

IN AND BEFORE THE
FEDERAL ELECTION COMMISSION

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COMMISSION

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In re:)
Make Us Great Again, Inc.) MUR 6514
Paul Kilgore, Treasurer)
in his official capacity)

**RESPONSE AND MOTION TO DISMISS COMPLAINT AND
MOTION TO REFER COMPLAINANTS TO DEPARTMENT OF JUSTICE FOR
FALSE STATEMENTS**

Make Us Great Again, Inc. ("Make Us Great Again") and Paul Kilgore in his official capacity as Treasurer of the Committee ("Treasurer"), (collectively hereafter "Respondents"), hereby file this Response to the Complaint filed by J. Gerald Hebert on behalf of the Campaign Legal Center ("Hebert") and Fred Wertheimer on behalf of Democracy 21 ("Wertheimer")(collectively, hereafter "Complainants") with the Federal Election Commission ("Commission") ("the Complaint"), falsely alleging that Respondents have committed a violation of the Federal Election Campaign Act of 1971, as amended ("the Act"). Respondents affirmatively state that not only have Respondents not committed any violation of the Act, but that the Complaint alleging such violation contains false statement(s) which should subject Complainants to prosecution for making such false statements in violation of 18 U.S.C. §1001.

The Complaint is wholly frivolous, groundless, politically motivated, devoid of any factual basis or support, and should be dismissed.

Complainants have no factual support for their Complaint and, indeed, have not alleged any facts to support their Complaint because there are none. Complainants should not be allowed to make false statements to the Commission with impunity. The law is the law and Complainants' false statements should be subject to investigation and penalty as provided in federal law.

Facts of the Case

Make Us Great Again made a television ad, which was researched, produced and aired solely by Make Us Great Again. The ad was developed wholly independently from

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the Rick Perry presidential campaign. The ad footage was produced and paid for by Make Us Great Again. The ad was aired publicly on television, then posted on the Make Us Great Again website and on YouTube. In other words, it was disseminated into the public domain. Make Us Great Again, its principals, vendors and consultants, first learned of the possible use of some portion of its footage by the Perry campaign when a reporter called to inquire about it.

That story, cited by Complainants as the 'factual basis' for the Complaint, clearly states that there was no coordination between the Perry campaign and Make Us Great Again. Indeed, the story specifically addresses that issue, which is no doubt why the story itself was not included in its entirety in the Complaint:

"Perry spokesman Mark Miner told me there was "no coordination with SuperPac here." "Two of the shots were taken from public domain," he said in an email." Ben Smith, *Perry Ad Footage Features SuperPAC Footage*, POLITICO, November 26, 2011, available at http://www.politico.com/blogs/bensmith/1111/Perry_ad_features_SuperPAC_footage.html

Additionally, the article states that Make Us Great Again spokesman Jason Miller 'heatedly denied' any cooperation (coordination) with the Perry campaign. *Id.*

The other news article cited by Complainants also flatly states that the Perry campaign did not coordinate its ad(s) with Respondents. "There is no coordination between our campaign and any PAC," Perry campaign spokesman Mark Miner said Monday". See Joe Holley, *Pair of Perry Ads Test Limits of the Election Law*, HOUSTON CHRONICLE, Nov. 28, 2011, available at <http://blog.chron.com/rickperry/2011/11/pair-of-perry-ads-test-limits-of-the-election-law/>

Notwithstanding the absence of any factual support for the allegations, including nothing in the 'published reports' to support the claims by Hebert and Werthimer, the Complainants nonetheless filed this frivolous complaint, which contains patently false statements for which there is no supporting evidence.

Attached are the statements of Scott Rials, Executive Director of Make Us Great Again and Jason Miller, Communications Director for Make Us Great Again, both of whom outline and confirm that the footage for the Make Us Great Again ad was developed and produced solely by the PAC, that it was publicly disseminated and posted on various internet sites, and that the first time they heard of any possible use of some or part of the ad footage by the Perry campaign was when Mr. Miller received a phone call from the reporter who wrote the first story referenced above.

