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**Christal  
Dennis**

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February 14, 2020

**VIA E-MAIL**  
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Jeff S. Jordan, Esq.  
Assistant General Counsel  
Complaints Examination & Legal Administration  
Federal Election Commission  
1050 First Street, NE  
Washington, D.C. 20463

**Re: MUR 7666**

Dear Mr. Jordan:

We write as counsel to Peters for Michigan (“the Committee”) and Geraldine Buckles, in her official capacity as Treasurer (collectively, “Respondents”) in response to the Complaint filed by the Foundation for Accountability and Civic Trust (“FACT”) on December 5, 2019 and the Supplement filed on December 23, 2019, alleging a violation of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Federal Election Commission (“FEC” or the “Commission”) regulations.

The Complaint falsely alleges that Respondents engaged in prohibited coordination with VoteVets Action Fund in connection with two advertisements that feature Senator Peters. The only factual basis for this allegation is that the two advertisements include photographs and short clips of b-roll footage of Senator Peters and reference facts about Senator Peters’s service with the military and record as a Senator which were also posted on the Committee’s publicly available website. As FACT is well aware, the Commission has repeatedly made clear that such activity does not constitute “coordination” for purposes of the Act. As the Complaint does not allege any additional facts to demonstrate that coordination took place, and because no coordination took place, the Commission should find no reason to believe that Respondents violated the Act or FEC regulations and should dismiss the Complaint.

The Supplement consists of a cover letter and a copy of the complaint submitted by FACT in MUR 7675, which similarly falsely alleges that Respondents engaged in prohibited coordination with Majority Forward in connection with a Facebook advertisement featuring Senator Peters. To the extent that the Commission considers the Supplement in its decision on MUR 7666, we request that the Commission also consider the Committee’s response to MUR 7675 which was filed with the Commission on February 13, 2020 and a copy of which has been attached here as Exhibit A.

## FACTUAL BACKGROUND

Senator Gary Peters is a member of the United States Senate and a candidate for U.S. Senate in Michigan in 2020.<sup>1</sup> Peters for Michigan, Senator Peters's principal campaign committee<sup>2</sup> maintains a publicly available website located at [www.petersformichigan.com](http://www.petersformichigan.com). The Committee uses this website to communicate information about Senator Peters to the general public.

VoteVets Action Fund is not a political action committee as the Complaint alleges.<sup>3</sup> VoteVets Action Fund is a non-profit organization organized under Section 501(c)(4) of the Internal Revenue Code.<sup>4</sup> VoteVets Action Fund was formed and operates completely separately from Senator Peters and the Committee.

## LEGAL ANALYSIS

The Complaint alleges that Respondents coordinated with VoteVets Action Fund on the production of two television advertisements. However, the Complaint does not provide any facts establishing that the advertisements are coordinated communications. A communication is a "coordinated communication" under 11 C.F.R. § 109.21 only if it satisfies all three prongs of the regulation: the payment prong, the content prong and the conduct prong. The Complaint fails to allege any facts that demonstrate that the content prong or the conduct prong were satisfied in connection with the referenced advertisement. As such, the Complaint fails to allege facts which, if true, would constitute a violation of the Act or FEC regulations and must be dismissed.<sup>5</sup>

### **A. The Complaint Alleges No facts that Establish that the Conduct Prong is Met**

The Complaint claims that the advertisements meet the conduct prong under 11 C.F.R. § 109.21(d)(1) because the Committee requested the advertisements through public postings on its website that state: "An Important Update[:] WHAT MICHIGANDERS NEED TO KNOW" and "What Michiganders from all parts of the state need to know."<sup>6</sup> This assertion is simply incorrect as a matter of law. The Commission's regulations, and the Commission's interpretation of those regulations on numerous occasions, make clear that communications appearing on a campaign's publicly available website are never sufficient to find that the conduct prong has been satisfied.

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<sup>1</sup> Gary Peters, FEC Form 2 - Statement of Candidacy (Jan. 16, 2020).

<sup>2</sup> Peters for Michigan, FEC Form 1 - Statement of Organization (Jan. 16, 2020).

<sup>3</sup> Complaint at 1.

<sup>4</sup> See IRS, VoteVets Action Fund Inc. EIN: 51-0596352 Copies of Returns, <https://apps.irs.gov/app/eos/displayAll.do?dispatchMethod=displayAllInfo&Id=256098&ein=510596352&country=US&deductibility=all&dispatchMethod=searchAll&isDescending=false&city=&ein1=51-0596352&postDateFrom=&exemptTypeCode=al&submitName=Search&sortColumn=orgName&totalResults=1&names=&resultsPerPage=25&indexOffFirstRow=0&postDateTo=&state=All+States>.

