several conduct standards.⁶

As discussed in detail below, each activity attacked in the Complaint is exempt from the definition of “contribution” under the Act and accompanying regulations, as interpreted by the FEC. At no time did the Committee coordinate with Campaign with respect to the creation or dissemination of a “public communication.” Nor did it make any unreported contributions, in-kind or monetary, to the Campaign.

A. Respondents Permissibly Engaged in Coordinated Activity

The Complaint fails to identify any activity conducted by Respondents that would have triggered a coordinated communication. Neither making statements to the press about engaging in coordinated activity nor actual engagement in coordinated canvassing meet the content standard for a coordinated communication.⁷ Nor does the Complaint allege any activity by the Committee that would meet any conduct standard.⁸ Instead, it alleges that Committee volunteers stated that they were coordinating door-to-door advocacy efforts with the Campaign. It further cites to the Committee’s treasurer stating that it is coordinating with campaigns. More revealing is what the Complaint does *not* state. It does not state that the Committee, as a multicandidate *Carey* PAC, surpassed its \$5,000 contribution limit to the Campaign. It does not state that the Committee or any of its volunteers expended any Committee funds on coordinated canvassing efforts. And it does not state why the Committee cannot coordinate its activity with the Campaign.

In short, the Complainant misunderstands the legal structure of the Committee. Federal law allows a PAC not authorized by a candidate and not connected to a corporation or labor organization both to 1) raise funds within regular federal limits and restrictions to contribute to federal candidates, and 2) to raise unlimited funds to pay for activity that does not result in a contribution to a federal candidate or political party committee.⁹ The Committee uses its “Contribution Account”— the account that complies with federal contribution limits and source restrictions — to coordinate legally with candidates. Accordingly, the Committee engages in its coordinated activity with candidate committees, like the Campaign, out of the Contribution Account. However, the Complaint fails to identify *any* expenditures that were actually coordinated with the Campaign by either the Committee or Committee volunteers that would constitute in-kind contributions surpassing the permissible limits.

⁶ 11 C.F.R. § 109.21.

⁷ 11 C.F.R. § 109.21(c).

⁸ *Id.* § 109.21(d).

⁹ See *Spechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); see also *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011).

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Lastly, the value of services provided by an unpaid volunteer such as Abby Karp are not considered to be expenditures.¹⁰ Accordingly, Abby Karp's volunteer activity in support of the Committee and in support of the Campaign were not in-kind contributions.

B. Door-to-Door Canvassing is not a Public Communication

The Commission has indicated that door-to-door canvassing is not a "public communication" and that it could therefore be coordinated with candidates without triggering an in-kind contribution.¹¹ More recently, three Commissioners signed an opinion arguing that door-to-door canvassing is not a "public communication" even when paid for by an independent expenditure-only committee.¹² In the opinion, Great America PAC, a hybrid committee, asked whether it could hire field staff to canvass door-to-door and phone bank to expressly advocate for Donald Trump, if those "front-line voter outreach" workers had done similar work for the Trump campaign, a state party, or the RNC during the previous 120 days.¹³ The Commission split 3-3 on the question of whether door-to-door canvassing constitutes a public communication. Concurring, three Commissioners stated that "[t]he Commission's longstanding position [] is that door-to-door canvassing is not a 'public communication' under 11 C.F.R. § 100.26, and therefore does not constitute a 'coordinated communication' under 11 C.F.R. § 109.21."¹⁴ The concurrence reasoned that door-to-door canvassing is "fundamentally different" from the forms of paid mass communication enumerated in the definition of public communication, each of which "lends itself to distribution of content through an entity ordinarily owned or controlled by another person."¹⁵ It also found that canvassing "is not the kind of mass communication contemplated in the Act," nor is canvassing a form of advertising that qualifies for the catch-all

¹⁰ *Id.* § 100.11(e)(2). The value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee is also not a contribution to that candidate or committee. *Id.* § 100.74.

¹¹ See FEC Matter Under Review 5564 at 9 (Alaska Democratic Party), Factual and Legal Analysis at 14 (May 4, 2006) (concluding that door-to-door canvassing does not qualify as a public communication), Statement of Reasons of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky at 9 (Dec. 21, 2007) ("Door-to-door canvassing is not 'general public political advertising' . . . [t]hus, door-to-door canvassing is [not] a 'public communication.'"); see also MUR 5564, Statement of Reasons of Chairman Robert D. Lenhard (Dec. 31, 2007) ("Most of the costs related to the ADP's field program were payments by the ADP for salaries and benefits of its employees, and for costs related to maintaining office space. As such, these costs were not for 'public communications' (such as radio ads and direct mail) as that term is defined in our regulations. These costs include door to door canvassing, manning campaign offices and other traditional grass roots activities.") (citations omitted); see also Factual and Legal Analysis, FEC Matter Under Review 6163 at 6 (Houghton County Democratic Committee), (Nov. 17, 2009).

