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Assistant General Counsel  
Complaints Examination & Legal Administration  
Federal Election Commission  
1050 First Street, N.E.  
Washington, D.C. 20463**Re: MUR 7760**

Dear Mr. Jordan:

We write as counsel to John Hickenlooper, Hickenlooper for Colorado (the “Campaign”), and Mark Turnage in his official capacity as treasurer of the Campaign (collectively, “Respondents”) in response to a complaint filed by the Foundation for Accountability and Civic Trust (“FACT”) on July 9, 2020. The Complaint alleges violations of the Federal Election Campaign Act of 1971, as amended (the “Act”) and Federal Election Commission (the “Commission” or “FEC”) regulations.

Specifically, the Complaint falsely accuses Respondents of engaging in prohibited coordination with SMP, also known as Senate Majority PAC, in connection with a television advertisement. It also alleges that SMP republished Campaign materials. FACT bases these allegations on thematic similarities between information found on one of the Campaign’s publicly available websites and the SMP commercial, and the fact that the commercial includes short fragments of b-roll from an advertisement the Campaign disseminated in 2019. FACT has filed numerous complaints during the past two election cycles regurgitating the same discredited claim and the Commission has not acted on any of them. As FACT is well aware, that is because the alleged activity does not constitute coordination or republication under the Act or Commission regulations. Because the Complaint does not allege any additional facts that demonstrate Respondents received an impermissible in-kind contribution from SMP, the Commission should find no reason to believe Respondents violated the Act and dismiss the Complaint immediately.

## FACTUAL BACKGROUND

John Hickenlooper is a candidate for U.S. Senate in Colorado.<sup>1</sup> Hickenlooper for Colorado, with Mark Turnage as treasurer, is his principal campaign committee.<sup>2</sup> SMP is a federally registered super PAC.<sup>3</sup> As a super PAC, SMP operates separately from Respondents.<sup>4</sup>

The Campaign maintains a publicly available website located at [www.getthefacts.co](http://www.getthefacts.co). Similar to most campaign pages, the website contains regularly updated information for voters about Governor Hickenlooper's record and the contrast between the Governor and his Republican opponent, and it seeks to set the record straight on attacks made against the Governor.<sup>5</sup> On June 13, 2020, the Campaign added content to the webpage addressing a recent line of attacks leveled against the Governor by his opponent and other Republican groups.<sup>6</sup>

On June 25, 2020, SMP began airing a television advertisement defending the Governor against those same attacks and criticizing his opponent.<sup>7</sup> Respondents allege that the SMP advertisement copied written materials from the Campaign website and borrowed brief clips of b-roll from a previously disseminated Campaign ad.<sup>8</sup> According to the Complaint, the ad republished Campaign materials, and the similarities between the advertisement and the website demonstrate that the ad was also a coordinated communication.<sup>9</sup>

## LEGAL ANALYSIS

The FEC may find “reason to believe” only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act or Commission regulations.<sup>10</sup> The FACT Complaint fails to make that showing.

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<sup>1</sup> John Hickenlooper, FEC Form 2, Statement of Candidacy (amended June 18, 2020), <https://docquery.fec.gov/pdf/803/202006189239944803/202006189239944803.pdf>.

<sup>2</sup> Hickenlooper for Colorado, FEC Form 1, Statement of Organization (amended June 18, 2020), <https://docquery.fec.gov/pdf/689/202006189239944689/202006189239944689.pdf>.

<sup>3</sup> SMP, FEC Form 1, Statement of Organization (amended Oct. 1, 2019), <https://docquery.fec.gov/pdf/667/201910019163579667/201910019163579667.pdf>.

<sup>4</sup> See *Registering as a Super PAC*, FEC, <https://www.fec.gov/help-candidates-and-committees/filing-pac-reports/registering-super-pac/> (last visited Aug. 24, 2020).

<sup>5</sup> GET THE FACTS, <https://www.getthefacts.co/> (last visited Aug. 24, 2020).

<sup>6</sup> See Compl. at 3 (July 9, 2020).

<sup>7</sup> *Id.* at 3-4.

<sup>8</sup> *Id.* at 7-8.

<sup>9</sup> *Id.*

<sup>10</sup> 52 U.S.C. § 30109(a)(2); Statement of Reasons (“SOR”) of Comm’rs Mason, Sandstrom, Smith & Thomas, MUR 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee).

## A. Coordinated Communication

A communication is a “coordinated communication,” and thus an in-kind contribution to the benefitting candidate under 11 C.F.R. § 109.21, 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 Complaint *alleges* that Respondents’ and SMP’s activities meet the “request or suggestion” conduct prong, but the Complaint presents *no evidence* even suggesting that is true.