<sup>5</sup> See 11 C.F.R. § 111.4(a), (d); MUR 4960 (Clinton for U.S. Senate), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas at 1 (Dec. 21, 2000).

<sup>6</sup> See Complaint at 3, 4, 9.

As part of the revision of the coordination regulations in 2003, the Commission established that the conduct prong would be satisfied if a campaign made a “request or suggestion” that a third party disseminate a communication on its behalf.<sup>7</sup> In the accompanying Explanation and Justification, the Commission clarified that “[t]he ‘request or suggestion’ conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1).”<sup>8</sup> A request or suggestion made on a publicly available website simply does not satisfy the conduct prong.

The Commission subsequently confirmed that the use of publicly available information by a third party does not satisfy the conduct prong, noting that “[u]nder the new safe harbor, a communication created with information found, for instance, on a candidate’s or political party’s Web site, or learned from a public campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication.”<sup>9</sup>

The Commission has re-affirmed this basic principle through the enforcement process. In MUR 6821, the FEC dismissed a complaint that alleged that a coordinated communication occurred when Senate Majority PAC began to air advertisements with similar themes to those contained in a message posted on the publicly available website of Shaheen for Senate, the principal campaign committee of Senator Jeanne Shaheen. In finding that there was no reason to believe that any violation of the Act occurred, and dismissing the complaint, the Commission emphasized that “a communication resulting from a general request to the public or use of publicly available information, including information contained on a candidate’s campaign website, does not satisfy the conduct standards.”<sup>10</sup> Further, in MUR 7124, the Commission dismissed a complaint filed by FACT against Katie McGinty, a candidate for U.S. Senate. The complaint alleged that coordinated communications occurred when Women Vote! and Majority Forward paid to air three separate television advertisements supporting McGinty that contained themes similar to those posted on McGinty’s publicly available campaign site. The Commission voted 5-0 to dismiss the complaint and made clear once again that “the ‘request or suggestion’ ‘conduct’ standard refers to requests or suggestions ‘made to a select audience, but not those offered to the public generally’” and therefore a request that is posted on a web page that is available to the general public does not trigger the request or suggestion content standard.<sup>11</sup>

Here, as was the case in MUR 6821 and 7124, the message identified in the Complaint was posted on the publicly available website of the Committee. The message was accessible directly through a prominent link on the [www.petersformichigan.com](http://www.petersformichigan.com) homepage. Accordingly, the

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<sup>7</sup> 11 C.F.R. § 109.21(d)(1).

<sup>8</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

<sup>9</sup> Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

<sup>10</sup> See MUR 6821 (Shaheen for Senate), Factual and Legal Analysis at 8 (Dec. 2, 2015).

<sup>11</sup> MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 8-9 (May 4, 2017).

posting of content on Peters for Michigan’s publicly available site cannot be a basis to find that the advertisements at issue satisfy the conduct prong.

Perhaps because the complainant knows that a message on a public website is insufficient to establish coordination, the Complaint alleges that private communications must have occurred between the parties, claiming that “there must have been some other communications between outside organizations for both parties to know how the information would be formatted, i.e. make the request on a specific subpage of the campaign webpage, titled with specific language . . . The Peters’ campaign either asked how to format the request or was told of this method to make the request and assented to it.”<sup>12</sup> Yet, the Complaint provides absolutely no evidence or support for the assertion that any non-public communication occurred. The Commission dealt with similar baseless allegations from FACT regarding private communications in MUR 7124 and held that “similarities between [the campaign website] and the commercials and the timing and geographical placement of the commercials, are insufficient to show that any additional private communications occurred.”<sup>13</sup> Accordingly, the Complaint fails to allege any facts that if true demonstrate that the conduct prong of the Commission’s coordinated communication test is met.

#### **B. The Complaint Alleges No Facts that Establish that the Content Prong is Met**

The advertisements at issue also fail to meet the content prong under 11 C.F.R. § 109.21(c). A communication meets the content prong under 11 C.F.R. § 109.21(c) only if the communication, in relevant part: (i) is an “electioneering communication”; (ii) disseminates, distributes, or republishes campaign materials prepared by a candidate or the candidate’s authorized committee and is not subject to an applicable exception; (iii) expressly advocates the election or defeat of a clearly identified candidate or contains “the functional equivalent of express advocacy”; or (iv) refers to a clearly identified Senate candidate and is publicly distributed in the clearly identified candidate’s jurisdiction within 90 days of the candidate’s primary or general election.<sup>14</sup>

