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March 31, 2020

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**Re: MUR 7715**

Dear Mr. Jordan:

We write as counsel to Mary Jennings (“MJ”) Hegar, her principal campaign committee, MJ for Texas (the “Committee”), and Adam Reiser, the Committee’s Treasurer, in his official capacity (together, “Respondents”), in response to the complaint filed by the Foundation for Accountability and Civic Trust (“FACT”) on March 9, 2020 (the “Complaint”).

The Complaint falsely alleges that Respondents violated the Federal Election Campaign Act of 1971, as amended (the “Act”) by accepting an illegal in-kind contribution in the form of a television advertisement paid for by VoteVets. However, the Complaint alleges no facts which, if proven true, would show that Respondents coordinated with VoteVets in a manner that would make the advertisement a coordinated communication and therefore an in-kind contribution. The only facts alleged to support the claim that Respondents coordinated with VoteVets are that the advertisement includes video clips taken from the Committee’s YouTube page. As FACT is well aware, the Federal Election Commission (“FEC” or 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 facts to demonstrate that the Committee engaged in illegal coordination with VoteVets, the Commission should find no reason to believe that Respondents violated the Act and dismiss the Complaint.

### FACTUAL BACKGROUND

MJ Hegar is a candidate for U.S. Senate in Texas in 2020.<sup>1</sup> MJ for Texas is her principal campaign committee.<sup>2</sup> MJ for Texas maintains a publicly available YouTube page, which it uses

<sup>1</sup> Mary Jennings (“MJ”) Hegar, FEC Form 2 Statement of Candidacy (amended Feb. 15, 2020) <https://docquery.fec.gov/pdf/762/202002159186506762/202002159186506762.pdf>.

<sup>2</sup> MJ for Texas, FEC Form 1 Statement of Organization (amended Feb. 15, 2020) <https://docquery.fec.gov/pdf/743/202002159186506743/202002159186506743.pdf>.

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to communicate with the general public about the campaign.<sup>3</sup> The YouTube page has over 3 million views.<sup>4</sup>

VoteVets is a multicandidate political committee that is registered with the Federal Election Commission.<sup>5</sup> Contrary to the Complaint's claim that VoteVets is a "super PAC,"<sup>6</sup> VoteVets maintains both a hard money "contribution" account, which accepts and spends funds within federal contribution limits and source restrictions, and a soft money "non-contribution" account, which may accept and spend funds raised in unlimited amounts from individuals, corporations, labor organizations, and/or other political committees.<sup>7</sup>

On February 4, 2020, VoteVets began running an advertisement featuring MJ Hegar on broadcast television, titled "Fight of her Life - MJ Hegar."<sup>8</sup> The advertisement uses video footage that was also available on the Committee's publicly available YouTube account.<sup>9</sup>

### LEGAL ANALYSIS

The Complaint alleges that Respondents solicited and accepted an illegal in-kind contribution by coordinating with VoteVets in the making of the advertisements.<sup>10</sup> However, the Complaint does not provide any facts that, even if taken as true, would establish that any such illegal coordination occurred. Therefore, there is no basis for the Commission to find reason to believe that Respondents have violated the Act.

A communication is a "coordinated communication," and thus an in-kind contribution to the benefitting candidate, only if it satisfies all three prongs of the coordinated communication regulation: (1) the payment prong, (2) the content prong, and (3) the conduct prong.<sup>11</sup> The advertisement in question met the payment prong because it was paid for by VoteVets, and met the content prong because it was a "public communication"<sup>12</sup> which referred to MJ Hegar and

<sup>3</sup> MJ for Texas, YouTube, <https://www.youtube.com/channel/UCPmv1X5NSogezwrUrcPuIwQ/featured>.

<sup>4</sup> MJ for Texas, "About," YouTube, <https://www.youtube.com/channel/UCPmv1X5NSogezwrUrcPuIwQ/about>.

<sup>5</sup> VoteVets, FEC Form 1 Statement of Organization (December 6, 2019) <https://docquery.fec.gov/pdf/525/201912069166160525/201912069166160525.pdf>;

<sup>6</sup> Complaint at 2.

<sup>7</sup> VoteVets, FEC Form 99 (filed July 5, 2016) <https://docquery.fec.gov/pdf/244/201607059020114244/201607059020114244.pdf>.

<sup>8</sup> Complaint at 5.

