



January 3, 2022

**VIA EMAIL: CELA@FEC.GOV**

Roy Q. Lockett, Esq.  
Acting Assistant General Counsel  
Complaints Examination & Legal Administration  
Federal Election Commission  
1050 First Street, NE  
Washington, DC 20463

**Re: MUR 7943**

Dear Mr. Lockett:

We write as counsel to Common Good Virginia (“CGVA”) in response to the complaint filed by Americans for Public Trust on November 10, 2021 (the “Complaint”).

The Complaint alleges that Val Demings for U.S. Senate (the “Campaign”) impermissibly accepted an in-kind contribution from CGVA (in the form of emails supporting the Campaign) paid for with nonfederal funds, and therefore violated the Federal Election Campaign Act of 1971, as amended (“the Act”). However, this allegation reflects a basic lack of understanding – or deliberate mischaracterization – of both federal law and Commission precedent on this question.

A complaint against a respondent must include a “clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction.”<sup>1</sup> In addition, the Commission may only find “reason to believe” and commence an investigation when a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act, or Commission regulations.<sup>2</sup> In determining whether it has reason to believe, “[u]nwarranted legal conclusions from asserted facts” and “mere speculation” will not be accepted as true.<sup>3</sup>

Here, the facts alleged in the Complaint, even if true, would not constitute a violation of the Act. The Commission should therefore find no reason to believe that CGVA violated the Act, and should promptly dismiss this matter.

## I. FACTUAL BACKGROUND

Val Demings for U.S. Senate is the principal campaign committee of Representative Val Demings. Representative Demings is a current Member of the House of Representatives and a candidate for U.S. Senate from the state of Florida. Common Good Virginia is a nonfederal political committee registered

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<sup>1</sup> 11 C.F.R. § 111.4(d)(3).

<sup>2</sup> MUR 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1 (Dec. 21, 2000).

<sup>3</sup> *Id.* at 2; *see also* MURs 6789/6852 (Special Operations for America, et al.), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 4 (May 28, 2019) (“We do not authorize Commission investigations based on mere speculation”).

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with the Virginia State Board of Elections.

During the month of October 2021, CGVA sent out several fundraising emails that used Representative Demings's name and likeness to solicit contributions for both CGVA and the Campaign. These emails linked to an ActBlue fundraising page that also solicited contributions for both CGVA and the Campaign.

The Complaint does not assert that CGVA incurred any costs or made any payments in connection with the dissemination of these fundraising emails; nor does the Complaint allege any facts which would demonstrate that the emails in question met the definition of coordinated communications under federal law. Rather, Complainant merely concludes that sending out an email supporting a federal candidate constitutes a thing of value under the Act, without providing any legal argument for this mischaracterization of the law.

## II. LEGAL ANALYSIS

### A. Emails do not meet the definition of coordinated communications, and therefore cannot constitute in-kind contributions.

The full extent of the Complaint's factual allegations is that CGVA sent out fundraising emails soliciting contributions for CGVA and the Campaign. Even if taken as true, these facts would not result in an in-kind contribution from CGVA to the Campaign under the Act.

Under Commission regulations, the costs of a communication result in an in-kind contribution only if the communication is a "coordinated communication."<sup>4</sup> In order to meet the definition of a coordinated communication, a communication must be either an "electioneering communication" or a "public communication."<sup>5</sup> "Electioneering communications" include only certain "broadcast, cable, or satellite communication[s]," while "public communications" explicitly exclude "communications over the Internet, except for communications placed for a fee on another person's Web site."<sup>6</sup> The email solicitations in question here fall squarely within that exclusion.

The Commission has consistently found that the cost of communications are not in-kind contributions unless they meet the definition of a coordinated communication under Commission regulations.<sup>7</sup>

In a 2011 advisory opinion, the Commission addressed a proposal from an organization that wished to "solicit individuals in the general public via email and the [organization's] website to make contributions directly to certain recommended Federal Candidates."<sup>8</sup> The Commission advised that the "costs of the [organization's] solicitations via email and website will not be in-kind contributions to the recommended candidates because the solicitations will not be 'coordinated communications,'" explaining that "**[b]ecause the Project's communications will appear only on the Project's own**

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<sup>4</sup> 11 C.F.R. § 109.21(b)(1).

<sup>5</sup> *Id.* § 109.21(c).

<sup>6</sup> *Id.* §§ 100.26, 100.29.

<sup>7</sup> *See, e.g.*, Adv. Op. 2011-14 (Utah Bankers Association); MUR 6477 (Turn Right USA), First General Counsel's Report at 8 (Dec. 27, 2011); MUR 6502 (Nebraska Democratic Party), First General Counsel's Report at 13 (May 17, 2012); MUR 6522 (Lisa Wilson-Foley for Congress), First General Counsel's Report at 7 (Feb. 5, 2013); MUR 6657 (Akin for Senate), First General Counsel's Report at 6-7 (May. 16, 2013); MUR 6722 (House Majority PAC), First General Counsel's Report at 4-5 (Aug. 6, 2013).

<sup>8</sup> Adv. Op. 2011-14.