The two advertisements at issue—the advertisement entitled “Sen. Gary Peters Has Always Been There for Veterans” and the advertisement entitled “Raise”—do not satisfy any of those standards. The advertisements did not air 90 days or fewer before Senator Peters’s primary or general election for U.S. Senate in 2020 in Michigan. The advertisements are also not “electioneering communications.”<sup>15</sup> An electioneering communication is any broadcast, cable, or satellite communication that: (i) refers to a clearly identified candidate for federal office, (ii) is publicly distributed within 30 days before a primary election or 60 days before a general election for the office sought by the referenced candidate, and (iii) is targeted to the relevant electorate.<sup>16</sup> A communication must meet all three requirements to be considered an electioneering communication. Here, as these advertisements were not

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<sup>12</sup> Complaint at 9.

<sup>13</sup> MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 10 (May 4, 2017).

<sup>14</sup> 11 C.F.R. § 109.21(c).

<sup>15</sup> *Id.* § 100.29.

<sup>16</sup> *Id.*

distributed within 30 days of the primary election<sup>17</sup> or 60 days before the general election for U.S. Senate in Michigan,<sup>18</sup> these advertisements are not electioneering communications.

The advertisements do not contain any express advocacy for Senator Peters or against one of his opponents, nor is either ad the functional equivalent of express advocacy. A public communication is the functional equivalent of express advocacy only if “it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.”<sup>19</sup> Both advertisements end with a clear, non-electoral call to action that states “Call Gary Peters; Thank him for sponsoring the Securing America’s Ports of Entry Act; 202-224-6221.” The phone number provided in the advertisements is the phone number for Senator Peters official office. The only reasonable interpretation of these advertisements is as a call to action for viewers to call Senator Peters’s official office and thank him for his support of legislation. These advertisements have a clear non-electoral meaning and are therefore not the functional equivalent of express advocacy.

The advertisements also do not disseminate, distribute or republish campaign material within the scope of 11 C.F.R. § 109.21(c)(2). FEC regulations provide that the content prong is met if a communication “disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate’s authorized committee, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b).”<sup>20</sup> Under 11 C.F.R. § 109.23(b) the content prong is not met where: “[t]he campaign material used consists of a brief quote of materials that demonstrate a candidate’s position as part of a person’s expression of its own views.”<sup>21</sup>

In determining whether an entity has republished a candidate’s campaign materials under this regulatory standard, the Commission examines the degree of overlap between the two communications. The Commission has concluded that “mere thematic similarities between a candidate’s campaign materials and a third-party communication are insufficient to establish republication.”<sup>22</sup> Further, the Commission has consistently failed to find reason to believe that an advertisement that contains short snippets of b-roll video footage from a campaign has violated the Act or FEC regulations by disseminating, distributing, or republishing campaign material.<sup>23</sup>

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<sup>17</sup> Michigan’s primary for U.S. Senate is currently set for August 4, 2020. Michigan Sec’y of State, 2020 Michigan Election Dates 4, [https://www.michigan.gov/documents/sos/2020\\_Elec-Dates-Booklet\\_ED-12\\_10-09-19\\_668275\\_7.pdf](https://www.michigan.gov/documents/sos/2020_Elec-Dates-Booklet_ED-12_10-09-19_668275_7.pdf) (last visited Feb. 13, 2020).

<sup>18</sup> Michigan’s general election will be November 3, 2020. *Id.* at 5.

<sup>19</sup> 11 C.F.R. § 109.2(c)(5).

<sup>20</sup> *Id.* § 109.21(c)(2).

<sup>21</sup> *Id.* § 109.23(b)(4).

<sup>22</sup> MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 11 (May 4, 2017).

<sup>23</sup> *See, e.g.*, MUR 7432 (John James for Senate, et al.), Statement of Reasons, Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter (Aug. 30, 2019) (In MUR 7432 the Commission failed to find reason to believe a violation occurred when a 20 second advertisement produced by a PAC contained 6 seconds of video from a campaign’s ad. In the statement of reasons, two commissioners wrote that “our position on the Act’s republication provision has been consistent: ‘[It] is designed to capture situations where third parties [ ] subsidize a candidate’s