¹² FEC Adv. Op. 2016-21, Concurring Statement of Vice Chair Caroline C. Hunter, Commissioners Lee E. Goodman, & Matthew Petersen (Jan. 12, 2017).

¹³ Adv. Op. Request, FEC Adv. Op. 2016-21 (Great America PAC).

¹⁴ Concurring Statement of Commissioners Hunter, Goodman, and Petersen, FEC Adv. Op. 2016-21 (Great America PAC).

¹⁵ *Id.*

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category of “general public political advertising,” “let alone advertising that is aimed at the general public.”¹⁶

Although the three other Commissioners could not agree on whether coordinated communication constitutes a public communication, they did not issue a separate opinion. Accordingly, even if the Complaint actually discussed expenditures made by Committee for coordinated canvassing, the Committee likely can engage in such activity without treating the resulting activity as a coordinated communication or in-kind contribution.

Further, although the regulations appear to contain a catch-all provision that treats as an in-kind contribution all communications that are coordinated with a candidate but that do not meet the technical coordinated communication requirements, that provision has been construed narrowly by the Commission to apply only to expenditures for things other than communications. The regulation provides that any expenditure that is coordinated, “but that is not made for a coordinated communication,” is “an in-kind contribution” to the candidate with whom it was coordinated.¹⁷ When it promulgated this regulation in 2003, the FEC made clear it “addresses expenditures *that are not made for communications* but that are coordinated with a candidate, authorized committee, or political party committee,”¹⁸ such as when a third party pays the rental fee for a campaign event or a campaign staffer’s salary. As such, even if the Complaint could pinpoint to expenditures made by Committee for coordinated canvassing, they would nonetheless not be in-kind contributions.

C. Committee is a Permissible Conduit

The Committee serves as a conduit, accepting contributions that individuals and political action committees have earmarked for particular candidates and forwarding such contributions to the candidates. The Complaint states that “Swing Left evidences an even closer relationship with the Manning campaign in its reports of earmarked, or conduit contributions.”¹⁹ The Complaint fails to identify a legal issue. The Act and Commission regulations clearly permit such activity: “[a]ll contributions by a person made on behalf of or to a candidate, including contributions which are in any way earmarked or otherwise are in any way earmarked or otherwise directed to the candidate through an intermediary or conduit are contributions from the person to the candidate.”²⁰ So long as the conduit does not “exercise any direction or control over the choice of the recipient candidate”, a conduit’s “contribution limits are not affected by the forwarding of

¹⁶ *Id.*; see also FEC Matter Under Review (Alaska Democratic Party), Factual and Legal Analysis at 14 (May 4, 2006), Statement of Reasons of Commissioners Mason and von Spakovsky at 9 (Dec. 21, 2007) (“Door-to-door canvassing is not ‘general public political advertising’ . . . [t]hus, door-to-door canvassing is [not] a ‘public communication’”);

¹⁷ *Id.* § 109.20.

¹⁸ 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (emphasis added).

¹⁹ Compl. at 2.

²⁰ 11 C.F.R. § 110.6(a).

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an earmarked contribution[.]”²¹ Accordingly, the contributions from the many individuals who directed their contributions to candidate campaign committees, including Kathy Manning for Congress, by way of the Committee were contributions to the candidates from the individuals, not from Committee.

The Complainant returns to his prior baseless allegations that the Committee made unreported contributions to the Campaign, even if the Committee’s acceptance of earmarked contributions violated no law.²² The Complaint suffers from the same fatal flaw as outlined above: it points to no expenditures made by the Committee that would constitute an in-kind contribution.

CONCLUSION

As described herein, the Complaint does not allege any facts, which, if proven true, would constitute a violation of the Act or Commission regulations. Accordingly, the Commission should reject the Complaint’s request for an investigation, find no reason to believe that a violation of the Act or Commission regulations has occurred, and immediately dismiss this matter.

Very truly yours,



Ezra W. Reese
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Counsel to Respondents

²¹ *Id.* § 110.6(d).

²² Compl. at 2.