### 1. Information on a Publicly Available Website Cannot Form the Basis of a “Request or Suggestion”

The Complaint alleges that [www.getthefacts.co](http://www.getthefacts.co) is a website the Campaign uses to communicate with super PACs and that the website uses coded language to tell super PACs like SMP what messages to include in their ads.<sup>12</sup> However, even if this were true, the Commission has made clear that communications appearing on a campaign’s publicly available website are never sufficient to satisfy the conduct prong of the coordinated communication test.

When the Commission revised its coordination rules in 2003, it established that a campaign’s “request or suggestion” that a third party disseminate a communication on its behalf would satisfy the conduct prong.<sup>13</sup> In the Commission’s Explanation and Justification (“E&J”) for the new regulation, the Commission clarified that:

The “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>14</sup>

As this language demonstrates, a request or suggestion made on a publicly available website does not, as a matter of law, satisfy the conduct prong.

Subsequently, in a 2006 E&J concerning coordinated communications, the FEC affirmed this approach, stating 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

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<sup>11</sup> 11 C.F.R. § 109.21(a)-(b)(1).

<sup>12</sup> See Compl. at 9, 12.

<sup>13</sup> 11 C.F.R. § 109.21(d)(1).

<sup>14</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).

campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication.”<sup>15</sup>

Since 2006, the Commission has also repeatedly held in enforcement actions that communications on a candidate’s public-facing website cannot serve as a “request or suggestion”—often in response to complaints filed by FACT. For example, in MUR 6821, the FEC dismissed a complaint that alleged that a coordinated communication occurred when SMP 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.<sup>16</sup> In finding there was no reason to believe 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>17</sup> The Commission has since dismissed similar complaints in a half dozen other matters based on the same reasoning.<sup>18</sup>

The facts here are no different than in any of those cases the Commission has dismissed. The Complaint’s coordination claim relies on information posted to Respondents’ website, which is available to the general public. The information on the website sought to advocate John Hickenlooper’s election and could not possibly qualify as a “request or suggestion” that SMP make an expenditure. Further, as explained above, even if the Campaign’s post could be interpreted as a request or suggestion to SMP that it run a particular communication, because the content appeared on a public website and was not sent to a select audience, the posts would not constitute a “request or suggestion” under 11 C.F.R. § 109.21(d)(1) and could not support a coordination finding.

## **2. The Remaining Factual Allegations are Purely Speculative and Do Not Support a Finding on Any Conduct Prong**

The rest of the Complaint’s “evidence” of coordination is purely speculative. First, the Complaint argues that the fact that “just days elapsed between the ‘request or suggestion’ and the ad airing” demonstrates coordination.<sup>19</sup> But this is another argument the Commission has repeatedly rejected. In MUR 6902, to take one example, a complaint alleged that an outside group used materials posted by Al Franken’s campaign to produce a communication, and that the timing of the materials being posted, when coupled with the similarities in the content of the ads,

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<sup>15</sup> Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (Jun. 8, 2006).

<sup>16</sup> Factual and Legal Analysis (“F&LA”) at 8, MUR 6821 (Shaheen for Senate).

<sup>17</sup> *Id.*

<sup>18</sup> See MURs 7138 & 7229 (Friends of Patrick Murphy); MUR 7142 (Evan Bayh Committee); MUR 7136 (Strickland for Senate); MUR 7124 (Katie McGinty for Senate); MUR 6902 (Al Franken for Senate 2014).

<sup>19</sup> Compl. at 12.

indicated that coordination had occurred.<sup>20</sup> The Commission, however, found no reason to believe any violation occurred and clarified that 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 a coordination finding.<sup>21</sup>

Similarly, the Complaint alleges that there must have been behind-the-scenes communications between the Campaign and SMP, because the Campaign knew which “code words” to use; Campaign and DSCC officials tweeted the link to [www.getthefacts.co](http://www.getthefacts.co); there was only a short period of time between the post and SMP’s creation of the ad; and the ad and the website were thematically similar.<sup>22</sup> These observations, however, provide no support for the assertion that the Campaign and SMP engaged in conduct that satisfies the “conduct prong.” The Commission has previously rejected similarly baseless allegations made by FACT regarding non-public communications. In MUR 7124 (Katie McGinty for Senate), the Commission held that “similarities between [the campaign website] and the commercials and the timing and geographical placement of the commercials, are insufficient to show that any additional private communications occurred” between the campaign and super PAC.<sup>23</sup> As the Commission has said elsewhere, “[u]nwarranted legal conclusions from asserted facts, or mere speculation, will not be accepted as true.”<sup>24</sup>

Accordingly, the Complaint fails to allege any facts that demonstrate that the Campaign and SMP engaged in any activity that meets the conduct prong of the coordinated communication test. Therefore, there is no basis on which the Commission can find that the SMP advertisement was an impermissible in-kind contribution to Respondents.

