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**Re: MUR 7921; Response to Complaint from Buddy Carter for Congress, et al.**

Dear Mr. Jordan:

We are writing this letter on behalf of Representative Buddy Carter (GA-1), Buddy Carter for Congress, and Paul Kilgore, in his official capacity as Treasurer (collectively, the “Respondents”), in response to the Complaint filed in the above-referenced matter by Scott Hogan, the Executive Director of the Democratic Party of Georgia (the “Complainant”). The Complaint was clearly filed for publicity and political gain, is based solely on speculation and innuendo, and is centered around a gross misapplication of federal election law.

The Federal Election Commission (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 (the “Act”).<sup>1</sup> Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true.<sup>2</sup> Moreover, the Commission will dismiss a complaint when the allegations are refuted with sufficiently compelling evidence.<sup>3</sup>

As explained in more detail below, the allegations made in the Complaint are both factually and legally flawed and do not support a reason to believe finding in this matter. The Complaint should be immediately dismissed.

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<sup>1</sup> See 11 C.F.R. § 111.4(a), (d).

<sup>2</sup> See MUR 4960, Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons (Dec. 21, 2001).

<sup>3</sup> See *id.*

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## **I. Factual Background**

Buddy Carter is a current Member of Congress who has represented Georgia's First Congressional District since 2015. Two weeks after he was reelected on November 3, 2020, Rep. Carter filed his Form 2 Statement of Candidacy declaring his intention to run for reelection to his House seat in 2022.<sup>4</sup> His principal campaign committee is Buddy Carter for Congress.

In the months following U.S. Senator Raphael Warnock's victory in Georgia's runoff election on January 5, 2021, a number of Republicans announced their candidacies to challenge Senator Warnock in 2022, including Georgia's Agriculture Commissioner, Gary Black,<sup>5</sup> Air Force veteran, Kelvin King,<sup>6</sup> and former White House official, Latham Sadler.<sup>7</sup>

On March 10, 2021, former President Trump publicly urged former University of Georgia football star, Herschel Walker, to run against Senator Warnock in 2022, stating in a press release from his Save America PAC:

Wouldn't it be fantastic if the legendary Herschel Walker ran for the United States Senate in Georgia? He would be unstoppable, just like he was when he played for the Georgia Bulldogs, and in the NFL. He is also a GREAT person. Run Herschel, run!<sup>8</sup>

At that point in time, Mr. Walker was undecided on whether to mount a candidacy for Senate, but he spent the next several months testing the waters and examining his potential

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<sup>4</sup> See Earl Leroy Carter, FEC Form 2 Statement of Candidacy (Nov. 17, 2020), <https://docquery.fec.gov/pdf/396/202011179336995396/202011179336995396.pdf>.

<sup>5</sup> See Greg Bluestein, *Republican Gary Black enters Senate race against Raphael Warnock*, ATLANTA J. & CONST. (June 4, 2021), <https://www.ajc.com/politics/politics-blog/republican-gary-black-enters-senate-race-against-raphael-warnock/BAWKRPN7DBFGNLLDYGDYRFYI2E/>.

<sup>6</sup> See Greg Bluestein, *Republican Kelvin King to challenge Warnock in 2022 Senate contest*, ATLANTA J. & CONST. (Apr. 12, 2021), <https://www.ajc.com/politics/politics-blog/republican-kelvin-king-to-challenge-warnock-in-2022-senate-contest/66EXTI6PE5C4ZCQPAD43YNCIFY/>.

<sup>7</sup> See Greg Bluestein, *Navy veteran Latham Saddler enters US Senate race against Warnock*, ATLANTA J. & CONST. (Apr. 15, 2021), <https://www.ajc.com/politics/politics-blog/navy-veteran-latham-saddler-enters-us-senate-race-against-warnock/VWX36JEXN5HPNOJRWSQYLR6VTA/>.

<sup>8</sup> See Greg Bluestein, *'Run Herschel, run!' Trump wants Walker to rush for Senate in 2022*, ATLANTA J. & CONST. (March 10, 2021), <https://www.ajc.com/politics/politics-blog/run-herschel-run-trump-presses-walker-to-enter-us-senate-race-in-georgia/LFPDLC2IFRBEXDZ72ZISF42FCU/>.

