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March 13, 2020

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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 7682

Dear Mr. Jordan:

We write as counsel to Save America Fund and Edward Galvin, in his official capacity as Treasurer (“**Respondents**”), in response to the Complaint filed by J. McCauley Brown, the chair of the Republican Party of Kentucky on January 21, 2020. The Complaint alleges that Amy McGrath For Senate, its treasurer Chris Patton, and Amy McGrath’s campaign manager, Mark Nickolas, violated the Federal Election Campaign Act of 1971, as amended (the “**Act**”), and Federal Election Commission (“**FEC**” or the “**Commission**”) regulations.

At no point does the Complaint allege that Respondents violated the Act or Commission regulations. Accordingly, the Commission should dismiss the Complaint with respect to the Respondents. Moreover, though ultimately irrelevant to Respondents, the Complaint also fails to allege facts which, if true, would demonstrate that Ms. McGrath or her agents solicited “soft money” in violation of the Act or Commission regulations.

FACTUAL BACKGROUND

Amy McGrath is a candidate for U.S. Senate in Kentucky and Amy McGrath For Senate is her principal campaign committee. Mark Nickolas is Ms. McGrath’s campaign manager.¹

Save America Fund is a federal Super PAC.² Fire Mitch Save America is a project of Save America Fund. Save America Fund operates independently from Ms. McGrath’s campaign.

¹ See Matt Stevens, *Amy McGrath Raises \$2.5 Million in First Day of Kentucky Senate Bid*, N.Y. Times (July 10, 2019), <https://www.nytimes.com/2019/07/10/us/politics/amy-mcgrath-2020.html>.

² Save America Fund, FEC Form 1 - Statement of Organization (Jan. 6, 2020), <https://docquery.fec.gov/pdf/608/202001069167021608/202001069167021608.pdf>.

LEGAL ANALYSIS

A. The Complaint Does Not Allege that Respondents Violated the Act or FEC Regulations

A complaint against a respondent must be dismissed unless it pleads “sufficient specific facts, which, if proven true, would constitute a violation of the [Act]” by the respondent.³ While the Complaint refers to Save America Fund, it does not name Save America Fund as a respondent in the matter nor does it allege that Respondents violated the Act or FEC regulations.

The Complaint alleges a violation of 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 300.61, which prohibit federal officeholders, candidates, and their agents from soliciting funds in connection with a federal election that do not comply with federal source restrictions, amount limits, or reporting requirements. These restrictions do *not* apply to Save America Fund. The Commission has explained that “it is clear that under *Citizens United*, [Super PACs] may accept unlimited contributions from individuals, corporations, and labor organizations; however, the Act’s solicitation restrictions remain applicable to contributions solicited by Federal candidates, officeholders, and national party committees and their agents.”⁴ Save America Fund is a Super PAC. It is not a federal officeholder, candidate, or agent thereof. The Complaint does not allege otherwise. The restrictions set forth in 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 300.61, therefore, do not apply to Save America Fund.

Because Save America Fund is not subject to the statutory and regulatory provisions cited by the Complaint as having been violated and because the Complaint does not allege facts showing that any other statutory or regulatory provision has been violated, the Complaint must be dismissed with respect to Respondents.

B. The Complaint Fails to Allege Facts that Establish that Amy McGrath or Her Agents Violated the Act

Though ultimately irrelevant to Respondents, the Complaint also fails to allege facts which, if true, would demonstrate that Ms. McGrath or her agents solicited “soft money” in violation of the Act or Commission regulations. Federal law provides that federal officeholders, candidates, and their agents may not “solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.”⁵ The term “solicit” means “a *clear message* asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value.”⁶ Whether a communication is considered to be a solicitation depends on how it is “reasonably understood in the context in which it is made . . . includ[ing] the conduct of persons involved in the

³ Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas, Matter Under Review 4960 (Clinton for U.S. Exploratory Committee) (Dec. 21, 2000).

⁴ FEC Adv. Op. 2011-12 (Majority PAC *et al.*) at 4.