Make Us Great Again took great pains to ensure that its vendors or consultants did not come even close to the line in terms of actions that could meet the conduct prong of 11 C.F.R. §109.21(d) for coordinated public communications. As evidenced by the

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Statements of the two Make Us Great Again principals, there is zero evidence or indication that any of the vendors or consultants to / for Make Us Great Again were in any way involved with the Perry presidential campaign. Complainants offer nothing to substantiate their groundless claims.

Complainants' False Statements

Complainants have sworn under penalty of perjury that the following statements in the Complaint are true when, in fact, the statements are false and the Complainants *knew* they were false at the time of making the statements:

1. *"Make Us Great Again...made...an in-kind contribution to RickPerry.org."*

Response: The language in the Complaint states as a fact something that did *not* happen. There is nothing else to know about this matter. Yet, despite the lack of evidence even in the news stories to which they cite, these two Complainants, self-proclaimed experts on the Federal Election Campaign Act of 1971, as amended ("FECA") nonetheless filed an FEC complaint, containing zero facts, falsely accusing Respondents of violating the law.

Respondents *made* a television ad and publicly disseminated it. Period. That is the end of the story insofar as the Respondents are concerned. Complainants' false statement that Respondents *made* an in-kind contribution is just that: a false statement. And the only basis for these false statements are two news articles, *both* of which contain uncontroverted statements by the spokesman for the Perry campaign that there was no communication or coordination with the PAC and that the Perry campaign obtained the ad footage from public source(s).

Complainants did not even bother to couch their statements in terms that could be arguably defensible. They did not say, "Make Us Great Again 'appears to have made' or 'perhaps made' or 'possibly made' an in-kind contribution to the Perry campaign.

Rather, the Complainants *stated* as a fact something that is *not* true. Complainants stated under penalty of perjury that Make Us Great Again *made* an in-kind contribution. That is false and it is a violation of federal law to make a false statement.

2. *"Make Us Great Again produced video footage...and gave that video footage to Perry's principal campaign committee..."*

Response: Make Us Great Again did produce video footage. But Complainants' bald assertion that Respondents *gave* that video footage to Perry's principal campaign committee is false and Complainants have no evidence to support that statement. There is not one fact cited by Complainants to substantiate this charge. The Perry campaign plainly stated to the reporters that the footage was taken *from the public domain*. Complainants therefore were on notice that their statement was false before they filed this Complaint.

Complainants state that they are relying on 'published reports' for their assertions. But the only two published reports on this subject, and the only ones cited by Complainants, clearly indicate that there was not any coordinated effort. One of the articles includes an uncontroverted statement from the Perry campaign that it obtained the ad footage from the public domain.

So what other 'published reports' do Complainants rely on for their statement that Make Us Great Again 'gave' ad footage to the Perry campaign? The Commission should demand those published reports and if none exist, the Complainants should face the consequences for making false statements to the federal government.

3. *"Make Us Great Again made one or more contributions....by providing video footage to RickPerry.org without charge or at a charge that was less than the usual and normal charge for such goods."*

Response: Again, there is no factual basis for these statements. The 'published reports' on which Complainants apparently rely do not say what Complainants have alleged. There is no published report which says that Make Us Great Again provided video footage to RickPerry.org. In fact, the Perry campaign spokesman said just the opposite.

And how clever of Complainant Wertheimer to make statements to a reporter, who uses Wertheimer's quote in his article, and then Complainants 'rely' on the article as a 'published report' to substantiate the claims in the Complaint. This sort of 'published report documentation' should be utterly disregarded by the Office of General Counsel as lacking probative value to analyze Wertheimer's latest negative attacks against some innocent political committees and the Commission.

But certainly in this case, the only support in the 'published reports' for Wertheimer's claims are quotes from....Fred Wertheimer.

4. *"...video clips like those contributed by Make Us Great Again to RickPerry.org..."*

Response: There were no video clips contributed by Make Us Great Again to RickPerry.org, or to any other third party for that matter. There was ad footage developed and paid for by Respondents and publicly disseminated. The Perry campaign acknowledged that it obtained the footage from the public domain. There is zero evidence to support the Complainants' false statement that the video clips were 'contributed' to the campaign by Respondents, Complainants have no and do not offer any such evidence. Their claims are false, their statements are false and there are federal laws prohibiting their making such false statements to the Commission.