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viability as a candidate. Mr. Walker ultimately declared his candidacy for Senate on August 24, 2021<sup>9</sup> and received former President Trump's endorsement on September 2, 2021.<sup>10</sup>

Prior to Mr. Walker's entry into the Senate race in late August, Rep. Carter also explored a run for Senate in 2022. However, he made clear right from the start that he would not seek the Republican nomination if Mr. Walker decided to run. In an interview with the Atlanta Journal-Constitution on July 7, 2021, Rep. Carter stated that "If Herschel is going to run, I'm going to support him. And so is President Trump...and that means he's going to win the primary."<sup>11</sup> He added that "I'm not interested in political suicide. I ain't gonna run against Herschel Walker in the state of Georgia. I was born at night, but it wasn't last night."<sup>12</sup> It was well-known in media and political circles that Rep. Carter's potential Senate candidacy was entirely contingent on Mr. Walker deciding against running in 2022.<sup>13</sup>

While awaiting Mr. Walker's decision throughout the spring and summer, Rep. Carter engaged in traditional testing the waters activities such as traveling the state to talk to voters, speaking to consultants, mapping out a potential campaign team, and performing polling and survey research. In an April interview with WGAU, Rep. Carter said that he's "considering it very seriously and doing our due diligence."<sup>14</sup>

During this time period, another issue was also dominating headlines in Georgia—the state's enactment of a new election and voting law. National and state Democrats and their

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<sup>9</sup> See Greg Bluestein, *Herschel Walker is running for U.S. Senate in Georgia*, ATLANTA J. & CONST. (Aug. 24, 2021), <https://www.ajc.com/politics/politics-blog/breaking-herschel-walker-is-running-for-us-senate-in-georgia/6GZ3BDZBHJHRFFJA76PT2K2XLA/>.

<sup>10</sup> Maya T. Prabhu, *Trump endorses Herschel Walker, Burt Jones in Georgia elections*, ATLANTA J. & CONST. (Sep. 2, 2021), <https://www.ajc.com/politics/trump-endorses-herschel-walker-burt-jones-in-georgia-elections/2L6V6GCAMFG7NDDYR5ZSHTJGVA/>.

<sup>11</sup> Tia Mitchell, *The Jolt: Buddy Carter's waiting game has a name, 'Herschel Walker'*, ATLANTA J. & CONST. (July 8, 2021), <https://www.ajc.com/politics/politics-blog/the-jolt-the-jolt-buddy-carters-waiting-game-has-a-name-herschel-walker/OKHGUVENTKJF2TK42QALUJG57TA/>.

<sup>12</sup> *Id.*

<sup>13</sup> See Rep. Buddy Carter considering a run for U.S. Senate, WTOC (Apr. 19, 2021), <https://www.wtoc.com/2021/04/19/rep-buddy-carter-considering-run-us-senate/> ("Rep. Buddy Carter says he is considering a run for the U.S. Senate if Herschel Walker, a former University of Georgia and NFL running back and Augusta-native, decides against."); see also Greg Bluestein, *'Up in the air.' In Georgia politics, the wait is on for top 2022 races*, ATLANTA J. & CONST. (May 28, 2021), <https://www.ajc.com/politics/up-in-the-air-in-georgia-politics-2022-is-a-waiting-game/IO7OMH5SIFBDBJRITPZH7CF4YE/> ("Walker has told state Republicans he's nearing a decision on whether to run, and U.S. Rep. Buddy Carter said he won't join the contest if the former UGA star gets in.").

<sup>14</sup> Greg Bluestein, *Georgia 2022: Republican Buddy Carter gears up for a Senate run*, ATLANTA J. & CONST. (Apr. 19, 2021), <https://www.ajc.com/politics/politics-blog/georgia-2022-republican-buddy-carter-gears-up-for-a-senate-run/ZAAQFMD3HZCNXLGRPFMQYBV7F4/>.

