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Federal Election Commission
1050 First Street NE
Washington, DC 20463
VIA E-MAIL: CELA@fec.gov

Re: MUR 7686 – Response to Complaint from John James and John James for Senate, Inc.

Mr. Jordan,

We write on behalf of John James, John James for Senate, and Timothy Caughlin in his official capacity as Treasurer (collectively "the Campaign") in response to a recent complaint filed by End Citizens United that falsely accuses the Campaign of coordinating communications with Better Future Michigan, a 501(c)(4) organization, based purely on worse-case speculation with no support. The Commission may find "reason to believe" only if a Complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended ("FECA") or Federal Election Commission ("FEC") regulations.[1] The Complaint has failed to meet that standard, which is why we ask the Commission to expeditiously dismiss this case and close the file.

I. Background and Legal Analysis

The Complaint alleges that the Campaign and a non-profit organization called "Better Future Michigan" coordinated on a Facebook advertisement based solely upon Victoria "Tori" Sachs' prior role on the 2018 Campaign and her current role with Better Future Michigan, as well as a speculative and factually incorrect "timeline." The Complaint is cleverly worded with assumptions[2] designed to create the appearance of coordination when in fact the former consultant in question, Ms. Sachs, never worked on the 2020 campaign. Consequently, the Complaint is doing nothing more than grasping at straws. The Complaint does not and cannot

[1] Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas at 1, MUR 4960.
[2] *See* Complaint at 3 ("*potentially* only twelve days…"; "by this day *if not earlier*…", "*presumably* to cover the entire month of May").

provide any evidence of coordination between the Campaign and Better Future Michigan because there was none.

"Coordination" is defined as something "made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee.[3] A communication is considered coordinated if it meets a three-part test: (1) the communication is paid for by an entity other than the campaign ("payment prong"); (2) it must satisfy any one of an enumerated list of content standards ("content prong"); and (3) it must satisfy any one of an enumerated list of conduct standards ("conduct prong").[4] The appearance of one prong being violated does not constitute coordination under the law. **All three must be established for a communication to be considered coordinated.**

A. The "Eliminate" Advertisement by Better Future Michigan is Not Express Advocacy

This advertisement is pure issue advocacy. It was released in July 2019, well before the November 3, 2020 election date, and explains that Senator Gary Peters (who, of course, is an elected official), plans to eliminate private health insurance in favor of Medicare for All. Commenting on a hotly-debated policy issue has consistently been found to not be express advocacy.[5] Unfortunately for the Complaint, subjectively described "ominous background music, dramatic jump-cuts and darkly-tinted scenes" are not part of the Commission's analysis in determining whether an advertisement is express advocacy.[6]

When watching the advertisement, it is obvious that the Complainant's conclusory accusation that the advertisement is a "functional equivalent" of express advocacy[7] is absurd. An advertisement will be considered the functional equivalent of express advocacy only when it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate."[8] This advertisement is not calling for Senator Peter's defeat; it is providing information about Senator Peters' position on an important issue (healthcare) to Michigan voters and allowing them to draw their own conclusions.[9]

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3 11 C.F.R. § 109.20(a).

4 *Id*. at § 109.21(a)(1)-(3).

5 *See*, *e.g. FEC v. Survival Education Fund, Inc*., 65 F.3d 285 (2nd Cir. 1995) (letters criticizing Reagan Administration's military involvement in Central America not express advocacy); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2nd Cir. 1980) (en banc) (bulletin criticizing congressman for his record on taxes and government spending not express advocacy); *FEC v. Christian Action Network*, 100 F.3d 1049 (4th Cir. 1997) (ads criticizing presidential candidate for positions on gay rights not express advocacy). *See also* Statement of Reasons for Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 2, MUR 7416 (Unknown Respondents) ("The mailer informs readers as to the candidates' positions on a variety of issues on which the American public hold differing views. This is precisely the sort of activity the express advocacy construct was meant to exclude from Commission jurisdiction.").

6 Compl. at 5.

7 Factors that have previously been considered in determining whether an advertisement is express advocacy include the timing of the advertising, whether the communication is unambiguous, and whether the advertisement encourages actions to elect or defeat a clearly identified candidate or encourages some other kind of action. 11 C.F.R. § 100.22(b)

8 11 C.F.R. § 109.21(c)(5).

9 *See* Statement of Reasons for Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 2, MUR 7416 (Unknown Respondents), citing FEC v. Freedom's Heritage Forum, 1999 WL 33756662 (W.D. Ky.