Complainants Should Be Prosecuted For Their False Statements

The making of a false statement is prohibited and punishable under federal law. 2 U.S.C. §437g(a) requires those making complaints to the Commission to do so with verified statements and the knowledge that the statements made to the Commission must be true. These Complainants are not novices insofar as knowledge of the Commission's regulations and the requirements of federal law as related to Commission procedures.

In their zeal to constantly berate, attack and demean the Commission, these Complainants have become more and more shrill, careless and nasty. They decry the Commission's failure to 'enforce FECA...' ("The FEC is completely controlled by three commissioners who oppose the law and are blocking enforcement of it," he (Wertheimer) said." *Sae Holley, Houston Chronicle, supra*).

If Complainants are so dedicated to enforcement of federal law, they should welcome the Commission's demand for adherence to the legal requirements that only truthful complaints be filed with the Commission. Federal statutes provide as follows:

"2 U.S.C. § 437g : Enforcement.

a) Administrative and judicial practice and procedure

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18 " (emphasis added)

**"18 U.S.C. §1001: Crimes And Criminal Procedure
Part I - Crimes
Chapter 47 - Fraud And False Statements**

Sec. 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully -

(2) makes any materially false, fictitious, or fraudulent statement or representation; ...

shall be fined under this title, imprisoned not more than 5 years." (emphasis added)

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"18 U.S.C. § 1621. Perjury generally

[http://www.law.cornell.edu/uscode/HowCurrent.php?tn=18&fragid=T18F00645&extid=usc sec 18 00001621---000-&sourcedate=2010-06-28&proctime=Tue%20Jun%2022%2010:11:15%202010](http://www.law.cornell.edu/uscode/HowCurrent.php?tn=18&fragid=T18F00645&extid=usc_sec_18_00001621---000-&sourcedate=2010-06-28&proctime=Tue%20Jun%2022%2010:11:15%202010)

Whoever— ...

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both..."

Complainants offer only two 'published reports' as the 'evidence' of their false allegations against Respondents. *Both* of the published reports contain uncontroverted statements from the Perry campaign spokesman that the ad video footage was not obtained from Respondents. Despite the public statements and the utter absence of facts supporting the Complainants' allegations, Hebert and Wertheimer filed their Complaint in this MUR, swore under penalty of perjury that the statements were true, and signed a complaint which contains multiple false statements.

The Commission should put a stop to the false complaint industry fostered by these blowhard Complainants.

This is an utterly frivolous and false complaint and Complainants should suffer the penalties and consequences of their actions. Then perhaps they would understand that the Commission is actually quite functional, that there is a community that is highly regulated and they should be subject to the same scrutiny and investigation as those against whom they feel free to level false allegations on a continuing basis.

CONCLUSION

Respondents Make Us Great Again, Paul Kilgore in his official capacity as Treasurer, hereby deny each and every one of the Complainants' allegations, advise the Commission that the allegations are completely false and devoid of any factual basis and move that the Commission find no reason to believe a violation has been committed by Respondents, dismiss this MUR and prosecute Complainants Hebert and Wertheimer for knowingly and wilfully making false statements to the Commission.

The ad footage was produced and paid for by Make

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Respectfully Submitted,



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Paul Kilgore, Treasurer in his official
capacity

Submitted via electronic mail this 20th day of January, 2012

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Federal Election Commission
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Washington, D.C. 20463

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EXHIBIT C

POLITICO

Perry ad features SuperPAC footage - Ben Smith: Perry ad features SuperPAC footage

November 26, 2011

Perry ad features SuperPAC footage

The last shred of regulation preventing unlimited money from flowing into presidential campaigns is the requirement that campaigns not "coordinate" their communications with Super PACs and the other independent groups pouring money into that race.

Rick Perry's campaign for president appears to be testing the limits of that regulation: In its Thanksgiving video, the campaign uses two clips from an slickly produced advertisement aired on Perry's behalf by Make Us Great Again, a SuperPAC run by a longtime Perry associate, Mike Toomey.