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friends in the media cried foul, hyperbolically asserting that the law amounted to “Jim Crow 2.0.”<sup>15</sup> President Biden and former gubernatorial candidate Stacey Abrams supported the idea of companies boycotting doing business in the state in protest of the law.<sup>16</sup> The false narrative even led Major League Baseball (“MLB”) to move its All Star Game out of Atlanta, a decision MLB made two days after Ms. Abrams wrote an op-ed in USA Today touting the effectiveness of such boycotts.<sup>17</sup> Ms. Abrams subsequently downplayed her role in MLB’s move, but by that point, the decision had been made and MLB had moved the All Star Game to Denver, Colorado, a state that, ironically, has more restrictive voting laws than Georgia and a significantly lower minority population. MLB’s capitulation to such political pressure resulted in an estimated \$70 million in lost revenue for Atlanta small businesses, many of which were minority-owned. As the Atlanta Braves noted, “unfortunately, businesses, employees and fans in Georgia are the victims of this decision.”<sup>18</sup>

Not surprisingly, countless Georgians were appalled that the President of the United States and the most prominent Democrat politician in Georgia would support the idea of companies boycotting the state and MLB moving its All Star Game to another state. One of those Georgians was Rep. Carter, who decided to cut an ad geared at educating Georgia voters about the left’s role in having the All Star Game moved elsewhere. The mainstream media was not covering the issue fairly, so Rep. Carter thought it was important to educate Georgia voters about who was really responsible for MLB’s decision and the resulting economic loss.

Accordingly, Rep. Carter’s reelection campaign ran an ad in advance of the All Star Game held in Denver that emphasized the “radical left’s” role in MLB’s cancellation of Georgia, while explaining the need for “leaders who will take on big tech, big business and the big lies being forced down our throats.” The ad, entitled “Step Up To the Plate,” did not have a single reference to an election, let alone a campaign for U.S. Senate, which the Associated Press acknowledged in its article about the Complaint in this matter— “[a]t no point in the ad did Carter mention a Senate run.”<sup>19</sup> In response to the Complaint, Rep. Carter explained to The Brunswick News that “Georgia Democrats are enraged that I continue to make it known that they

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<sup>15</sup> Stacey Abrams Tweet (Mar. 25, 2021), <https://twitter.com/staceyabrams/status/1375226723239886857?lang=en>.

<sup>16</sup> Ryan Mills, *USA Today Let Stacey Abrams Stealth Edit Op-Ed to Downplay Support for Georgia Boycotts*, NAT’L REV. (Apr. 27, 2021), <https://www.nationalreview.com/news/usa-today-let-stacey-abrams-stealth-edit-op-ed-to-downplay-support-for-georgia-boycotts/>.

<sup>17</sup> Stacey Abrams, *Stacey Abrams: 3 ways for corporations to show they get what's at stake on voting rights*, USA TODAY (Mar. 31, 2021), <https://web.archive.org/web/20210331210632/https://www.usatoday.com/story/opinion/2021/03/31/voter-suppression-will-corporations-redeem-themselves-column/4820354001/>.

<sup>18</sup> Michael Ruiz, *Dem-backed MLB All-Star Game move cost majority-Black Atlanta tens of millions of dollars*, FOX BUSINESS (July 13, 2021), <https://www.foxbusiness.com/economy/mlb-all-star-game-atlanta-businesses>.

<sup>19</sup> *FEC complaint filed against Georgia Congressman Buddy Carter*, AP (Aug. 21, 2021), <https://apnews.com/article/sports-mlb-baseball-georgia-buddy-carter-2b0e9a3bde714cf71ebc669e665b14f5>.

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are responsible for the economic and cultural loss Georgia endured when their threats caused the relocation of the (Major League Baseball) All-Star game.”<sup>20</sup> Rep. Carter’s reelection campaign reported its payment for the media buy for the ad on its 2021 October Quarterly Report.<sup>21</sup>

Following Mr. Walker’s announcement on August 24th that he would run for Senate, Rep. Carter endorsed Walker’s candidacy the very next day. In an interview with Fox28 Savannah from the Savannah-Hilton Head airport on August 25th, Rep. Carter stated, “I’m all behind Herschel...I made it clear from the very beginning that if Herschel runs, I’m not going to run, and I’m going to support him, and I am.”<sup>22</sup> Rep. Carter also confirmed the same day that he would be running for reelection to his House seat, stating to WTOC that “I’m going to be running for re-election. There’s no question about this.”<sup>23</sup>

