



January 21, 2022

**VIA EMAIL at [cela@fec.gov](mailto:cela@fec.gov)**

Federal Election Commission  
Office of Complaints Examination  
& Legal Administration  
Attn: Christal Dennis, Paralegal  
1050 First Street, NE  
Washington, DC 20463

**Re: MUR 7951: Response of Kistner for Congress and Thomas Datwyler in his official capacity as treasurer**

Dear Ms. Dennis:

We represent Kistner for Congress and Thomas Datwyler in his official capacity as treasurer (the “Committee”), and we write in response to your letter regarding the Complaint filed in the above-referenced matter. The sole allegation in the Complaint is that the Committee violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by reimbursing the candidate for travel not associated with his campaign. The Complaint, however, provides absolutely no factual connection between the reimbursed travel and any personal use. Instead, the Complaint relies entirely on speculation and conjecture, concluding that the amount of reimbursement alone must constitute a violation of the Act. The Commission has made clear that such unsupported allegations cannot provide the basis for a reason to believe finding. Moreover, the Committee follows all Commission rules for record keeping, including requiring all campaign staffers seeking reimbursement for campaign travel to keep mileage logs that are retained by the Committee’s treasurer. In light of this, the Commission should find no reason to believe a violation occurred and close the file.

### **I. Background.**

Kistner for Congress is the authorized committee for Tyler Kistner, a Republican congressional candidate in Minnesota’s Second Congressional District. Complainant, End Citizens United, is a federal political action committee with the stated purpose of electing Democratic candidates.<sup>1</sup> According to Commission data, since 2016 Complainant has contributed at least \$38,900 to Angie Craig for Congress, the authorized committee for the incumbent candidate from the Second District.

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<sup>1</sup> <https://endcitizensunited.org/about-us/>.

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For the last two election cycles, Tyler Kistner has campaigned full time, traveling in his personal vehicle to every corner of the Second District and beyond to meet with voters and officials. Like many congressional campaigns, the Committee reimburses the candidate and its staffers for the mileage they incur traveling on behalf of the Committee, pursuant to federal law. To be reimbursed, campaign travelers are required to keep and submit detailed mileage logs, including the starting point, destination, purpose, and total miles traveled for each trip.

Sensing a difficult fight for the incumbent, and not satisfied with maxing out to her authorized committee, Complainant filed this Complaint, hoping to attach the label “under investigation by the FEC” to the Committee for the duration of the election cycle. The Complaint, without any support, alleges that because of the relatively large reimbursements the Committee has disbursed to Kistner, some of that travel must have been for personal use.

## II. Discussion.

The Act prohibits any person from converting campaign funds to personal use, defining “personal use” as using funds “to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office.”<sup>2</sup> Commission regulations enumerate types of disbursements that qualify as *per se* personal use.<sup>3</sup> Other types of disbursements, such as travel, are determined on a case-by-case basis using the Commission’s “irrespective test.”<sup>4</sup>

On several occasions the Commission has explained that mere speculation is not enough to support a reason to believe finding and allegations must be substantiated with specific evidence of personal use. For instance, in MUR 7421, the Commission found no reason to believe campaign funds were used for personal travel because “[t]he Complaint [did] not point to any specific information to support its allegation, instead relying on an assertion that the amount of the reimbursements seemed excessive compared to a general impression of how much the [candidate] could have reasonably traveled for the campaign during the relevant time period.”<sup>5</sup> Similarly, the Office of General Counsel has recommended dismissing allegations of personal use that were based solely on the total amount a committee spent compared to other committees in the state. OGC explained that “without additional specificity regarding the potential personal use, the Complaint’s comparative spending analysis does not provide sufficient reason to believe that the identified disbursements constitute personal use.”<sup>6</sup> Likewise, explaining its dismissal of the complaint in MUR 7494, the Commission observed that “there is nothing inherently suggestive about the fact that the Committee reported spending more ... than other committees.”<sup>7</sup>

Here, the Complaint is based entirely on a single news article suggesting that the Committee’s spending seems “unusually high” or “raise[s] questions.”<sup>8</sup> As discussed, Commission precedent holds that this type of speculation or comparative spending analysis

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<sup>2</sup> 52 U.S.C. § 30114(b); see also 11 C.F.R. § 113(g).

