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December 20, 2018

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

Re: Response to MUR 7527

Dear Mr. Jordan:

We write as counsel to News for Democracy in response to the complaint (the “*Complaint*”) filed by the Foundation for Accountability and Civic Trust (the “*Complainants*”) on October 25, 2018. The Complaint fails to state any facts that, if true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended, 52 U.S.C. § 30101 et seq. (the “*Act*”), or any of its implementing regulations. The Federal Election Commission (“*FEC*” or the “*Commission*”) may find “reason to believe” a violation of the Act has occurred only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act.¹ Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.² The Commission should, therefore, find no reason to believe that News for Democracy violated the Act, and should close this matter immediately.

I. FACTUAL BACKGROUND

News for Democracy is a nonprofit organization that is organized and operated under Section 501(c)(4) of the Internal Revenue Code. Its primary purpose is the promotion of social welfare, and its mission is to educate the public through identifying inaccurate news or commentary and promoting digital news that is factual in nature to counteract the harmful effects of news or commentary that is not accurate, reliable, or credible, or is generated by “bots.”

News for Democracy incorporated in the District of Columbia as a nonprofit corporation on August 27, 2018 and notified the Internal Revenue Service of its intent to operate as a Section 501(c)(4) social welfare organization by filing Form 8976 shortly thereafter. It then initiated its

¹ 11 C.F.R. § 111.4(d).

² See MUR 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas, at 2.

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operations and began to create, produce, and disseminate digital advertising content to advance its mission. This content is disseminated in the form of paid digital advertisements on social media platforms such as Facebook, as well as content that is shared organically.

II. LEGAL ANALYSIS

A. News for Democracy is not a federal political committee because it lacks the major purpose to engage in federal campaign activity

Commission regulations require organizations that qualify as “political committees” to register with the Commission and file periodic disclosure reports. A “political committee” is defined as “any committee, club, association, or other group of persons ... which makes expenditures aggregating in excess of \$1,000 during a calendar year.”³ An expenditure is “anything of value made by any person for the purpose of influencing any election for Federal office.”⁴

The U.S. Supreme Court has clearly stated that the FEC may only regulate “organizations ... the major purpose of which is the nomination or election of a candidate.”⁵ As a result, “only organizations whose major purpose is Federal campaign activity can be considered political committees under the Act.”⁶ In other words, for an organization to be a political committee, “[n]ot only must the organization have raised or spent \$1,000 in contributions or expenditures, but it must additionally have *the major purpose of engaging in federal campaign activity*.”⁷ Crucially, courts have found that an organization’s purpose of engaging in federal campaign activity must be *the* major purpose of the organization, rather than simply *a* major purpose.⁸ To determine whether an organization has the major purpose to engage in federal campaign activity, the FEC looks to an organization’s own characterization of its major purpose and the percentage of its historical overall spending on federal campaign activities.⁹

The Complaint alleges that News for Democracy is required to register with the Commission as a political committee because it “has spent between \$1.2 million and \$4.6 million to influence federal elections.” But News for Democracy’s spending is not made for the purpose of influencing federal elections. The five advertisements cited in Exhibit A of the Complaint represent “genuine issue advertisements” which “cannot be regulated as electoral advocacy.”¹⁰

³ 11 C.F.R. § 100.5(a).

⁴ *Id.* § 100.111(a).

⁵ *Buckley v. Valeo*, 424 U.S. 1, 79 (1974).

⁶ Political Committee Status, 72 F.R. 5595, 5601 (Feb. 7, 2007).

⁷ *Id.* (emphasis added).

⁸ *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 278-279 (4th Cir. 2008).

⁹ 72 F.R. at 5601.

¹⁰ *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804, 834-35 (7th Cir. 2014). *See also* FEC MUR 6538 (Americans for Job Security), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen.

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The purpose of these advertisements is to educate the public on policy topics such as international trade, healthcare, and the economy, and to spur public debate that includes healthy critiques of the two officeholders featured in the advertisements, Governor Rick Scott and Representative Kevin Cramer. Without any evidence that News for Democracy has spent more than \$1,000 in a calendar year on “communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office,”¹¹ the Commission has no reason to believe that News for Democracy is a political committee.¹²

News for Democracy also lacks the “major purpose” to engage in federal political activity. To qualify as a Section 501(c)(4) tax-exempt organization, the Internal Revenue Code requires that News for Democracy’s primary purpose be the promotion of social welfare.¹³ While an organization’s tax status is not dispositive as to whether it qualifies as a political committee, this status weighs in favor of a focus on issue advocacy rather than federal campaign activity.¹⁴ News for Democracy accomplishes its social welfare mission through disseminating digital issue advertisements aimed at educating the public about state and federal policies and public officials. Both courts and the Commission have made clear that such genuine issue advertisements are beyond the purview of the Commission.¹⁵ Thus, News for Democracy’s “major purpose” is not federal campaign activity.¹⁶ Commissioners have acknowledged that “it would be an unusual case for a group whose central organizational purpose is *not* the nomination or election of a candidate and whose spending is *not* predominantly campaign-related to otherwise meet the major purpose test on the basis of other factors.”¹⁷

The Complainant attempts to implore nebulous principles of transparency to argue that News for Democracy should be regulated by the Commission, claiming that News for Democracy is a “secretive organization” that has become “one of the most influential organizations in political advertising.” But the Commission does not have jurisdiction over organizations based on their

¹¹ *Buckley*, 424 U.S. at 44, 80.

¹² Political Committee Status, 72 Fed. Reg. 5,595, 5,597 (Feb. 7, 2007).