## **II. The Complaint**

The Complaint asserts that Rep. Carter triggered candidate status and should have filed a Form 2 Statement of Candidacy for U.S. Senate by virtue of his testing the waters activities and his House campaign’s sponsorship of the advertisement referenced above. Specifically, the Complaint alleges that Rep. Carter “has spent significant sums of money to advance his candidacy for U.S. Senate in Georgia—hiring a campaign team, preparing a launch statement, and running a statewide television advertisement,” but “he has failed to file any paperwork with the Federal Election Commission to alert the public of his candidacy as required by law.”<sup>24</sup>

## **III. Legal Analysis**

### ***A. Testing the Waters***

An individual becomes a candidate for federal office when the person receives or spends more than \$5,000 in “contributions” and “expenditures.”<sup>25</sup> The Act and the Commission’s regulations allow, however, an individual the opportunity to determine whether there is sufficient

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<sup>20</sup> Hank Rowland, *Ethics complaint filed against Rep. Carter*, BRUNSWICK NEWS (Aug. 13, 2021), [https://thebrunswicknews.com/news/local\\_news/ethics-complaint-filed-against-rep-carter/article\\_1a556573-349e-518c-8a0a-57e08f682fbf.html](https://thebrunswicknews.com/news/local_news/ethics-complaint-filed-against-rep-carter/article_1a556573-349e-518c-8a0a-57e08f682fbf.html).

<sup>21</sup> See Buddy Carter for Congress (C00543967), 2021 October Quarterly Report at 97, <https://docquery.fec.gov/pdf/764/202110159467651764/202110159467651764.pdf>.

<sup>22</sup> Isabel Litterst, *Rep. Buddy Carter endorses Herschel Walker for U.S. Senate*, WGXA NEWS (Aug. 25, 2021), <https://wgxa.tv/news/local/rep-buddy-carter-endorses-herschel-walker-for-ga-senate>.

<sup>23</sup> *Rep. Buddy Carter will seek re-election for U.S. House seat*, WTOC (Aug. 25, 2021), <https://www.wtoc.com/2021/08/25/rep-buddy-carter-will-seek-re-election-us-house-seat/>.

<sup>24</sup> Compl. at 1.

<sup>25</sup> 52 U.S.C. § 30101(2).

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political support for a candidacy before becoming a candidate.<sup>26</sup> Money raised or spent solely to “test the waters” does not count toward the \$5,000 threshold, until the individual decides to run for office or conducts activities that indicate the decision to become a candidate.<sup>27</sup> To determine whether the individual decided to become a candidate and whether the testing the waters exemption applies, the Commission looks objectively at the individual’s activities.<sup>28</sup>

The Commission’s regulations give examples of permissible activities to test the waters.<sup>29</sup> “Examples of activities permissible under this exemption if they are conducted to determine whether an individual should become a candidate include, but are not limited to, conducting a poll, telephone calls, and travel.”<sup>30</sup>

The Commission has clarified and expanded what constitutes permissible activities in advisory opinions and enforcement matters. For example, the Commission determined the following activities did not trigger candidacy if the purpose of the activities was solely to determine the viability of a candidacy: 1) traveling to speak to groups about public issues; 2) employing assistants to coordinate travel arrangements; 3) employing specialists in opinion research to conduct polls; 4) employing political consultants and public relation consultants; 5) renting office space and equipment; 6) preparing and using stationary to correspond with persons who displayed an interest in a potential campaign; 7) preparing and printing biographical brochures and possibly photographs for use at speaking appearances; 8) soliciting contributions for testing the waters activities; 9) compiling and maintaining information concerning persons who indicated interest in a possible candidacy; 10) organizing advisory groups on issues requiring expertise; 11) sending direct mail solicitations, provided mailings clearly indicate the person has not decided to run for office; 12) appearing at cocktail receptions of prominent businessmen the day after the Republican state convention and meeting with farmers and ranchers.<sup>31</sup>

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<sup>26</sup> See 11 C.F.R. §§ 100.72(a) (Exemption from the definition of contribution) and 100.131(a) (Exemptions for definition of expenditure); see also FEC Advisory Opinion 1981-32 (Askew) at 4 (Oct. 2, 1981).