In MUR 6902, the Commission failed to find reason to believe a violation of the Act or FEC regulations occurred when an advertisement produced by an independent expenditure-only PAC contained video footage from a campaign committee's advertisement. In the statement of reasons for voting against such a finding, three Commissioners wrote that "republication requires more than respondents creating and paying for advertisements that incorporate as background footage brief segments of video footage posted on publicly accessible websites by authorized committees of federal candidates. Here, snippets of b-roll footage of federal candidates were incorporated into [ ] communication[s] in which [respondents] add[ed their] own text, graphics, audio, and narration to create [their] own message."<sup>24</sup> Similarly, in MUR 6357, the Commission failed to find reason to believe a violation occurred when American Crossroads, an independent expenditure-only PAC, used several clips of video footage posted online by the candidate or the candidate's committee amounting to 10-15 seconds in a 30 second ad.<sup>25</sup> Three commissioners stated that the use of campaign footage did not constitute republication because "the few fleeting images from [the campaign's] footage are incorporated into a communication in which American Crossroads adds its own text, graphics, audio, and narration to create its own message. [The advertisement] was neither in whole nor in substantial part [ ] anything close to a carbon copy of the [campaign's] footage."<sup>26</sup>

Along similar lines, the Commission has also failed to find reason to believe that an advertisement that incorporates a photo taken from a campaign's publicly available website violates the Act or FEC regulations by disseminating, distributing, or republishing campaign material.<sup>27</sup> For example, in MUR 5996 (Tim Bee), the Commission dismissed a complaint concerning whether the use of a candidate's head shot obtained from a campaign's publicly available website by an independent group in an ad constituted republication. In an accompanying statement of reasons, three Commissioners explained that the activity at issue was "not the type of 'republication of campaign materials' contemplated by the Act and Commission Regulations. The traditional type of republication involves the reprinting and dissemination of a candidate's mailers, brochures, yard signs, billboards, or posters—in other words, materials that copy and convey a campaign's message."<sup>28</sup>

Here, just as in the matters referenced above, the advertisement entitled "Sen. Gary Peters Has Always Been There for Veterans" only uses two photographs, each of which is only shown on screen for a few seconds, and two, three second snippets of b-roll footage from

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campaign by expending the destruction of communications whose content, format, and overall message are devised by the candidate. . . . [R]epublication requires more than respondents creating and paying for advertisements that incorporate as background footage brief segments of video footage posted on publicly accessible websites by authorized committees of federal candidates."").

<sup>24</sup> MURs 6603, 6777, 6801, 6870, 6902 (Al Franken for Senate 2014, et al.), Statement of Reasons, Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman (Dec. 17, 2015).

<sup>25</sup> MUR 6357 (American Crossroads), Factual and Legal Analysis, at 1-2, 6-7 (Feb. 22, 2012).

<sup>26</sup> MUR 6357 (American Crossroads), Statement of Reasons, Chair Caroline C. Hunter, Commissioners Donald F. McGahn and Matthew S. Petersen (Feb. 22, 2012).

<sup>27</sup> See MUR 5996 (Tim Bee).

<sup>28</sup> MUR 5996 (Tim Bee), Statement of Reasons, Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter, Commissioners Donald F. McGahn (Dec. 3, 2009).

the Committee’s public website. Similarly, the advertisement entitled “Raise” only incorporates two photographs, each of which is only shown on screen for a few seconds, and short snippets of b-roll footage from the Committee’s public website. Pursuant to established Commission precedent, this brief and sporadic incorporation of materials from the Committee’s public website does not amount to republication under 11 C.F.R. § 109.21(c)(2).

Moreover, although the Committee’s website and the advertisements share similar themes and similar language, it is clear that VoteVets Action Fund’s advertisements contain VoteVets Action Fund’s own words and reflect its own message. The Complaint provides six statements from the Committee’s publicly available website and compares them to six statements in the voiceover of the advertisement entitled “Sen. Gary Peters Has Always Been There for Veterans.”<sup>29</sup> Although the six statements shown in the Complaint are similar to statements on the Committee’s public website, the statements only overlap in theme, and are not carbon copies of each other. In MUR 7124, the Commission dealt with a similar complaint concerning the similarities in statements used in advertisements paid for by Women Vote! and Majority Forward and statements posted on Katie McGinty’s publicly available campaign site. The factual and legal analysis accompanying the Commission’s 5-0 vote to find no reason to believe that there was a violation of the Act explained that “the Commission has [ ] determined that a person may create a communication using sentences similar to those appearing in a campaign’s publications, so long as the sentences use different words or phrasings. . . .” and cited to previous MURs for the proposition that “similar sentences . . . do not rise to the level sufficient to indicate republication of campaign materials because of differences in wording or phrasing.”<sup>30</sup> Further, the analysis makes clear that even if an advertisement does use the same phrase as a campaign, it does not necessarily amount to a republication of campaign materials as in MUR 6592 “[t]he Commission determined that there was no republication when a person created ads repeating the same phrase used by a campaign because ‘the phrase [was] commonly used in political discourse, and the ads also contained significant additional language that differed from the campaign materials.’”<sup>31</sup>

Here, the statements used in the “Sen. Gary Peters Has Always Been There for Veterans” voiceover are not taken verbatim from the campaign’s website; the statements are similar to those posted on the Committee’s website, but they contain different words and phrasings. Additionally, both advertisements clearly present their own message as they both center on nonpolitical advocacy. Both advertisements end with a clear, non-electoral call to action that states “Call Gary Peters; Thank him for sponsoring the Securing America’s Ports of Entry Act; 202-224-6221.” The phone number provided in the advertisements is the phone number for Senator Peters official office. Accordingly, consistent with Commission’s longstanding

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<sup>29</sup> Complaint at 12.