<sup>9</sup> Compare VoteVets, "Fight of her Life - MJ Hegar," YouTube, <https://www.youtube.com/watch?v=Teh-UhQtn-s> with MJ for Texas, "Texas Tough," YouTube, <https://www.youtube.com/watch?v=4xvfWxIMj00>.

<sup>10</sup> Complaint at 2.

<sup>11</sup> 11 CFR § 109.21.

<sup>12</sup> A "public communication" means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 11 CFR § 100.26.

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was aired in Texas within 90 days of the Texas primary election for U.S. Senate.<sup>13</sup> However, the Complaint fails to allege any facts that demonstrate that the conduct prong was satisfied in connection with the referenced advertisements. Thus, the Complaint fails to allege any facts which, if true, would constitute a violation of the Act or FEC regulations and must be dismissed.<sup>14</sup>

The Complaint suggests that the advertisement meets the conduct standard because it was “created, produced, or distributed at the ‘request or suggestion’ of a candidate.”<sup>15</sup> However, it alleges no facts that indicate any such request or suggestion occurred. The Complaint’s coordination allegation instead relies on the fact that the Committee, like most political campaigns, uploaded a video onto a publicly available website.<sup>16</sup> However, FEC regulations, and the Commission’s interpretation of those regulations, 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>17</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>18</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>19</sup>

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<sup>13</sup> See *id.* § 109.21(c)(2)(i).

<sup>14</sup> See *id.* § 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>15</sup> Complaint at 6.

<sup>16</sup> See *id.*

<sup>17</sup> 11 C.F.R. § 109.21(d)(1).

<sup>18</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

<sup>19</sup> Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

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The Commission has re-affirmed this basic principle repeatedly through the enforcement process.<sup>20</sup> For example, 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>21</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>22</sup>

The Commission faced similarly speculative claims that coordination occurred based on the similarity in the use of campaign materials between a campaign and an outside group in MUR 6902.<sup>23</sup> A complainant alleged that an outside group used materials posted by Al Franken’s campaign, and that the timing of the materials being posted, and the similar content of the ads, indicated that coordination had occurred.<sup>24</sup> The Commission found no reason to believe any violation occurred in this instance, and clarified that the allegations of coordination that are “wholly speculative based primarily on the proximity of time between placement of the footage online and airing of the ads, as well as thematic similarities of the communications” cannot sustain an allegation of coordination.<sup>25</sup>

FACT’s allegations here similarly rely on a publicly posted video on the Committee’s YouTube page, which is commonly visited by members of the public, as evidenced by the page’s millions of views. The posting of a single video by the Committee could not possibly be construed as a request or suggestion for VoteVets to make an expenditure in support of the Committee. The video was not accompanied by any text or messaging that could indicate a desire for any outside

<sup>20</sup> See, e.g., MUR 7136 (Strickland for Senate); MUR 6603 (Ben Chandler for Congress); MUR 6357 (American Crossroads).

<sup>21</sup> See MUR 6821 (Shaheen for Senate), Factual and Legal Analysis at 8 (Dec. 2, 2015).

<sup>22</sup> MUR 7124 (Katie McGinty for Senate), Factual and Legal Analysis at 8-9 (May 4, 2017).

<sup>23</sup> See MUR 6902 (Al Franken for Senate 2014), General Counsel’s Report at 12.

<sup>24</sup> *Id.*

<sup>25</sup> See MUR 6902 (Al Franken for Senate 2014), Statement of Reasons of Vice Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Lee E. Goodman at 2 (Dec. 17, 2015).

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group to engage in specific advertising on the Committee's behalf. However, even if the posting of this video could be interpreted as a request or suggestion to engage in a particular communication, because it was posted on a public website and was not sent to a select audience, it would not constitute "request or suggestion" and would not be evidence of coordination under 11 CFR § 109.21(d)(1). Accordingly, the mere posting of a video on MJ for Texas's publicly available YouTube page cannot be a basis to find that the VoteVets advertisement at issue satisfies the conduct prong. Therefore, the complaint does not state facts which support a finding that the Committee received an in-kind contribution in the form of a coordinated communication.

### 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>26</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>27</sup> Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true and provide no independent basis for investigation.<sup>28</sup>

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



Ezra W. Reese  
Elizabeth P. Poston  
Counsel to Respondents

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<sup>26</sup> 52 U.S.C. § 30109(a)(2).

<sup>27</sup> See 11 CFR § 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>28</sup> *Id.*