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BEFORE THE FEDERAL ELECTION COMMISSION

)
) **MUR 8287**
)

**RESPONSE OF BERNIE MORENO FOR SENATE AND
PAUL KILGORE, AS TREASURER**

By and through undersigned counsel, Bernie Moreno for Senate (“the Campaign”) responds to the Complaint in the above-captioned Matter Under Review (“MUR”). For the reasons set forth below, we respectfully request that the Federal Election Commission (“FEC” or “Commission”) find that there is no reason to believe that a violation of the Federal Election Campaign Act (“the Act”) or FEC regulations has occurred, dismiss the Complaint, and close the file as to the Campaign.

BACKGROUND

The Commission generated the Campaign as a respondent in this MUR based on a single paragraph in the Complaint. Compl. ¶ 1. In it, the Complaint alleges “[i]llegal coordination” between the Campaign and an FEC-registered committee called The Joshua Super PAC (“the PAC”) just because the PAC’s treasurer purportedly attended a fundraiser for the Campaign with her spouse in August 2023. *Id.* ¶ 1.¹ The Complaint declares that this indicates the PAC “coordinated expenditures with the [Campaign] and made excessive and prohibited in-kind contributions to the [C]ampaign by paying for communications that constituted coordinated

¹ The Complaint attaches a photograph of a portion of a purported invitation to a Campaign fundraising event on August 16, 2023. Compl. at 13. The Complaint claims that the invitation holds out the PAC’s treasurer (Kathy Fishel) “as a member of the Bernie Moreno Campaign’s Leadership Committee,” Compl. at 3, but it merely lists her and her spouse (Scott Fishel) as being among the event’s honorary “Leadership Committee” of planned attendees who had contributed \$500 or more to the Campaign. *Id.* at 13. And indeed, the PAC treasurer’s spouse had contributed \$500 to the Campaign as of the event, qualifying for the honorary “Leadership Committee” designation. *See* Bernie Moreno for Senate, Receipts from Scott Fishel as of Aug. 16, 2023, https://www.fec.gov/data/receipts/?data_type=processed&committee_id=C00837484&contributor_name=Fishel&two_year_transaction_period=2024&min_date=01%2F01%2F2023&max_date=08%2F16%2F2023 (last visited Oct. 14, 2024).

communications under 11 CFR §109.21” *Id.* Yet the Complaint does not identify any PAC communication it believes was actually “coordinated” with the Campaign, *id.*, and from its FEC disclosures, it appears that the PAC has not made any independent expenditures in connection with any federal races.²

ANALYSIS

The Commission should immediately dismiss this MUR as to the Campaign because the Complaint is both legally defective and substantively deficient.

I. THE COMPLAINT MUST BE DISMISSED AS LEGALLY DEFECTIVE.

The Commission should dismiss the Complaint as to the Campaign because it rests entirely on the sorts of “[p]urely speculative charges” and bald legal conclusions that the Commission has concluded can never establish “reason to believe.” MUR 5467 (Michael Moore), First General Counsel’s Report at 5 (quoting MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee), Statement of Reasons of Comm’rs Mason, Sandstrom, Smith & Thomas at 3); *see also* MUR 5845 (Citizens for Truth), Factual & Legal Analysis at 6 n.8 (“Unwarranted legal conclusions from asserted facts or mere speculation ... will not be accepted as true.”). Indeed, “[a] ‘reason to believe’ finding followed by an investigation [is only] appropriate when a complaint credibly alleges that a significant violation may have occurred” FEC, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 89 Fed. Reg. 19729, 19730 (Mar. 20, 2024). It is not enough for a complaint to “present mere allegations that the Act has been violated and request that the Commission undertake an investigation to determine whether there are facts to support the charges.” MUR 6056 (Protect Colorado Jobs, Inc.), Statement of Reasons of

² In reality, from its FEC disclosures, it appears that the PAC is essentially inactive. It has spent little over \$30,000 the entire 2023-2024 election cycle as of the date of this response. *See* The Joshua Super PAC, 2023-2024 Cycle Spending, fec.gov, <https://www.fec.gov/data/committee/C00810499/?tab=spending&cycle=2024#total-disbursements> (last visited Oct. 16, 2024).

Comm’rs Petersen, Hunter & McGahn at 2; *see also* MUR 4850 (Deloitte & Touche, LLP), Statement of Reasons of Comm’rs Wold, Mason & Thomas at 2 (“A mere conclusory allegation without any supporting evidence does not shift the burden of proof to the respondents.”). Yet that is exactly what this Complaint looks to do and why the Commission must dismiss it.