<sup>3</sup> 11 C.F.R. § 113.1(g)(1)(ii).

<sup>4</sup> *Id.*

<sup>5</sup> Factual and Legal Analysis at 5, MUR 7421 (Cramer for Senate, *et al.*).

<sup>6</sup> First General Counsel’s Report at 12, MUR 7534 (William P. Huizenga, *et al.*).

<sup>7</sup> Factual and Legal Analysis at 7, MUR 7494 (John Culberson, *et al.*).

<sup>8</sup> Compl.at 2.

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cannot support a reason to believe finding. As the Commission knows well, no two campaigns are the same. Incumbent Members of Congress are required to spend most of their time in Washington, campaigning inside their districts only sporadically. Many challengers, on the other hand, are on the road campaigning every day, spending 80 hours a week or more canvassing neighborhoods in their districts or traveling to meetings, including meetings outside their districts. Here, the Complaint's cumulative spending analysis is evidence of nothing more than an active campaign.

Even if the Commission were to embark on such a comparative analysis, the Complaint's description of the travel is misleading and should be rejected. For instance, the Complaint states that the candidate lives "only" 20 miles from the campaign headquarters, which would logically be a 40-mile round trip.<sup>9</sup> Next, the Complaint implies that Kistner's campaign-related travel can only take place within the "120 miles wide" Second District, which is incorrect. Campaign events and meetings may occur in St. Paul, Minneapolis, or other towns in the state but outside the Second District, round trips that can be 100 miles or more. Even more misleading, the Complaint begins its reimbursement analysis on August 11, 2020, a date the Committee made a reimbursement to Kistner, but the Complaint excludes the period before August 11 when the reimbursed travel actually occurred.<sup>10</sup> So, when viewed in a fairer context, what the Complaint describes as \$26,177.65 "in less than a year" is more accurately described as about \$50 per day over much more than a year.

In MUR 4850, three Commissioners forcefully rejected a conclusory allegation that illegal contributions "appear to have been made," stating that "[t]he complaint itself literally fails to make any factual showing to support an accusation that [respondent] violated the FECA."<sup>11</sup> Likewise here, the Complaint literally fails to make any factual showing to support its accusation that the Committee converted campaign funds to personal use. The Complainant is inviting the Commission on a fishing expedition, hoping to trigger a baseless investigation to bog down a Republican candidate in one of the most competitive districts in the country.

Unfortunately for Complainant, the Act is not a backdoor FOIA provision to go after one's political opponents. The burden of proof cannot be shifted, the burden remains with Complainant, and Complainant has failed to meet that burden. "The standard, after all, is 'reason to believe,' not reason to question."<sup>12</sup> "[M]ere 'official curiosity' will not suffice as the basis for FEC investigations."<sup>13</sup> "The burden of proof does not shift to a respondent merely because a complaint is filed."<sup>14</sup> Accordingly, the Commission should decline Complainant's invitation and find no reason to believe a violation occurred.

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<sup>9</sup> *See id.* at 6.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> Statement of Reasons of Chairman Darryl R. Wold and Commissioners David M. Mason and Scott E. Thomas at 2 (July 20, 2000), MUR 4850 (Deloitte & Touche, LLP, et al.).

<sup>12</sup> Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor III at fn. 31 (Oct. 8, 2021), MUR 7753 (Everytown for Gun Safety Action Fund, et al.)

<sup>13</sup> *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981).

<sup>14</sup> Statement of Reasons of Chairman Darryl R. Wold and Commissioners David M. Mason and Scott E. Thomas at 2 (July 20, 2000), MUR 4850 (Deloitte & Touche, LLP, et al.).

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Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'DHR', written in a cursive style.

Derek H. Ross  
Scott Gast  
*Counsel to Kistner for Congress  
and Thomas Datwyler in his official  
capacity as treasurer*