<sup>30</sup> MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 11-12 (May 4, 2017) (citing to MUR 6592 (Nebraska Democratic State Central Committee) (May 4, 2017) (citing to MUR 6502 (Nebraska Democratic State Central Committee), Factual & Legal Analysis at 9 (citing MUR 2766 (Auto Dealers and Drivers for Free Trade PAC) for the proposition that “similar sentences . . . do not rise to the level sufficient to indicate republication of campaign materials because of differences in wording or phrasing.”)).

<sup>31</sup> *Id.*

interpretation of the regulation, the content prong is not met under the standard set forth in 11 C.F.R. § 109.21(c)(2).

Finally, even if VoteVets Action Fund did republish campaign materials in these advertisements, the Committee still did not receive or accept an in-kind contribution from VoteVets Action Fund. As explained by 11 C.F.R. § 109.23(a), “the candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21 . . .”<sup>32</sup> The Complaint does not allege any facts that, even if taken as true, establish that the Committee coordinated with VoteVets Action Fund on the advertisements at issue. Therefore, no in-kind contribution to the Committee would result, even if VoteVets Action Fund were to republish campaign materials.

### CONCLUSION

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.<sup>33</sup> 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.<sup>34</sup> Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.<sup>35</sup>

The Complaint has not alleged facts that provide a sufficient basis for the Commission to find “reason to believe” that the Act or Commission regulations have been violated. Respondents have not engaged in any prohibited coordination with VoteVets Action Fund, and VoteVets Action Fund did not republish the Committee’s campaign materials. Accordingly, the Commission must reject the Complaint’s request for an investigation. It should instead immediately dismiss the Complaint and close the file.

Very truly yours,



Marc E. Elias  
Jacquelyn K. Lopez  
Rebecca K. Mears  
Counsel to Respondents

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<sup>32</sup> 11 C.F.R. § 109.23(a).

<sup>33</sup> 52 U.S.C. § 30109(a)(2).

<sup>34</sup> See 11 C.F.R. § 111.4(a), (d); FEC Matter Under Review 4960 (Clinton for U.S. Senate), Statement of Reasons, Commissioners Mason, Sandstrom, Smith and Thomas at 1 (Dec. 21, 2000).

<sup>35</sup> *Id.*



# EXHIBIT A

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February 13, 2020

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FEC MAIL OFFICE  
2020 FEB 13 PM 4:11**Re: MUR 7675**

Dear Mr. Jordan:

We write as counsel to Peters for Michigan (“the Committee”) and Geraldine Buckles, in her official capacity as Treasurer (collectively, “Respondents”) in response to the Complaint filed by the Foundation for Accountability and Civic Trust (“FACT”) on December 23, 2019, alleging a violation of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Federal Election Commission (“FEC” or the “Commission”) regulations.

The Complaint falsely alleges that Respondents engaged in prohibited coordination with Majority Forward in connection with an advertisement that features Senator Gary Peters. The only factual basis for this allegation is that the advertisement includes short b-roll video clips of Senator Peters and references facts about Senator Peters’s record as a Senator which were also posted on the Committee’s publicly available website. As FACT is well aware, the Commission has repeatedly made clear that such activity does not constitute “coordination” for purposes of the Act. As the Complaint does not allege any additional facts to demonstrate that coordination took place, and because no coordination took place, the Commission should find no reason to believe that Respondents violated the Act or FEC regulations and should dismiss the Complaint.

**FACTUAL BACKGROUND**

Senator Gary Peters is a member of the United States Senate and a candidate for U.S. Senate in Michigan in 2020.<sup>1</sup> Peters for Michigan, Senator Peters’s principal campaign committee<sup>2</sup> maintains a publicly available website located at [www.petersformichigan.com](http://www.petersformichigan.com). The Committee uses this website to communicate information about Senator Peters to the general public.

<sup>1</sup> Gary Peters, FEC Form 2 - Statement of Candidacy (Jan. 16, 2020).