¹³ See I.R.C. § 501(c)(4).

¹⁴ See FEC MUR 6538 (Americans for Job Security), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, at 18.

¹⁵ See FEC MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, at 1 (stating that “controlling statute and court decisions stretching back nearly forty years properly tailor the applicability of campaign finance laws to protect non-profit issue advocacy groups ... from burdensome political committee registration and reporting requirements”); FEC MUR 6589 (American Action Network), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, at 12 (stating that “courts have appropriately rejected attempts to count issue speech—even that which references federal candidates—as evidence that a group has met *Buckley*’s major purpose test”).

¹⁶ *Buckley*, 424 U.S. at 79.

¹⁷ See FEC MUR 6396 (Crossroads GPS), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, at 10 (emphasis in original).

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level of influence or the size of their budgets. News for Democracy's spending is focused on issue advertisements and its "major purpose" is not federal campaign activity. Accordingly, it is not required to register with the Commission as a federal political committee.

B. Complainants have not identified a federal independent expenditure made by News for Democracy

A Section 501(c)(4) organization that is not required to register with the Commission as a political committee is required to file reports upon spending specified amounts on federal "independent expenditures." An "independent expenditure" is an expenditure for a communication that (i) contains express advocacy and (ii) is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's campaign, a political party, or their agents.¹⁸ Under Commission regulations, a communication contains "express advocacy" if it urges the election or defeat of a clearly identified federal candidate, because: (i) it includes "magic words" like "vote for," "elect," "defeat," etc.; or (ii) the electoral portion of the ad is unambiguous and suggestive of only one meaning, and reasonable minds could not differ as to whether the communication urges the election or defeat of a candidate.¹⁹

Complainants allege that News for Democracy "has failed to share any information about its political activities with the Commission" without explaining why News for Democracy would have an obligation in the first place. Complainants attached five digital advertisements to the Complaint in Exhibit A, presumably as evidence that News for Democracy has made federal independent expenditures. Yet none of these five digital advertisements contain express advocacy under 11 C.F.R. § 100.22(a):

- The first advertisement cited ("Sounds Like Tennessee") does not clearly identify any 2018 federal candidate.
- The second advertisement cited ("That's Just North Dakota") does not include "magic words" of express advocacy.
- The third advertisement cited ("Corazon Coqui" still ad) does not include "magic words" of express advocacy.
- The fourth advertisement cited ("Corazon Coqui" video) does not include "magic words" of express advocacy.
- The final advertisement ("Women for Civility") does not clearly identify any 2018 federal candidate.

¹⁸ 11 C.F.R. § 100.16(a).

¹⁹ *Id.* § 100.22(a), (b).

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These advertisements also do not include the “functional equivalent of” express advocacy under 11 C.F.R. § 100.22(b). Only three of the advertisements clearly identify federal candidates, (“That’s Just North Dakota” and the two “Corazon Coqui” advertisements). However, these advertisements are clearly aimed at educating the public about actions Governor Rick Scott and Representative Cramer have taken as sitting officeholders, rather than advocating for or against their election to federal office:

- “That’s Just North Dakota” reads as follows: “Rep. Kevin Cramer seems to have all the wrong priorities. He voted to give banks huge tax breaks. And to slash regulations that protect consumers. While receiving over \$330,000 from finance and lending lobbyists. He voted to roll back protections on water from mining pollution. And air quality regulations on methane. While taking over \$1 million from oil, gas, and coal companies. Cramer has proven he can’t be trusted to look out for our families.”
- “Corazon Coqui” (video) reads as follows: “Rick Scott is a thief and liar who was fined \$1.7 billion and invoked the 5th amendment 75 times in the largest Medicare fraud case in the history of the United States. Scott ran a network of hospitals and medical centers called Columbia/HCA, that for years stole funds designated for healthcare for seniors. With his hands in the cookie jar, Scott invoked the 5th amendment 75 times, and said he supposedly ‘didn’t know.’ But as CEO, Scott signed various annual reports filled with warning signs of fraud. ‘Anything that happened on my watch, I take responsibility for.’”
- “Corazon Coqui” (still) reads as follows: “After wasting dollars that would have lowered health expenses, Rick Scott wants a seat in the Senate, where he has said he will support Donald Trump’s agenda and will finish destroying protections for pre-existing conditions.”

An advertisement may only be treated as the “functional equivalent of” express advocacy “if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”²⁰ Two of the three advertisements above make no reference to a federal election or federal candidacy, period, and all three advertisements are susceptible to a reasonable alternative interpretation other than as an appeal for or against a federal candidate. The advertisements educate members of the public about their elected officials and spark healthy commentary on the actions of Governor Scott and Representative Cramer. Thus, the digital advertisements cited in the Complaint do not include express advocacy and are not reportable federal independent expenditures under the Act.

III. CONCLUSION

²⁰ *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 450 (2007).

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The Act requires that the Commission find “reason to believe that a person has committed, or is about to commit, a violation” of the Act as a precondition to opening an investigation into the alleged violation.²¹ In turn, the Commission may find “reason to believe” only if a complaint sets forth specific facts, which, if proven true, would constitute a violation of the Act.²²

Complainants have not alleged any facts that provide a sufficient basis for the Commission to find “reason to believe” that News for Democracy violated the Act or Commission regulations. Accordingly, the Commission must find no reason to believe a violation occurred and close the file.

Sincerely,



Ezra W. Reese
Katherine T. LaBeau
Counsel to News for Democracy

²¹ 52 U.S.C. § 30109(a)(2).

²² See 11 C.F.R. § 111.4(a), (d); FEC MUR 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas, at 1.