<sup>27</sup> *Id.*; see also FEC Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC) at 5-6 (Nov. 13, 2015).

<sup>28</sup> *Id.* at 6; see FEC Matter Under Review 5363 (Sharpton), Factual and Legal Analysis at 7-8 (Nov. 13, 2003).

<sup>29</sup> 11 C.F.R. §§ 100.72(a) and 100.131(a).

<sup>30</sup> *Id.*

<sup>31</sup> See FEC Advisory Opinion 1981-32 at 2-4 (Commission found none of the 14 testing-the-waters activities proposed by former Governor Reubin Askew triggered candidacy.); see also FEC Advisory Opinion 1982-3 (Canston) at 2 (March 15, 1982) (Commission approved Senator Canston’s request to travel and speak to groups on a variety of public issues and meet with opinion makers.); FEC Advisory Opinion 1985-40 (Republican Majority Fund) at 4 (Former Senator Howard Baker, Jr. could send direct mail solicitations, because the mailings clearly indicated Baker had not yet determined whether he would seek the presidential nomination; he stated the funds were for testing-the-waters activities; the solicitations did not result in amassing campaign funds.); FEC Matter Under Review 6224 (Friona), Factual Legal Analysis at 8-9 (July 14, 2010) (Commission found that appearing on public

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The Commission’s regulations also list activities as non-exhaustive factors that may trigger candidate status.<sup>32</sup> An individual can indicate that he has gone beyond “testing the waters” and decided to become a candidate by: 1) using general public political advertising to publicize an intention to run for office; 2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activity designed to amass campaign funds that would be spent after becoming a candidate; 3) making or authorizing statements referring to the individual as a candidate; 4) conducting activity in close proximity to the election or over a protracted period of time; 5) taking action to qualify for the ballot under state law.<sup>33</sup>

***B. Rep. Carter’s Testing the Waters Activities Did Not Trigger His Candidacy for U.S. Senate***

The Complaint alleges that Rep. Carter “has triggered candidacy by making expenditures exceeding \$5,000 that do not fit within the testing-the-waters exemption” and that “the activities Representative Carter engaged in are ‘relevant to conducting a campaign’—for which the testing-the-waters exemption is not available—rather than for the purpose of determining the feasibility of his candidacy.” However, the activities cited in the Complaint contradict these allegations.

The Complaint first points to an article in the Atlanta Journal-Constitution that states Rep. Carter “is assembling a *campaign* team for a likely U.S. Senate bid.”<sup>34</sup> First, this was a description from the article’s author and not a quote from Rep. Carter or his agents. Second, simply because a journalist refers to the assembling of a “*campaign* team” does not mean that Rep. Carter has launched a “campaign” for U.S. Senate. Regardless of the semantics, even if Rep. Carter did put together a team to assist with his exploratory activities and decision-making process, this falls squarely within the testing the waters exemptions cited above and does not trigger candidate status.<sup>35</sup> Furthermore, the same article cited by Complainant makes explicitly

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television and panel commentary appearances or meeting with businessmen, farmers and ranchers did not constitute general public political advertising.).

<sup>32</sup> 11 C.F.R. §§ 100.72(b) and 100.131(b).

<sup>33</sup> *Id.*

<sup>34</sup> Greg Bluestein, *Georgia 2022: Republican Buddy Carter gears up for a Senate run*, ATLANTA J. & CONST. (Apr. 19, 2021), <https://www.ajc.com/politics/politics-blog/georgia-2022-republican-buddy-carter-gears-up-for-a-senate-run/ZAAQFMD3HZCNXLGRPFMQYBV7F4/>.

<sup>35</sup> See 11 C.F.R. §§ 100.72(a), 100.131(a) (“Testing the waters activities include, but are not limited to, payments for polling, telephone calls, and travel”); see also FEC Advisory Opinion 1981-32 (Askew) (concluding that employment of political consultants is permissible so long as such an undertaking is for the purpose of deciding whether to become a candidate).