⁵ 52 U.S.C. § 30125(e)(1)(A)

⁶ 11 C.F.R. § 300.2(m) (emphasis added).

communication.”⁷ “The test is objective, and does not turn on the subjective interpretations of the speaker or the recipient.”⁸ Furthermore, a solicitation “does not include mere statements of political support”⁹

The Complaint alleges that two statements by Mr. Nickolas violated the Act. *First*, a McClatchy reporter appears to have asked Mr. Nickolas whether the formation of Save America Fund “signal[s] that McGrath has the support of the Kentucky Democratic establishment.”¹⁰ In response, Mr. Nickolas responded, “I think the signal is for people who are interested in contributing beyond the legal limits, they should have confidence to contribute to the Super PAC.”¹¹ *Second*, Politico quoted Mr. Nickolas as saying: “[t]his is a big deal that Eric [Hyers] will lead this effort, given his recent success in ousting the other unpopular Republican in Kentucky in a race that many didn’t think was winnable. He knows the electorate better than anyone. We very strongly encourage donors to give to [Save America Fund].”¹²

The Complaint relies heavily on the first statement, asserting that “Nickolas expressly asks donors to give funds ‘beyond the legal limits.’”¹³ But that is *not* the most reasonable interpretation of Mr. Nickolas’ statement. Instead, Mr. Nickolas appears to have been responding to a reporter’s question regarding the *political* significance of the PAC’s formation. The reporter had suggested that the PAC’s formation signaled that Ms. McGrath “ha[d] the support of the Kentucky Democratic establishment.” Mr. Nickolas simply disagreed with the reporter’s political judgment and suggested that the PAC’s formation had a different meaning.

This statement is too ambiguous to constitute a “solicitation,” let alone a solicitation for funds in excess of federal source restrictions or amount limits. The Commission’s regulations are clear that a solicitation occurs only when there is “a *clear message* asking, requesting, or recommending that another person make a contribution”¹⁴ The Commission has rejected complaints alleging an impermissible solicitation of soft money where the statement in question, like this one, does not *clearly* ask, request, or recommend that another person make a contribution.¹⁵ The statement attributed to Mr. Nickolas lacks the normal indicia of a solicitation. For instance, “the statement does not ‘provide[] a method of making a contribution . . . [such as] providing a separate card, envelope, or reply device’; did not ‘provide[] instructions on how or

⁷ *Id.* (emphasis added).

⁸ FEC MUR 7135 (Donald J. Trump for President Inc., *et al.*), Statement of Reasons of Chair Caroline C. Hunter and Commissioner Matthew S. Petersen at 2 (Sept. 6, 2018).

⁹ 11 C.F.R. § 300.2(m).

¹⁰ Daniel Desrochers, *Former Andy Beshear Staffer Forms Super PAC to Raise Money for Amy McGrath*, McClatchy DC (Jan. 7, 2020), <https://www.mcclatchydc.com/news/politics-government/election/article239012218.html>.

¹¹ *Id.*

¹² Zach Montellaro, *The Democratic Debate Squeeze*, Politico (Jan. 7, 2020), <https://www.politico.com/newsletters/morning-score/2020/01/07/the-democratic-debate-squeeze-784121>.

¹³ Compl. at ¶ 36.

¹⁴ 11 C.F.R. § 300.2(m) (emphasis added).

¹⁵ FEC MUR 7135 (Donald J. Trump for President Inc., *et al.*), Statement of Reasons of Chair Caroline C. Hunter and Commissioner Matthew S. Petersen (Sept. 6, 2018), at 3 (a “solicitation must always be ‘clear,’ but especially so when the solicitation does not mention parties or candidates and does not overtly ask for money.”).

where to send contributions’; and did not ‘identif[y] a Web address where the Web page displayed is specifically dedicated to facilitating the making of a contribution.’”¹⁶ Standard political bantering with a reporter is simply not a “solicitation” under the Commission’s regulations.

But even if the statement did constitute a “solicitation,” Mr. Nickolas did not solicit funds in excess of \$5,000 or from a federally prohibited source. Mr. Nickolas’ reference to “contributing beyond the legal limits” appears to be referring to the limits to *the McGrath campaign* (\$2,800 per election per individual or \$5,000 per election per multi-candidate PAC) rather than the amounts that Ms. McGrath or her agents could permissibly solicit on behalf of Save America Fund. The Complaint’s allegation that “contributing beyond the legal limits” refers to what Mr. Nickolas could permissibly solicit for the PAC is unpersuasive, given that *contributors are not subject to legal limits when contributing to Save America Fund*. The reference to “legal limits,” therefore, must have been referring to the contribution limits to the McGrath campaign. Mr. Nickolas’ statement did not violate the Act.