II. THE COMPLAINT MUST ALSO BE DISMISSED BECAUSE ITS ALLEGATIONS DO NOT DESCRIBE A VIOLATION OF LAW.

The Commission also should dismiss the Complaint as to the Campaign because it fails to “describe a violation of statute or regulation over which the Commission has jurisdiction.” 11 C.F.R. § 111.4(d)(3). The Commission only “may find reason to believe if a complaint sets forth sufficient specific facts which, if proven true, would constitute a violation of the Act.” MUR 5845 (Citizens for Truth), Factual & Legal Analysis at 6, 6 n.8 (emphasis added); *see also* MUR 6554 (Friends of Weiner), Factual & Legal Analysis at 5 (“The Complaint and other available information in the record do not provide information sufficient to establish” a violation of FECA.). But the Complaint’s bare assertions of “illegal coordination” by the Campaign fail this fundamental standard. In fact, the Complaint does not set forth *any* factual allegations that could constitute a violation by the Campaign of the Commission’s “coordinated communication” rules under 11 C.F.R. § 109.21.

The Commission will treat a “communication” as “coordinated” with a candidate or campaign committee under 11 C.F.R. § 109.21 only if it meets the Commission’s “three-part test.” MUR 7960 (Casten for Congress), Factual & Legal Analysis at 7. Under that test, a communication is coordinated if it “(1) is paid for, partly or entirely, by a person other than the candidate, authorized committee, political party committee, or agent thereof; (2) satisfies at least one of the ‘content standards’ at 11 C.F.R. § 109.21(c); and (3) satisfies at least one of the ‘conduct standards’ at 11 C.F.R. § 109.21(d).” MUR 7503 (Kansas Republican Party), Factual & Legal Analysis at 5-6. “All three [of these] prongs must be satisfied for a communication to be considered coordinated.” *Id.* at 6. But the Complaint fails each one of them.

First, the Complaint fails at the payment prong, 11 C.F.R. § 109.21(a)(1), because there was no payment by the PAC. Indeed, the Complaint does not identify even one communication it believes to have been paid for by the PAC in coordination with the Campaign. And the PAC’s FEC disclosures further belie the Complaint’s unwarranted speculation. As noted above, the PAC apparently has paid for *no* advertisements in the form of independent expenditures supporting Bernie Moreno’s 2024 Senate candidacy, or any other federal candidate for that matter. Without a “payment,” there can be no violation of 11 C.F.R. § 109.21, and the Commission should dismiss the Complaint on this basis alone.

Second, the Complaint crumbles at the second step of the “coordination” test—the content prong of 11 C.F.R. § 109.21(c)—for the same reasons. While there are five content standards under the Commission’s regulations, each one requires that there be a showing of a “public communication” in the case of alleged coordination with a reporting federal political committee. *See* 11 C.F.R. § 109.21(a)(2), (c) (explaining that a “coordinated communication” must be either a “public communication” under 11 C.F.R. § 100.26 or an “electioneering communication” under 11 C.F.R. § 100.29); *see also* MUR 8134 (Lauren Boebert for Congress), Factual & Legal Analysis at 10 n.41 (discussing elements necessary to satisfy the regulation’s “content prong”). Yet neither the Complaint nor the PAC’s FEC reports indicate that the PAC has ever disseminated any public communication in support of Bernie Moreno’s Senate candidacy. The Complaint thus likewise fails to offer any facts meeting the content prong and the Commission should dismiss it for this reason as well.

Third, even if the PAC were to make independent expenditures in connection with Ohio’s 2024 Senate race after the filing of this response (and thus more than 14 months after its treasurer purportedly attended an August 16, 2023 Campaign event) the Complaint would

equally fail the conduct prong of 11 C.F.R. § 109.21(d). The Commission has rightly concluded that activity like that alleged in the Complaint—a PAC official’s mere attendance at a campaign event—cannot provide a basis on which to find “coordination.” *See* MUR 7148 (Khouri for Congress), Factual & Legal Analysis at 20 (“According to the Complaint, Proft’s fundraising and support for Khouri, as well as his attendance at campaign events suggests coordination, but the available information, without more, fails to support a reasonable inference that Proft’s activities, satisfy the conduct prong.”); *see also* MUR 7119 (Americans for Liberty & Free Enterprises), Factual & Legal Analysis at 5 (“[T]he available facts show only that a person associated with the Trump Committee ... attended and spoke at an ALFE event, and that does not demonstrate impermissible ‘coordination’ between ALFE and the Trump Committee.”). As such allegations are all the Complaint can muster, it fails to present any facts that could satisfy the conduct prong. The Commission thus must also reject the Complaint’s misguided “coordination” theory for this reason.

CONCLUSION

For each of the foregoing reasons, the Commission should reject the Complaint’s request for an investigation, find no reason to believe that a violation of the Act or Commission regulations has occurred, and immediately dismiss this matter as to the Campaign.

Respectfully submitted,



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