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April 15, 2020

Federal Election Commission
Office of Complaints Examination and Legal Administration
Attn: Christal Dennis, Paralegal
1050 First Street, NE
Washington, D.C. 20463

Re: MUR 7715

Ms. Dennis:

The undersigned serves as counsel to VoteVets, a “PAC with Non-Contribution Account” registered with the Commission, C00418897. This letter responds on behalf of VoteVets to the Commission’s notification of a complaint from the Foundation for Accountability and Civic Trust (the “Complaint”) alleging that VoteVets violated the Federal Election Campaign Act (the “Act”) and Federal Election Commission (the “Commission”) regulations.

As described below, the allegations made in the Complaint are baseless and not supported by any facts whatsoever. The Complaint makes one core allegation, regarding a television advertisement disseminated by VoteVets – that VoteVets “coordinated” (as defined in Commission rules and precedent) the advertisement with United States Senate candidate MJ Hegar and her campaign committee, MJ for Texas (collectively “Hegar”) by republishing campaign materials. The advertisement is entitled “Fight Of Her Life” (also referred to the “Advertisement”).¹

The Complaint’s allegation rings false. VoteVets did not “republish campaign materials” under the Commission’s extensive precedent on the issue – ***and the Complaint even admits that the facts in this matter are equivalent to others where the Commission did not find reason to believe a violation of law had occurred.*** Additionally, VoteVets did not communicate with Hegar in any way regarding the Advertisement.

As such, the Complaint’s analysis of a “request or suggestion” (or of the conduct standard for “coordinated communications” in general) is misplaced. The Commission should find no reason to believe that VoteVets committed any violation, and close the file.

¹ The Advertisement can be found at <https://www.youtube.com/watch?v=Teh-UhQtn-s> (last accessed April 15, 2020).

1. The Advertisement does not meet the criteria for a “coordinated communication” under 11 C.F.R. § 109.21.

a. “Coordinated Communications”

Under the FEC’s rules, a “coordinated communication” and an in-kind contribution results when a communication meets *all of the following criteria*:

- I. *[Public Communication]* the communication is a “public communication” – a paid medium;²
- II. *[Third Party]* the communication is paid for by a third party (other than that candidate or party);
- III. *[Content Standard]* it contains certain content;
- IV. *[Conduct Standard]* was produced as a result of certain conduct; and
- V. *[Safe Harbor]* is not protected by a safe harbor, such as a firewall.³

The Advertisement is a “public communication,” as it was disseminated on television. VoteVets is “a person other than that candidate, authorized committee, or political party committee” under 11 C.F.R. § 109.21(a)(1). The Advertisement expressly advocates for Hegar’s election.

However, the Advertisement *does not* meet the FEC’s conduct standard, as it does not republish the campaign’s materials under the FEC’s guidance – nor was other there any other conduct that would meet the coordination standard. Despite the Complaint’s attempts to fit the communication into each of the tests above for its own purposes, the Advertisement is *not* a “coordinated communication,” and is *not* an in-kind contribution to Hegar.

² 52 U.S.C. § 30101(22); 11 C.F.R. §§ 100.26 (definition of “public communication”, spacing added), 100.27 (definition of “mass mailing”), 100.28 (definition of “telephone bank”).

³ See 11 C.F.R. §§ 109.20-23.

b. Analysis of Content Standard

i. Overview

Under the FEC's rules, only certain communications can be considered coordinated:

- a) *[Electioneering Communications]* television, satellite, or radio advertisements that mention a clearly identified candidate within 30 days of a primary or 60 days of a general election;⁴
- b) *[Reference Test]* Public Communications that reference candidates or parties – for House or Senate, within 90 days of their primary or general election, or nominating convention or caucus.⁵
- c) *[Express Advocacy]* Public Communications that contain express advocacy, or the functional equivalent of express advocacy for a candidate *at any time*;⁶ or
- d) *[Republication of Candidate Materials]* Public Communications that disseminate, or republish campaign materials prepared by a candidate.⁷

The Advertisement expressly advocates for Hegar's election – and clearly meets the content standard.

⁴ 11 C.F.R. § 100.29 (definition of "electioneering communication")

⁵ 11 C.F.R. § 109.21(c)(4).

⁶ 11 C.F.R. § 109.21(c)(3), (c)(5). It should be noted that the Commission previously provided a definition of "functional equivalent of express advocacy" in its electioneering communications regulations, but removed this regulation in 2015. See 76 Fed. Reg. 80814 – 80815.