The Complaint's interpretation of express advocacy is not only broad, but dangerous. If we were to adopt the Complaint's interpretation, any ad that even mentions a candidate would be considered express advocacy, which is clearly out of the bounds that Congress, the Supreme Court, and the Commission have established and consistently enforced and most importantly, that campaigns, political organizations, and others have relied upon for over forty years.[10]

B. There was No Coordination between the Campaign and Better Future Michigan on the "Eliminate" Advertisement.

Assuming *arguendo* that the communication at issue satisfies the first two parts of the coordination test, the Complaint nonetheless provides zero evidence that the Campaign violated the conduct prong. Tori Sachs was indeed the Campaign Manager of the 2018 John James for Senate campaign. In early 2019, she continued as an independent contractor to assist with 2018 vendor issues, 2018 donor maintenance, and Mr. James 2020 testing-the-waters process to decide whether to run for office again, and if so, for what office. Ms. Sachs' role ended before Mr. James decided to run for Senate and she was not involved in strategy for the 2020 U.S. Senate Campaign.

The Complaint attempts to rely upon on the "former employee" standard, which states that the conduct prong is satisfied when 1) the communication is paid for by an individual who was employed by the campaign during the previous 120 days; and 2) information about the campaign's plans, projects, activities, or needs of the campaign is conveyed to the payor of the communication that is material to the creation, production, or distribution of the communication.[11] In fact, Ms. Sachs was not privy to any plans, projects, activities, or needs of the 2020 campaign.

The Complaint discusses Ms. Sachs' former employment and presumes that because she was involved in the 2018 campaign, she must have strategic non-public information about 2020.[12] That is incorrect. Indeed, the Complaint relies solely on Ms. Sachs' prior employment as campaign manager and independent contractor to presume that non-public strategic information must have been shared.[13] The Complaint has the burden of showing that non-public information about the campaign's plans, projects, activities, or needs of the campaign were being

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1999) (mailer comparing candidates' positions and which portrayed one candidate "in an unfavorable light" and the opposing "in a favorable one" not express advocacy because the "reader is left to draw her own conclusions.").

[10] The "magic words" test, established in *Buckley v. Valeo*, 424 U.S. 1 (1976), has been the standard for determining what constitutes express advocacy for over forty years. The standard was purposefully narrow, because it was intended to preserve the principle that political debate on public issues should be "uninhibited, robust, and wide open." *New York Times v. Sullivan*, 376 U.S. 254. Because "public discussion of public issues which are also campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct," the express advocacy standard was meant to protect praise and criticism about officeholders and candidates. *Buckley*, 424 U.S. at n. 50, *see also* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at n. 4, MUR 7416 (Unknown Respondents).

[11] 11 C.F.R. § 109.21(d)(5).

[12] Compl. at 6-7.

[13] *Id*. ("By the nature of her role as Executive Director [of Better Future for Michigan], it is almost impossible to believe that Tori Sachs is not substantially involved in the strategy and content of all of Better Future Michigan's paid communications.")

shared and that this information was material in the advertisement. The Complaint has provided the Commission with absolutely nothing to establish that, other than its own presumptuous inferences, which does not rise to the standard needed to warrant an investigation.

II. Conclusion

The Complaint assumes that it can provide threadbare evidence with the hopes that the Commission will fill the voids of its own submission. That is not how the Commission works. As the Complainants are well aware, given that they file baseless complaints with the Commission on a regular basis, "unwarranted legal conclusions drawn from asserted facts based on mere speculation will not be accepted as true, and provide no independent basis for investigation." [14] Therefore, pursuant to the Commission's longstanding precedent, we ask the Commission to dismiss this case and promptly close the file.

Respectfully submitted,

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[14] The Commission does not authorize investigations based on mere speculation. *See* Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas at 1, MUR 4960 (Hillary Clinton for Senate Exploratory Committee); *See also* Resp. of Beto for Texas at 1, MUR 7505 (End Citizens United) (quoting language from the above Statement of Reasons).

In fact, the Complainant's counsel, Marc Elias, has quoted this exact language in various responses before the Commission, most notably in a response to an enforcement matter involving Complainant. Response of Beto for Texas at 2, MUR 7505 (End Citizens United). In MUR 7505, the Complaint alleged that Beto for Texas and End Citizens United coordinated communications based on a solicitation End Citizens United sent on Facebook support Beto O'Rouke's Senate Campaign. The Complaint provided evidence of the payment and content prong, but failed to provide evidence for the conduct prong, which Beto for Texas's counsel (who is now counsel to End Citizens United) stated, "Respectfully, this is not how the complaint review process works; there must be a factual and legal basis for the Commission to commence an investigation, and the facts alleged in the Complaint are clearly insufficient to warrant such an investigation." *Id*. It is worth noting that the Commission dismissed the Complaint. *See* First General Counsel's Report (EPS Dismissal), MUR 7505 (End Citizens United).