<sup>2</sup> Peters for Michigan, FEC Form 1 - Statement of Organization (Jan. 16, 2020).

Majority Forward is a non-profit organization organized under Section 501(c)(4) of the Internal Revenue Code and was incorporated in the District of Columbia. Majority Forward was formed and operates completely separately from Senator Peters and the Committee.

## LEGAL ANALYSIS

The Complaint alleges that Respondents coordinated with Majority Forward in the production of a Facebook advertisement. However, the Complaint does not provide any facts establishing that the advertisement was a coordinated communication. A communication is a “coordinated communication” under 11 C.F.R. § 109.21 only if it satisfies all three prongs of the regulation: the payment prong, the content prong and the conduct prong. The Complaint fails to allege any facts that demonstrate that the content prong or the conduct prong were satisfied in connection with the referenced advertisement. As such, the Complaint fails to allege facts which, if true, would constitute a violation of the Act or FEC regulations and must be dismissed.<sup>36</sup>

### **A. The Complaint Alleges No facts that Establish that the Conduct Prong is Met**

The Complaint claims that the advertisement meets the conduct prong under 11 C.F.R. § 109.21(d)(1) because the Committee requested the advertisement through public postings on its website that state: “An Important Update[:] WHAT MICHIGANDERS NEED TO KNOW” and “What Michiganders from all parts of the state need to know.”<sup>37</sup> This assertion is simply incorrect as a matter of law. The Commission’s regulations, and the Commission’s interpretation of those regulations on numerous occasions, make clear that communications appearing on a campaign’s publicly available website are never sufficient to find that the conduct prong has been satisfied.

As part of the revision of the coordination regulations in 2003, the Commission established that the conduct prong would be satisfied if a campaign made a “request or suggestion” that a third party disseminate a communication on its behalf.<sup>38</sup> In the accompanying Explanation and Justification, the Commission clarified that “[t]he ‘request or suggestion’ conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1).”<sup>39</sup> A request or suggestion made on a publicly available website simply does not satisfy the conduct prong.

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<sup>36</sup> See 11 C.F.R. § 111.4(a), (d); MUR 4960 (Clinton for U.S. Senate), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas at 1 (Dec. 21, 2000).

<sup>37</sup> See Complaint at 3, 4, 9.

<sup>38</sup> 11 C.F.R. § 109.21(d)(1).

<sup>39</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

The Commission subsequently confirmed that the use of publicly available information by a third party does not satisfy the conduct prong, noting that “[u]nder the new safe harbor, a communication created with information found, for instance, on a candidate’s or political party’s Web site, or learned from a public campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication.”<sup>40</sup>

The Commission has re-affirmed this basic principle through the enforcement process. In MUR 6821, the FEC dismissed a complaint that alleged that a coordinated communication occurred when Senate Majority PAC began to air an advertisement with similar themes to those contained in a message posted on the publicly available website of Shaheen for Senate, the principal campaign committee of Senator Jeanne Shaheen. In finding that there was no reason to believe that any violation of the Act occurred, and dismissing the complaint, the Commission emphasized that “a communication resulting from a general request to the public or use of publicly available information, including information contained on a candidate’s campaign website, does not satisfy the conduct standards.”<sup>41</sup> Further, in MUR 7124, the Commission dismissed a complaint filed by FACT against Katie McGinty, a candidate for U.S. Senate. The complaint alleged that coordinated communications occurred when Women Vote! and Majority Forward paid to air three separate television advertisements supporting McGinty that contained themes similar to those posted on McGinty’s publicly available campaign site. The Commission voted 5-0 to dismiss the complaint and made clear once again that “the ‘request or suggestion’ ‘conduct’ standard refers to requests or suggestions ‘made to a select audience, but not those offered to the public generally’” and therefore a request that is posted on a web page that is available to the general public does not trigger the request or suggestion content standard.<sup>42</sup>

Here, as was the case in MUR 6821 and 7124, the message identified in the Complaint was posted on the publicly available website of the Committee. The message was accessible directly through a prominent link on the [www.petersformichigan.com](http://www.petersformichigan.com) homepage. Accordingly, the posting of content on Peters for Michigan’s publicly available site cannot be a basis to find that the Majority Forward advertisement at issue satisfies the conduct prong.