Therefore, there is no statutory or regulatory definition of the "functional equivalent of express advocacy" such that the regulated community can discern between the Commission's definition of "express advocacy" and section (c)(5), which appears to derive from the Commission's deleted regulation. See 11 C.F.R. § 114.15 (effective December 26, 2007 to January 26, 2015); 75 Fed. Reg. 55952 – 55957.

Given this, our analysis in this response is solely confined to the Commission's regulatory guidance found in 11 C.F.R. § 100.22 and related opinions.

⁷ 11 C.F.R. § 109.21(c).

c. Analysis of Conduct Standard

Despite this, there is not the requisite conduct to find a “coordination communication.” In order to find a “coordinated communication,” Hegar and VoteVets would have been required to engage in certain conduct:

- a) ***[Request or Suggestion]*** Hegar would have needed to request or suggest that VoteVets engage in a communication meeting the content standards;
- b) ***[Material Involvement]*** Hegar would have needed to have material involvement in the communication. There is an exception from this prong if the “information material to the creation, production, or distribution of the communication was obtained from a publicly available source.”
- c) ***[Substantial Discussion]*** Hegar and VoteVets would have needed to engage in substantial discussions regarding the communication. There is an exception from this prong if “information material to the creation, production, or distribution of the communication was obtained from a publicly available source.”
- d) ***[Common Vendor and Former Campaign Employees]*** Use of a common vendor between VoteVets and Hegar working on the communication, or a former employee of Hegar worked on VoteVets’ communication.
- e) ***[Republication of Candidate Materials]***, solely based on the conduct standards as above.⁸

None of these conduct standards are met in this situation – there was simply no coordination nor involvement by Hegar in VoteVets’ Advertisement and the complaint does not allege any facts that would lead to a conclusion that any of the above standards have been met. As to “request or suggestion”, the FEC has previously found that a website posting cannot “request or suggest” particular activity from a viewer, making the Complaint’s assertions in this area hollow:

The Commission has expressly stated, however, that a communication resulting from a general request to the public or the use of publicly available information,

⁸ 11 C.F.R. § 109.21(d).

including information contained on a candidate's campaign website, does not satisfy the conduct standards.⁹

The Advertisement also does not “republish” Hegar’s campaign materials. While the Advertisement makes use of materials that Hegar’s campaign has publicly disseminated, they do so in a manner consistent with FEC precedent – only using brief segments of materials from the campaign’s website. Most importantly, ***VoteVets did not communicate with Hegar in any way regarding the Advertisement.***

“Republication of candidate materials” is a legal term of art that the Commission has opined on in multiple different situations.¹⁰ While the Commission has not set out one test as to the extent to which a third-party *can* “republish” campaign materials, recent enforcement actions

⁹ See, e.g., FEC MUR 6821 (Shaheen for Senate), First General Counsel’s Report at 8-9 (January 21, 2015) citing Coordinated and Independent Expenditures, 68 Fed. Reg. 421,432 (Jan. 3, 2003) (explanation and justification); Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (Jun. 8, 2006) (explanation and justification), at <https://www.fec.gov/files/legal/murs/6821/15044382919.pdf> (last accessed April 15, 2020).

¹⁰ See 52 U.S.C. § 30116(a)(7)(B)(iii); 11 C.F.R. § 109.23;

See also, e.g., Federal Election Commission Matters Under Review:

- 6902 (Al Franken for Senate 2014) (FEC did not find reason to believe on an independent communication that utilized ***similar themes and branding*** as a campaign advertisements), Certification (November 9, 2015), available at <https://www.fec.gov/files/legal/murs/6902/15044382611.pdf>, Statement of Reasons of Republican Commissioners Petersen, Hunter, and Goodman in MURs 6603, 6777, 6801, 6870, 6902 (December 17, 2015), at <https://www.fec.gov/files/legal/murs/6902/15044382837.pdf>;
- 6801 (Senate Majority PAC) (FEC did not find reason to believe on a communication using ***16 seconds of campaign materials in a 30-second advertisement***), Certification (November 19, 2015) at <https://www.fec.gov/files/legal/murs/6801/15044382446.pdf>, First General Counsel’s Report (October 31, 2014) at <https://www.fec.gov/files/legal/murs/6801/15044382435.pdf>;
- 6603 (Ben Chandler for Congress) (FEC did not find reason to believe on a communication using ***13 seconds of campaign materials in a 30-second advertisement***), Certification (November 19, 2015) at <https://www.fec.gov/files/legal/murs/6603/15044382398.pdf>, First General Counsel’s Report (August 22, 2014), at <https://www.fec.gov/files/legal/murs/6603/15044382376.pdf>;
- 6535 (Restore Our Future) (an independent expenditure committee was fined \$50,000 for republishing ***nearly 100%*** of a 2008 Romney campaign advertisement in 2012), First General Counsel’s Report (February 26, 2013) at <https://www.fec.gov/files/legal/murs/6535/15044382228.pdf>, Conciliation Agreement (November 19, 2015) at <https://www.fec.gov/files/legal/murs/6535/15044382292.pdf>, Vote (November 16, 2015) at <https://www.fec.gov/files/legal/murs/6535/15044382269.pdf> (last accessed April 15, 2020).