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**website and by email, the communications will not be either public communications or electioneering communications...[b]ecause the content prong is not satisfied, the Project’s communications via email and on its own website will not be coordinated communications under 11 CFR 109.21. Accordingly, the costs of these communications will not be in-kind contributions.”<sup>9</sup>**

Similarly, in a 2013 enforcement action, the Commission considered a complaint alleging that email solicitations sent in coordination with a candidate constituted impermissible in-kind contributions to that candidate – precisely the same allegation that is being made here.<sup>10</sup> The Commission, however, noted that email solicitations “do not satisfy the content requirement because they are neither electioneering communications nor public communications... communications over the Internet are specifically exempt from the definition of ‘public communication’ unless placed for a fee on a third party website,” and concluded that therefore, “there was no coordinated communication under 11 C.F.R. § 109.21 and thus no contribution.”<sup>11</sup> The same is true here.

In short, the activities described in this Complaint — sending emails coordinated with a candidate and soliciting contributions for that candidate — fall squarely within the scope of this exemption, and as a matter of law cannot constitute in-kind contributions.

### **B. Common Good Virginia received consideration for its solicitations on behalf of the Campaign.**

Even if the Complaint were not incorrect as a matter of law, it would still be incorrect with respect to its factual analysis. The Complaint alleges that the Campaign received an in-kind contribution from CGVA based on the value of emails sent by CGVA soliciting contributions for the Campaign. However, by the Complainant’s own admission, “Common Good Virginia sent out numerous fundraising solicitations that requested contributions split *between itself and* Val Demings for U.S. Senate.”<sup>12</sup> In other words, in exchange for sending an email to raise funds for the Campaign, CGVA received the benefit of using Representative Demings’s name and likeness to solicit for CGVA.<sup>13</sup> CGVA thus received a thing of equal value from the Campaign.

The Commission has long held that no in-kind contribution occurs when one party receives adequate consideration for the services that it provides to another. In fact, the Commission has addressed other complaints arising under the very same statute cited in the Complaint, in connection with this type of split fundraising between federal and nonfederal committees or accounts, without ever suggesting that the practice of split fundraising *itself* raises any issues under 52 U.S.C. § 30125(e)(1)(A).<sup>14</sup>

Here, CGVA received equal consideration for its solicitation on behalf of the Campaign, in the form of the use of Representative Demings’s name and likeness to solicit contributions for CGVA. Therefore, even if not already exempted from the definition of an in-kind contribution as a matter of law, the email solicitations still would not represent a thing of value provided by CGVA to the Campaign.

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<sup>9</sup> *Id.* (emphasis added).

<sup>10</sup> MUR 6657, First General Counsel’s Report (May 6, 2013).

<sup>11</sup> *Id.* at 6-7.

<sup>12</sup> Compl. at ¶ 8 (emphasis added).

<sup>13</sup> All such solicitations were limited to federally permissible funds, in compliance with 11 C.F.R. § 300.62. *See* Compl. at Ex. D.

<sup>14</sup> *See, e.g.,* MUR 7347 (End Citizens United), First General Counsel’s Report (Feb. 15, 2019).

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**C. Common Good Virginia had sufficient federally permissible funds to account for the cost, if any, of the email solicitations.**

Finally, even setting aside these legal and factual mistakes in the Complaint, the allegation that CGVA violated U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 300.61 would still be incorrect, because CGVA's filings show it had sufficient federally permissible funds to account for the cost, if any, of the email solicitations.

Under federal law, “[a]ny organization that makes contributions... but that does not qualify as a political committee under 11 CFR 100.5... must demonstrate through a reasonable accounting method that, whenever such an organization makes a contribution or expenditure, or payment, the organization has received sufficient funds subject to the limitations and prohibitions of the Act to make such contribution, expenditure, or payment.”<sup>15</sup>

Here, an analysis of CGVA's most recent campaign report shows that it had \$371,820.04 in funds compliant with the limits and source restrictions of the Act at the beginning of the reporting period during which the emails in question were sent, an amount more than sufficient to account for the cost of the email solicitations.<sup>16</sup> The Complaint does not allege otherwise; rather, it simply assumes that CGVA's status as a nonfederal political committee renders *all* CGVA's funds impermissible under the Act. This is an incorrect characterization of the law. Once again, the facts alleged in the Complaint, even if assumed true, still would not violate the relevant provisions of the Act.

### III. CONCLUSION

The facts alleged in the Complaint do not provide a basis for the Commission to find “reason to believe” that the Act or Commission regulations have been violated. Both the plain text of the regulations and Commission precedent clearly state that emails are not coordinated communications, and do not constitute in-kind contributions under the Act. Furthermore, the emails in question would not have constituted in-kind contributions regardless, due to the consideration received by CGVA in the form of using Representative Demings's name and likeness to solicit contributions for CGVA. And even assuming the Complainant's mischaracterizations of these two questions to be accurate, there would still be no violation of 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 300.61, as alleged in the Complaint, because CGVA had sufficient federally permissible funds to account for any costs that would be associated with the communications.

Therefore, we respectfully request that the Commission find no reason to believe CGVA violated the Act or Commission regulations, and immediately dismiss this matter.

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<sup>15</sup> 11 C.F.R. § 102.5(b)(1).

<sup>16</sup> See Va. Dep't of Elections Campaign Finance Reports, Common Good Virginia, <https://cfreports.elections.virginia.gov/Report/Index/258012>.

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Very truly yours,

A handwritten signature in blue ink, appearing to read "Jon S. Berkon". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jonathan S. Berkon  
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Counsel to Common Good Virginia