Likewise, the second statement attributed to Mr. Nickolas does not violate the Act. Most of the statement merely expresses support and admiration for Save America Fund’s founder, Mr. Hyers, based on his successful stewardship of Andy Beshear’s gubernatorial campaign in 2019. The Complaint alleges that Save America Fund’s use of Mr. Nickolas’ quote – including the final sentence – on a contribution page means that Mr. Nickolas impermissibly solicited soft money. But Save America Fund’s decision to use Mr. Nickolas’ quote on its website cannot be fairly attributed to Mr. Nickolas. The Commission has never found that a Super PAC’s independent use of a publicly available statement by a campaign manager constitutes an impermissible solicitation by the campaign manager. Nor do the enumerated examples of a “solicitation” set forth in the Commission’s regulations identify any communications made to a reporter, as opposed to prospective donors.¹⁷

But even if the second statement constituted a “solicitation,” the Complaint fails to marshal any evidence that Mr. Nickolas impermissibly solicited *soft money* funds. A general solicitation that does not specify a contribution level is *not* a solicitation of soft money funds.¹⁸ Moreover, Exhibits 3 and 4 to the Complaint show online fundraising pages that solicit up to \$5,000 – the amount that Ms. McGrath and her agents may permissibly solicit.¹⁹ Save America Fund’s

¹⁶ *Id.* at 5 (citing 11 C.F.R. § 300.2(m)(1)).

¹⁷ *See* 11 C.F.R. § 300.2(m)(2).

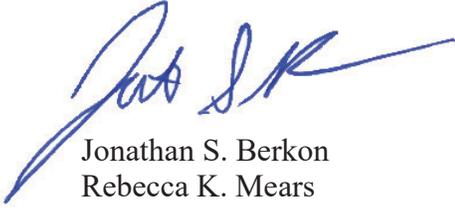
¹⁸ *See* FEC MUR 7135 (Donald J. Trump for President Inc., *et al.*), Statement of Reasons of Chair Caroline C. Hunter and Commissioner Matthew S. Petersen (Sept. 6, 2018), at 6 (“there are no facts that indicate he made a solicitation – assuming that he made a solicitation – of amounts in excess of the amount limitations or outside the source prohibitions of the Act.”). The Commission’s published guidance warning against soft money solicitations does not explicitly bar general solicitations that do not specify a contribution amount. *See* FEC, *Fundraising by Federal Candidates and Officeholders for Other Candidates and Committees* (Nov. 28, 2017), <https://www.fec.gov/updates/fundraising-federal-candidates-and-officeholders-other-candidates-and-committees-2017/>.

¹⁹ Compl. at Exs. 3-4. The Complaint includes screenshots of online fundraising pages where the *Complainant* had manually entered \$100,000 in the amount field. This deceptive exercise is functionally meaningless. There is no record that Complainant attempted to contribute – or, in fact, contributed – \$100,000.

website includes the following disclaimer: “Contributions or gifts to Save America Fund are not tax deductible. On this page, we are soliciting contributions up to \$5,000 from federally permissible sources.”²⁰ Save America Fund’s Act Blue page includes the following disclaimer: “On this page, we are soliciting contributions up to \$5,000 from federally permissible sources.”²¹ The Complaint does not identify any solicitation of funds in excess of \$5,000 or from federally prohibited sources, which were paired with Mr. Nickolas’ statement.

The Commission should immediately dismiss the Complaint and close the file.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jonathan S. Berkon". The signature is stylized and fluid, with a long horizontal stroke extending to the right.

Jonathan S. Berkon
Rebecca K. Mears
Counsel to Respondents

²⁰ Fire Mitch Save America, <https://www.firemitschsaveamerica.com/> (last visited Mar. 13, 2020).

²¹ Fire Mitch Save America ActBlue Page, <https://secure.actblue.com/donate/firemitschsaveamerica?refcode=website> (last visited Mar. 13, 2020).