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clear that Rep. Carter “hasn’t finalized his decision yet” and that he’s “considering it very seriously and doing our due diligence.”<sup>36</sup> Complainants cannot cherry pick the words “*campaign team*” from an article as ostensive proof of Rep. Carter triggering candidate status for U.S. Senate while ignoring language in the same article that makes clear he “hasn’t finalized his decision yet.”<sup>37</sup>

Next, the Complaint references another Atlanta Journal-Constitution article from July that cites several quotes from Rep. Carter about his consideration of becoming a candidate. Specifically, the Complaint cites Rep. Carter’s tongue-in-cheek comment to the reporter that “I’ve spent a lot of money” engaging in testing the waters activities, and his drafting of a “campaign launch announcement that’s ‘on the shelf and ready to go’”<sup>38</sup> as proof that he triggered candidate status. As an initial matter, the same article makes explicitly clear that Rep. Carter “is not just considering a bid for U.S. Senate, he’s actively preparing for it — but only if Herschel Walker decides not to get into the race against Democratic U.S. Sen. Raphael Warnock.” Accordingly, regardless of Rep. Carter’s spending of money for testing the waters activities and his drafting of a potential launch announcement in case he decided to run, his decision was always entirely conditional and contingent on Mr. Walker not running for Senate. The Commission has made clear on numerous occasions that conditional statements of candidacy are insufficient to trigger candidate status.<sup>39</sup>

Furthermore, a potential candidate’s spending of money is well within the testing the waters exemptions, as is the drafting of a campaign announcement to be used should the potential candidate decide to run. This is especially the case here, as Rep. Carter never actually made an announcement of candidacy or disseminated any announcement materials to the public. In short, Rep. Carter never made nor authorized statements that referred to him as a candidate for Senate, and as the Complaint concedes, “Representative Carter has been careful to couch his intention to run for Senate in conditional terms, stating that he will run only if...Herschel Walker, does not.”<sup>40</sup>

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<sup>36</sup> Bluestein Article, *supra* n. 34.

<sup>37</sup> *Id.*

<sup>38</sup> Mitchell Article, *supra* n. 11.

<sup>39</sup> See Statement of Reasons, Comm’rs. Petersen, Hunter, McGahn, & Weintraub at 2-3, MUR 5930 (Kirk Schuring) (explaining that conditional statements of candidacy are insufficient to trigger candidacy); Statement of Reasons, Comm’rs. Petersen, Hunter, McGahn, & Weintraub at 2-3, MUR 5934 (Fred D. Thompson) (noting that ambiguous statements are insufficient); Factual & Legal Analysis at 8, MUR 6472 (Diane Gooch) (explaining that indefinite public statements are insufficient to trigger candidacy).

<sup>40</sup> Compl. at 5 (citing Hank Rowland, *Rep. Carter clarifies plans for potential U.S. Senate run*, Brunswick News (Apr. 21, 2021), [https://thebrunswicknews.com/news/local\\_news/rep-carter-clarifies-plans-for-potential-u-s-senate-run/article\\_60fefce0-09dc-5aef-a33e-5506cb3d4a57.html](https://thebrunswicknews.com/news/local_news/rep-carter-clarifies-plans-for-potential-u-s-senate-run/article_60fefce0-09dc-5aef-a33e-5506cb3d4a57.html))



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***C. Buddy Carter for Congress' Ad Did Not Amount to Testing the Waters Activity***

Lastly, the Complaint places significant emphasis on Rep. Carter's reelection campaign's sponsorship of the television ad referenced above as apparent evidence that Rep. Carter triggered candidate status for U.S. Senate. The Complaint is particularly focused on the fact that the ad ran statewide, stating that "the spending of over \$50,000 on airtime in media markets outside of one's congressional district is a clear demonstration of promotional, partisan spending that does not qualify as testing-the-waters."<sup>41</sup> However, as explained above, Rep. Carter's reelection campaign's ad mentions nothing about an election or campaign, let alone a U.S. Senate campaign. Rather, the ad was designed to highlight the "radical left's" role in the removal of the MLB All Star Game from Atlanta. Rep. Carter felt it was important for the entire state to see the ad in the lead up to the All Star Game so all Georgians would be reminded of the "radical left's" responsibility for millions of dollars in lost revenue to the state's economy. Importantly, not once does Rep. Carter say he is running for U.S. Senate or even considering running for U.S. Senate in the ad.