Perhaps because the complainant knows that a message on a public website is insufficient to establish coordination, the Complaint alleges that private communications must have occurred between the parties, claiming that “there must have been some other communications between outside organizations for both parties to know how the information would be formatted, i.e. make the request on a specific subpage of the campaign webpage, titled with specific language . . . The Peters’ campaign either asked how to format the request or was told of this method to make the request and assented to it.”<sup>43</sup> Yet, the Complaint provides absolutely no evidence or support for the assertion that any non-public communication occurred. The Commission dealt with similar baseless allegations from FACT regarding private communications in MUR 7124 and held that “similarities between [the campaign website] and the commercials and the timing

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<sup>40</sup> Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

<sup>41</sup> See MUR 6821 (Shaheen for Senate), Factual and Legal Analysis at 8 (Dec. 2, 2015).

<sup>42</sup> MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 8-9 (May 4, 2017).

<sup>43</sup> Complaint at 9.

and geographical placement of the commercials, are insufficient to show that any additional private communications occurred.”<sup>44</sup> Accordingly, the Complaint fails to allege any facts that if true demonstrate that the conduct prong of the Commission’s coordinated communication test is met.

### **B. The Complaint Alleges No Facts that Establish that the Content Prong is Met**

The advertisement at issue also fails to meet the content prong under 11 C.F.R. § 109.21(c). A communication meets the content prong under 11 C.F.R. § 109.21(c) only if the communication, in relevant part: (i) is an “electioneering communication”; (ii) disseminates, distributes, or republishes campaign materials prepared by a candidate or the candidate’s authorized committee and is not subject to an applicable exception; (iii) expressly advocates the election or defeat of a clearly identified candidate or contains “the functional equivalent of express advocacy”; or (iv) refers to a clearly identified Senate candidate and is publicly distributed in the clearly identified candidate’s jurisdiction within 90 days of the candidate’s primary or general election.<sup>45</sup>

The Facebook advertisement at issue does not satisfy any of those standards. The advertisement did not air 90 days or fewer before Senator Peters’s primary or general election for U.S. Senate in 2020 in Michigan and is not an “electioneering communication.”<sup>46</sup> The advertisement does not contain any express advocacy for Senator Peters or against one of his opponents, nor is it the functional equivalent of express advocacy. A public communication is the functional equivalent of express advocacy only if “it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.”<sup>47</sup> The Facebook advertisement at issue ends with a clear, non-electoral call to action that states “Call Gary Peters; Thank him for sponsoring the Securing America’s Ports of Entry Act; 202-224-6221.” The phone number provided in the advertisement is the phone number for Senator Peters’s official office. The only reasonable interpretation of the advertisement is as a call to action for viewers to call Senator Peters’s official office and thank him for his support of the legislation. The advertisement has a clear non-electoral meaning and is therefore not the functional equivalent of express advocacy.

The advertisement also does not disseminate, distribute or republish campaign material within the scope of 11 C.F.R. § 109.21(c)(2). FEC regulations provide that the content prong is met if a communication “disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate’s authorized committee, unless the dissemination, distribution, or republication is excepted under 11 CFR 109.23(b).”<sup>48</sup>

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<sup>44</sup> MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 10 (May 4, 2017).

<sup>45</sup> 11 C.F.R. § 109.21(c).

<sup>46</sup> *Id.* § 100.29 (defining an “electioneering communication” to only include a communication over broadcast, cable or satellite).

<sup>47</sup> 11 C.F.R. § 109.2(c)(5).

<sup>48</sup> *Id.* § 109.21(c)(2).

Under 11 C.F.R. § 109.23(b) the content prong is not met where: “[t]he campaign material used consists of a brief quote of materials that demonstrate a candidate’s position as part of a person’s expression of its own views.”<sup>49</sup>

In determining whether an entity has republished a candidate’s campaign materials under this regulatory standard, the Commission examines the degree of overlap between the two communications. The Commission has concluded that “mere thematic similarities between a candidate’s campaign materials and a third-party communication are insufficient to establish republication.”<sup>50</sup> According to the Commission “similar sentences . . . do not rise to the level sufficient to indicate republication of campaign materials because of differences in wording or phrasing.”<sup>51</sup>

Further, the Commission has consistently failed to find reason to believe that an advertisement that contains short snippets of b-roll video footage from a campaign has violated the Act or FEC regulations by disseminating, distributing, or republishing campaign material.<sup>52</sup> In MUR 6902, the Commission failed to find reason to believe a violation of the Act or FEC regulations occurred when an advertisement produced by an independent expenditure-only PAC contained video footage from a campaign committee’s advertisement. In the statement of reasons for voting against such a finding, three Commissioners wrote that “republication requires more than respondents creating and paying for advertisements that incorporate as background footage brief segments of video footage posted on publicly accessible websites by authorized committees of federal candidates. Here, snippets of b-roll footage of federal candidates were incorporated into [] communication[s] in which [respondents] add[ed their] own text, graphics, audio, and narration to create [their] own message.”<sup>53</sup> Similarly, in MUR 6357, the Commission failed to find reason to believe a violation occurred when American Crossroads, an independent expenditure-only PAC, used several clips of video footage posted online by the candidate or the candidate’s committee amounting to 10-15 seconds in a 30 second ad.<sup>54</sup> Three

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<sup>49</sup> *Id.* § 109.23(b)(4).