## **B. Republication**

To the extent that FACT alleges that Respondents violated the Act in connection with SMP’s republication of Campaign materials, that claim also fails.<sup>25</sup>

According to the Complaint, SMP incorporated words and concepts from [www.getthefacts.co](http://www.getthefacts.co) into its advertisement and made use of a few seconds of b-roll from an advertisement aired previously by the Campaign.<sup>26</sup> The Complaint argues that this is a violation of the Act because “[a]ny republication” of campaign materials “is a contribution, even if the campaign materials

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<sup>20</sup> First Gen. Counsel’s Rpt. at 12, MUR 6902.

<sup>21</sup> SOR of Comm’rs Peterson, Hunter & Goodman at 2, MUR 6902.

<sup>22</sup> Compl. at 3, 9, 12.

<sup>23</sup> F&LA at 11, MUR 7124.

<sup>24</sup> SOR of Comm’rs Mason, Sandstrom, Smith & Thomas at 2, MUR 4960 (internal citations omitted).

<sup>25</sup> Compl. at 7.

<sup>26</sup> *Id.*

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are even a small part of a larger advertisement.”<sup>27</sup> Once again, though, the Complaint misstates the law.

The Commission’s regulations include an exception to the republication rule stating that republication does not occur when “the campaign material used consists of a brief quote of materials.”<sup>28</sup> The Commissioners have also made clear that “[t]he Act’s republication provision is designed to capture situations where third parties, in essence, subsidize a candidate’s campaign by expanding the distribution of communications whose content, format, and overall message are devised by the candidate.”<sup>29</sup> It is not intended to address situations where Respondents “did not repeat verbatim the [candidate’s] message” but instead created their own message, using publicly available materials.<sup>30</sup>

When assessing whether a third party has republished a candidate’s written materials, the Commission has also consistently found that “mere thematic similarities between a candidate’s campaign materials and a third-party communication are insufficient to establish republication,” and similar sentences . . . do not rise to the level sufficient to indicate republication of campaign materials” when there are “differences in wording or phrasing.”<sup>31</sup> And when video footage is at issue, the Commission has declined to find reason to believe an advertisement that contains short clips of b-roll footage from a campaign is in violation of the Act.<sup>32</sup> Here, where SMP used only brief clips of publicly available footage from a Campaign advertisement, and referenced themes on the Campaign’s websites but used its own words and phrases, it is clear that SMP did not engage in republication.

Moreover, even if SMP had republished Campaign materials, the Campaign would not be liable for receiving or accepting an in-kind contribution. The regulations state: “[T]he candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication.”<sup>33</sup> As demonstrated in the previous section, SMP’s ad is not a coordinated communication.

For these reasons, the Complaint’s characterization of the television advertisement, even if taken as true, does not establish that SMP republished Campaign materials or made an in-kind contribution to the Campaign that the Campaign accepted or needed to report.

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<sup>27</sup> *Id.*

<sup>28</sup> 11 C.F.R. § 109.23(b)(4).

<sup>29</sup> SOR of Comm’rs Petersen, Hunter & Goodman, MUR 6603 (Ben Chandler for Congress) (internal quotation marks omitted).

<sup>30</sup> *Id.* (internal quotation marks omitted).

<sup>31</sup> F&LA at 10-11, MUR 7124.

<sup>32</sup> *See, e.g.*, SOR of Comm’rs Petersen & Hunter, MUR 7432 (John James for Senate).

<sup>33</sup> 11 C.F.R. § 109.23(a).

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## CONCLUSION

Respondents have demonstrated herein that they did not accept an in-kind contribution from SMP under a coordination or republication theory. To the contrary, the Complaint's allegations are meritless and, based on existing precedent, almost frivolous. The Complaint fails to allege any facts that demonstrate the presence of a conduct standard in the Commission's coordinated communications test. The facts in the Complaint also do not give rise to a conclusion that SMP republished Campaign materials, much less that Respondents received a contribution from the alleged republication. As such, the Commission should immediately reject the Complaint's request for an investigation, find no reason to believe that a violation of the Act or regulations occurred, and close the matter.

Very truly yours,



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Shanna M. Reulbach

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