The Commission's testing the waters regulation provides "examples of activities that indicate that an individual has decided to become a candidate," which includes, "[t]he individual uses general public political advertising to publicize his or her intention to campaign for Federal office."<sup>42</sup> While the ad in question would amount to general public political advertising, it does not contain any language whatsoever that publicizes Rep. Carter's "intention to campaign for federal office." Accordingly, Complainant cannot rely on this exception to the testing the waters general exemption to push its flawed legal rationale.

The Complaint suggests that "the only logical goal of spending money to air the advertisement outside the district is to generate name recognition and support for him as a candidate for U.S. Senate," and states that the "Commission has made clear that activities that are designed to heighten an individual's political appeal by projecting the individual to the public as a serious contender for office fall outside of the testing-the-waters allowance and count towards the \$5,000 candidacy trigger."<sup>43</sup> However, this mischaracterizes what the Commission actually said in the 1981 advisory opinion cited by Complainant as support for this contention. The Complaint conveniently omits that the advisory opinion explained "activities designed to heighten [an individual's] political appeal to the electorate" would fall outside the testing the waters exemption only "if [such activities] take place in a factual context indicating that [the

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<sup>41</sup> Compl. at 6.

<sup>42</sup> 11 C.F.R. § 100.72(b)(1).

<sup>43</sup> Compl. at 7 (citing FEC Advisory Opinion 1981-32 (Askew) at 5).

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individual] has moved beyond the deliberative process of deciding to become a candidate.<sup>44</sup> In this case, there has never been a factual context indicating that Rep. Carter moved beyond the deliberative process of deciding to become a candidate, as his potential candidacy for U.S. Senate was always contingent on Mr. Walker not running for U.S. Senate.

Furthermore, neither the Act nor the Commission's regulations prohibit a House candidate from sponsoring advertisements outside of his or her district. It is possible the Complainant is conflating the testing the waters regulation with the Commission's definition of "electioneering communication," which does take into consideration the geography of where a television advertisement is run—i.e. a television ad must be "targeted to the relevant electorate" to qualify as an electioneering communication.<sup>45</sup> However, the ad in this case is clearly not an electioneering communication because it was not run within thirty days before a primary or sixty days before a general election. In reality, the advertisement was nothing more than an issue ad intended to remind Georgians of the "radical left's" role in canceling the MLB All Star Game in Atlanta. Indeed, as two of the most prominent Democrat campaign finance attorneys, Bob Bauer and Marc Elias, argued in a prior matter, "there is no legal basis to support the [] assertion that issue ads mentioning a specific public official may only be aired in his or her electoral district."<sup>46</sup>

#### **IV. Conclusion**

In presenting politically motivated and factually and legally unsubstantiated arguments, Mr. Hogan and the Democratic Party of Georgia have failed to demonstrate that the Respondents have violated any provision of the Act or the Commission's regulations. Instead, they have invoked an administrative process as a means to assault their political opponents. We therefore respectfully request that the Commission recognize the legal and factual insufficiency of the Complaint on its face and immediately dismiss it.

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<sup>44</sup> FEC Advisory Opinion 1981-32 (Askew) at 5.

<sup>45</sup> See 11 C.F.R. 100.29(b)(5) ("Targeted to the relevant electorate means the communication can be received by 50,000 or more persons - (i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or (ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.")


<sup>46</sup> See MUR 4505 (Torricelli for U.S. Senate), Respondent's Motion to Dismiss at 10 (Dec. 9, 1996), <https://www.fec.gov/files/legal/murs/4505/0000396F.pdf>.

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Thank you for your consideration of this matter, and please do not hesitate to contact me directly at (202) 344-4522 with any questions.

Respectfully submitted,

A handwritten signature in black ink that reads "James E. Tyrrell III". The signature is written in a cursive style with a large, prominent "J" and "T".

James E. Tyrrell III  
*Counsel to Rep. Buddy Carter, Buddy Carter for  
Congress, and Paul Kilgore, in his official capacity  
as Treasurer*