indicate that there is not a consensus on the Commission on whether communications containing 50 percent candidate materials or less (based on time and space) are “republication”.¹¹

The Complaint admits that 43% of the Advertisement utilize footage and video from Hegar’s websites, roughly 13 seconds. VoteVets does not contest this, as it is safety within circumstances where the Commission has not found “republication” or a “coordinated communication” by an affirmative vote of four Commissioners as required by federal law. Footage of Hegar was used to supplement VoteVets’ communication regarding her “toughness” as a veteran – as incidental background to the core message of the communication.

This situation precisely matches the facts of MUR 6603, where the FEC did not find reason to believe on a communication using **13 seconds of campaign materials in a 30-second advertisement**.¹² As former Commissioners Petersen and Goodman (as well as Commissioner Hunter) stated in their Statement of Reasons in MURs 6603, 6777, 6801, 6870 and 6902:

“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.”¹³

An earlier Statement of Reasons by former Commissioners McGahn and Petersen (as well as Commissioner Hunter) stated that “republication” does not occur when a third-party “adds its own text, graphics, audio, and narration to create its own message. In other words, the . . . advertisement – neither in whole nor in substantial part – is anything close to a carbon copy of the [candidate’s] footage. . . the [independent spender] did not repeat verbatim the [candidate’s] message; rather, it created its own.”¹⁴

¹¹ See Footnote 10, above.

¹² FEC MUR 6603 (Ben Chandler for Congress) Certification (November 19, 2015) at <https://www.fec.gov/files/legal/murs/6603/15044382398.pdf>, First General Counsel’s Report (August 22, 2014), at <https://www.fec.gov/files/legal/murs/6603/15044382376.pdf> (last accessed April 15, 2020).

¹³ FEC MURs 6603 (Ben Chandler for Congress), 6777 (Kirkpatrick for Arizona), 6801 (Senate Majority PAC), 6870 (American Crossroads), 6902 (Al Franken for Senate 2014), Statement of Reasons of Commissioners Petersen, Hunter, Goodman (December 17, 2015), at <https://www.fec.gov/files/legal/murs/6870/15044382832.pdf> (last accessed April 15, 2020).

¹⁴ FEC MUR 6357 (American Crossroads), Statement of Reasons of Commissioners McGahn, Petersen, and Hunter (February 22, 2012), at <https://www.fec.gov/files/legal/murs/6357/12044312281.pdf>; First General Counsel’s Report (August 31, 2011), at <https://www.fec.gov/files/legal/murs/6357/12044312188.pdf>; Certification (3-3 vote, January 26, 2012), at <https://www.fec.gov/files/legal/murs/6357/12044312209.pdf> (last accessed April 15, 2020).

Similarly, Commissioner Weintraub and former Commissioner von Spakovsky described the use of public materials in MUR 5743:

“The downloading a photograph from a candidate’s website that is open to the world, for incidental use in a large mailer that is designed, created, and paid for by a political committee as part of an independent expenditure without any coordination with the candidate, does not constitute the ‘dissemination, distribution, or republication of candidate campaign materials.’”¹⁵

In this case, ***VoteVets did not communicate with Hegar in any way regarding the Advertisement.*** While the Complaint attempts to cite MUR 6357 (American Crossroads) for its own purposes – it conveniently disregards that the Commission split 3-3 on this MURs – and that the Republican Commissioners in MUR 6357 specifically cite the lack of communication between the campaign and the third-party as crucial to the analysis.¹⁶ This Commission should adopt the previous logic of Commissioners McGahn, Petersen, and Hunter in MUR 6357, and of the opinions cited throughout this Section, which resulted in the FEC ***not*** finding reason to believe that a violation occurred for similar uses of candidate materials in a third-party communication.