<sup>50</sup> MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 11 (May 4, 2017).

<sup>51</sup> *Id.* at 10 (citing to MUR 6502 (Nebraska Democratic State Central Committee), Factual & Legal Analysis at 9 (citing MUR 2766 (Auto Dealers and Drivers for Free Trade PAC) for the proposition that “similar sentences . . . do not rise to the level sufficient to indicate republication of campaign materials because of differences in wording or phrasing.”)).

<sup>52</sup> *See, e.g.*, MUR 7432 (John James for Senate, et al.), Statement of Reasons, Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter (Aug. 30, 2019) (In MUR 7432 the Commission failed to find reason to believe a violation occurred when a 20 second advertisement produced by a PAC contained 6 seconds of video from a campaign’s ad. In the statement of reasons, two commissioners wrote that “our position on the Act’s republication provision has been consistent: “[It] is designed to capture situations where third parties [] subsidize a candidate’s campaign by expending the destruction of communications whose content, format, and overall message are devised by the candidate. . . . [R]epublication requires more than respondents creating and paying for advertisements that incorporate as background footage brief segments of video footage posted on publicly accessible websites by authorized committees of federal candidates.”).

<sup>53</sup> MURs 6603, 6777, 6801, 6870, 6902 (Al Franken for Senate 2014, et al.), Statement of Reasons, Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman (Dec. 17, 2015).

<sup>54</sup> MUR 6357 (American Crossroads), Factual and Legal Analysis, at 1-2, 6-7 (Feb. 22, 2012).

commissioners stated that the use of campaign footage did not constitute republication because “the few fleeting images from [the campaign’s] footage are incorporated into a communication in which American Crossroads adds its own text, graphics, audio, and narration to create its own message. [The advertisement] was neither in whole nor in substantial part [ ] anything close to a carbon copy of the [campaign’s] footage.”<sup>55</sup>

Here, just as in the matters referenced above, Majority Forward’s advertisement only uses brief snippets of b-roll footage from the Committee’s publicly available website. Moreover, although the Committee’s website and the advertisement share similar themes, it is clear that Majority Forward’s advertisement contains its own words and reflects its own message. Indeed, Majority Forward’s advertisement centers around nonpolitical issue advocacy. Rather than ask individuals to vote for Senator Peters, Majority Forward’s advertisement asks individuals to call Senator Peters to thank him for sponsoring the Securing America’s Ports of Entry Act. Accordingly, consistent with Commission’s longstanding interpretation of the regulation, the conduct prong is not met under the standard set forth in 11 C.F.R. § 109.21(c)(2).

Finally, even if Majority Forward did republish campaign materials in the advertisement, the Committee still did not receive or accept an in-kind contribution from Majority Forward. As explained by 11 C.F.R. § 109.23(a), “the candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 CFR 109.21 . . .”<sup>56</sup> The Complaint does not allege any facts that, even if taken as true, establish that the Committee coordinated with Majority Forward on the Facebook advertisement at issue. Therefore, no in-kind contribution to the Committee would result, even if Majority Forward were to republish campaign materials.

## CONCLUSION

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.<sup>57</sup> 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.<sup>58</sup> Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.<sup>59</sup>

The Complaint has not alleged facts that provide a sufficient basis for the Commission to find “reason to believe” that the Act or Commission regulations have been violated. Accordingly,

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<sup>55</sup> MUR 6357 (American Crossroads), Statement of Reasons, Chair Caroline C. Hunter, Commissioners Donald F. McGahn and Matthew S. Petersen (Feb. 22, 2012).

<sup>56</sup> 11 C.F.R. § 109.23(a).

<sup>57</sup> 52 U.S.C. § 30109(a)(2).

<sup>58</sup> See 11 C.F.R. § 111.4(a), (d); MUR 4960 (Clinton for U.S. Senate), Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas at 1 (Dec. 21, 2000).

<sup>59</sup> *Id.*

the Commission must reject the Complaint's request for an investigation. It should instead immediately dismiss the Complaint and close the file.

Very truly yours,

A handwritten signature in blue ink, appearing to be "M. Elias", written over a horizontal line.

Marc E. Elias  
Jacquelyn K. Lopez  
Rebecca K. Mears  
Counsel to Respondents