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March 19, 2020

Mr. Jeff S. Jordan
Assistant General Counsel
Office of Complaints Examination
and Legal Administration
Federal Election Commission
1050 First Street, N.E.
Washington, D.C. 20463Re: MUR 7682 Respondents Amy McGrath for Senate, Inc., Chris Patton, treasurer, and
Mark Nickolas

Dear Mr. Jordan:

We are writing on behalf of Amy McGrath for Senate, Inc., Chris Patton, in his official capacity as Treasurer (“the Committee”) and Mark Nickolas in response to a complaint filed by the chair of the Republican Party of Kentucky alleging that Mr. Nickolas solicited prohibited contributions when he spoke separately to two reporters.

Mr. Nickolas did not solicit prohibited contributions when he spoke to reporters for the stories written, edited, and controlled by others.

Because there was no violation of the Federal Election Campaign Act of 1971, as amended (the “Act”) or the Federal Election Commission’s regulations, the Committee and Mr. Nickolas respectfully request that the Commission find “no reason to believe” and close this matter.

1. *Lexington Herald Leader*

The first story at issue in this matter appeared in the *Lexington Herald Leader* on January 7, 2020 and was written by Daniel Desrochers.¹

Mr. Desrochers opened his story about the formation of a new Super PAC writing that it “signal[ed] support for McGrath from the Kentucky Democratic establishment....”

¹ Daniel Desrochers, *Former Andy Beshear Staffer Forms Super PAC To Raise Money for Amy McGrath*, LEXINGTON HERALD LEADER (Jan. 7, 2020), <https://www.kentucky.com/news/politics-government/article239012218.html>;

The reporter interviewed at least three people for his story – the person running the Super PAC, Senator Mitch McConnell’s campaign manager, and Amy McGrath’s campaign manager, Mark Nickolas.

Mr. Desrochers selected a quote from his interview with Mr. Nickolas relating back to the opening of his story. Mr. Nickolas was quoted as saying, “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.”

Mr. Nickolas’s answers to a reporter’s question for a story that he does not control does not meet the definition of “to solicit” under the Commission’s regulations.

“**To solicit**” means “an oral or written communication that, construed *as reasonably understood in the context in which it is made*, contains a clear message asking, requesting, or recommending that *another person* make a contribution ...” The context includes the conduct of the persons involved in the communication. A solicitation does not include mere statements of political support ...”²

The test for determining whether a solicitation has been made is objective focusing “on the communications in context, and does not turn on subjective interpretations by the person making the communication or its recipient.”³

The context of the statement made by Mr. Nickolas is important here. The statement was made in response to a question from a reporter — not independently by Mr. Nickolas to potential donors at a fundraising event, political rally, or on a phone call or email where he controlled the content.

Furthermore, Mr. Nickolas made a series of on-the-record statements to the reporter and did not know which statements would be used in the article. To be sure, Mr. Nickolas was not soliciting Mr. Desrochers for contributions to Save America Fund; he was merely responding to the reporters’ questions about the significance of Mr. Hyers running an independent expenditure entity in Kentucky after successfully running the Kentucky Governor’s campaign last year. It is not reasonable to conclude that statements made in response to questions from reporters are solicitations.

Commission regulations provide for specific indicia that automatically turn a statement into a solicitation, such as providing a “method of making a contribution ..., instructions on how or where to send contributions . . .”, or identifying a donation page for the PAC.⁴ The statement made by Mr. Nickolas did not contain any of those details.

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

³ *Explanation and Justification for Definition of “Solicit”*, 71 Fed. Reg. 13926, 13928 (Mar. 20, 2006).

⁴ 11 C.F.R. § 300.2(m)(1).

Additionally, the Commission regulations provide several examples of statements that constitute solicitations — all of which are in the context of conversations directly with potential donors, not general statements made to a reporter or other third party.⁵

Even the examples of what is NOT a solicitation are in contexts where the speaker is addressing potential supporters.⁶ To extend the definition of solicitation to include conversations between campaign staff and reporters is an overreach. Rather, these statements should be construed to be “mere statements of political support” by Mr. Nickolas, which are not solicitations.⁷

2. *Politico*

The second story at issue appeared in *Politico* on January 7, 2020 and was written by Zach Montellaro.⁸

In the short piece, Mr. Montellaro quoted Mr. Nickolas as saying: “We very strongly encourage donors to give to Eric’s group.”

First, as discussed in detail above, in the context of a person simply talking to a reporter, the Commission’s definition of “to solicit” is not met.

Second, this quote is a general statement to a reporter, not a solicitation of funds above the federal limits or from prohibited sources.⁹

Campaign staff may solicit up to \$5,000 per calendar year from individuals for federal PACs that make independent expenditures supporting the candidate or opposing her opponent.¹⁰

Finally, speaking to a reporter is not the same as speaking at a “fundraising event” where a “clear and conspicuous written notice” or “oral statement” is required to inform the participants, at the fundraising event, that the Federal candidate’s agent is not soliciting funds from prohibited Federal sources or above the Federal limitations.¹¹

Mr. Nickolas was not required to make the disclaimer statement to the reporter because he was not participating in a “fundraising event.”

The *Politico* quote is not a solicitation of prohibited funds.

⁵ 11 C.F.R. § 300.2(m)(2).

⁶ See generally, 11 C.F.R. § 300.2(m)(3).

⁷ 11 C.F.R. § 300.2(m).

⁸ Zach Montellaro, *Morning Score*, POLITICO (Jan. 7, 2020) <https://www.politico.com/newsletters/morning-score/2020/01/07/the-democratic-debate-squeeze-784121>.

⁹ See, 52 U.S.C. § 30125(e)(1)A); 11 C.F.R. § 300.61.

¹⁰ Federal Election Commission, Advisory Opinion 2011-12 at 4 (Majority PAC and House Majority PAC); Advisory Opinion 2007-05 (Iverson). See 52 U.S.C. § 30125(e)(1).

¹¹ 11 C.F.R. § 300.64(b).

3. There was no knowing and willful violation

For the reasons discussed above, Mr. Nickolas's conversations with reporters did not meet the definition of "to solicit" and there was no solicitation of prohibited funds.

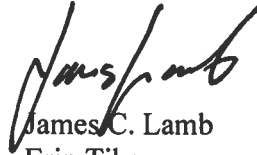
The Complainants' assertion that any potential violation was made knowingly and willfully based merely on the fact that Mr. Nickolas has worked on former federal campaigns is insufficient to establish any reasonable basis for finding a knowing and willful violation, which requires that an individual did "not act through ignorance, mistake, or accident," and "acted with knowledge that some part of his course of conduct was unlawful and with the intent to do something the law forbids."¹²

The Complaint merely speculates that because Mr. Nickolas has worked on prior federal campaigns, he must know the solicitation rules. This speculation is not sufficient to substantiate a finding that any potential violation is knowing and willful.

4. Conclusion

Speaking to a reporter is not a solicitation of a contribution from a donor. And Mr. Nickolas did not solicit any prohibited contributions. For the reasons described above, the Commission should find no reason to believe that a violation of the Act occurred and dismiss this matter.

Sincerely,



James C. Lamb
Erin Tibe

Counsel to Amy McGrath for Senate
and Mark Nickolas

¹² United States v. Whittemore, 776 F.3d 1074, 1080–81 (9th Cir. 2015)