VoteVets used materials “obtained from a publicly available source” – Hegar’s website – to produce its Advertisement, and did not otherwise communicate or “coordinate” its Advertisement with Hegar. The Complaint has presented no facts to the contrary, outside of mere speculation.

d. Similarities Between Hegar’s website and the Advertisement

While the Complaint also seeks to tie the similarities between the Advertisement and Hegar’s publicly posted video footage, as well as the timing of the posting of Hegar’s materials to its use by VoteVets, OGC has previously stated that ***similarities and timing are irrelevant in the analysis of “republication”***:

“[T]he alleged similarities of the two communications at issue and their rough temporal proximity do not give rise to a reasonable inference that any of the conduct standards were satisfied under the facts presented here, particularly

¹⁵ FEC MUR 5743 (Betty Sutton for Congress), Statement of Reasons of Commissioners Weintraub and Spakovsky (January 23, 2007), at <https://www.fec.gov/files/legal/murs/5743/00005AE4.pdf> (last accessed April 15, 2020).

¹⁶ FEC MUR 6357 (American Crossroads), Statement of Reasons of Commissioners McGahn, Petersen, and Hunter (February 22, 2012) (“Like MUR 5743 (Betty Sutton for Congress) and MUR 5996 (Tim Bee), the video footage of Rob Portman at issue was obtained without direct contact with the campaign; in this case, it was obtained from a publicly available Internet website”), at <https://www.fec.gov/files/legal/murs/6357/12044312281.pdf>; Certification (3-3 vote, January 26, 2012), at <https://www.fec.gov/files/legal/murs/6357/12044312209.pdf> (last accessed April 15, 2020).

where no other information indicating that the Respondents engaged in any of the activities outlined in the relevant conduct standards.”¹⁷

The Office of General Counsel’s analysis in MUR 6849 on the subject is also persuasive (of note, the FEC dismissed the allegations in this matter 6-0):

“Although there are similarities in the themes and words used in the Tiahrt campaign website and the radio advertisement, under the circumstances presented here, such similarity does not on its own sufficiently show that the content of the radio advertisement was coordinated.

Because the information on Tiahrt’s website was publicly available, KRG did not necessarily need to discuss its own advertisement with Tiahrt in order to include similar themes in its own advertisement and thus, absent other information, the similarities alone do not sufficiently establish that the conduct prong is met.”¹⁸

The Complaint has simply failed to state any additional information that would indicate that Hegar and VoteVets “coordinated” the Advertisement – ***likely because it does not exist.***

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

A complaint is required to allege facts that give rise to a violation of the Act or Commission regulations.¹⁹ As the Complaint does not do so – and only speculates and assumes

¹⁷ FEC MUR 6821 (Shaheen for Senate), First General Counsel’s Report at 8-9 (January 21, 2015), at <https://www.fec.gov/files/legal/murs/6821/15044382919.pdf> (last accessed April 15, 2020).

¹⁸ FEC MUR 6849 (Kansans for Tiahrt), First General Counsel’s Report at 7-8 (May 13, 2015) at <https://www.fec.gov/files/legal/murs/6849/15044385448.pdf>; Vote (December 23, 2015) at <https://www.fec.gov/files/legal/murs/6849/15044385470.pdf> (last accessed April 15, 2020).

¹⁹ See FEC MUR 7135 (Donald J. Trump for President, et. al.), Statement of Reasons of Commissions Hunter and Petersen at fn 31 (September 6, 2018, spacing for clarity), citing MURs 6296, 6056, 5467 (“We have on multiple occasions shown that the reason to believe standard found at 52 U.S.C. § 30109(a)(2) means more than merely a reason to suspect.

See, e.g., MUR 6296 (Buck for Colorado), Statement of Reasons of Vice-Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 7 (“[T]he Act’s complaint requirements and limits on Commission investigative authority serve no purpose if the Commission proceeds anytime it can imagine a scenario under which a violation may have occurred.”). . .

MUR 5467 (Michael Moore), First Gen. Counsel’s Rpt. at 5 (“Purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of the [Act] has occurred.”); see also FEC v. Machinists Non-Partisan

wrongdoing on the part of VoteVets – we request that the Commission determine that there is no reason to believe that VoteVets committed any violation alleged in the Complaint, and close the file in this matter.

Sincerely,



Neil Reiff



David Mitrani

Counsel for VoteVets

Political League, 655 F.2d 380,388 (D.C. Cir. 1981) ("[M]ere 'official curiosity' will not suffice as the basis for FEC investigations"); id. at 387 (distinguishing the Commission from other administrative agencies that are "vested with broad duties to gather and compile information and to conduct periodic investigations concerning business practices the FEC has no such roving statutory functions"), available at https://eqs.fec.gov/eqsdocsMUR/7135_2.pdf (last accessed April 15, 2020).