Make Us Great Again's ad first raised eyebrows for the sheer quality of its footage: Some consultants speculated that the camera position and access must have reflected the campaign's, at least tacit, cooperation, something a MUGA spokesman, Jason Miller, heatedly denied.

Now, that footage has migrated to the Perry campaign's own communications. Watch the ads above (from Perry) and below (from MUGA) in two browser windows: The handshake at 1:35 in Perry's Thanksgiving video appears to be taken from the SuperPAC's :24; and the Thanksgiving video's 2:11 is clearly the :10 moment from the SuperPAC ad. The latter is particularly obvious because Perry's head, at his South Carolina announcement, is framed by three stars on an American flag. The framing is identical in the two shots, something that makes clear they're coming from the same camera.

Perry spokesman Mark Miner told me there was "no coordination with SuperPac here."

"Two of the shots were taken from public domain," he said in an email. Television ads, though widely available, are not typically considered public domain.

MUGA's Miller declined to comment on the situation.

UPATE: A reader spots a third borrowing, with 1:31 in Perry's ad matching :25 in the SuperPAC spot.

Posted by Ben Smith 07:45 PM

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EXHIBIT D

PERRY

☆

Presidential

Pair of Perry ads test limits of the election law

Posted on November 28, 2011 at 7:40 pm by Joe Holley in Campaign 2012, Campaign Ad, Gov. Rick Perry

Two ads currently on the air on behalf of Rick Perry's presidential effort are testing the limits of election law restricting "coordination" between so-called Super PACs supporting a particular candidate and the candidate's campaign.

The ads, one of them a Thanksgiving video from the Perry campaign and the other from Make Us Great Again, a Super PAC formed by a longtime Perry associate, both use the same raw video footage from a Perry campaign event. Whether coordination or coincidence, the two ads illustrate the increasingly blurred line between the candidate's campaign and the Super PACs and other independent groups spending huge amounts of money on the candidate's behalf.

All of the presidential candidates have Super PACs raising money on their behalf. They can raise and spend unlimited amounts as long as they abide by Federal Election Commission rules that prohibit coordination with the campaign. The question at issue is whether using the same video footage constitutes coordination.

Powerful lobbyist

However independent the Super PACs are, most have been founded by former aides and fundraisers who have worked closely with the candidates for years and are well aware of the candidate's needs and strategy.

Make Us Great Again, for example, was founded in August by Mike Toomey, a powerful Austin lobbyist who once served as Perry's chief of staff in the governor's office.

Toomey co-owns an island off the New Hampshire coast with Dave Camey, Perry's chief campaign strategist. The group plans has said it plans to spend \$55 million in support of Perry's White House effort. "Make Us Great Again" is one of at least seven Super PACs raising and spending money on the Texas governor's behalf.

"There is no coordination between our campaign and any PAC," Perry campaign spokesman Mark Miner said Monday.

A spokesman for Make Us Great Again did not respond to an e-mail request for comment.

Campaign watchdog organizations contend that Super PACs, set up in the wake of a series of recent court rulings, are, essentially, fundraising arms of the individual campaigns. Fred Wertheimer, president of Democracy 21, said his group was examining the Perry ads to determine whether the Make Us Great Again ad constitutes an illegal contribution.

"If these candidate-specific Super PACs are acting in conjunction with the campaigns, then donors are giving illegal money to support them," he said.

Wertheimer, a leader in the fight for campaign-finance reform since the scandals of the Nixon era, has described Super PACs as "the most dangerous vehicle operating in American politics." He contends "they were enacted as vehicles for bypassing and circumventing the contribution limits on candidates."

Action unlikely

Werthelmer said he did not expect the FEC to rein in the Super PACs, regardless of any ruling on the Perry ads. "The FEC is completely controlled by three commissioners who oppose the law and are blocking enforcement of it," he said.

In regard to the Perry ads, someone would have to file a complaint with the FEC before any action would be taken. Rick Hasen, an election-law expert who teaches law at the University of California-Irvine, said he expects a complaint to be filed. He also said it would be difficult to prove coordination.

"We're seeing a lot of attempts to push at the borders of the law," he said. "It's clear that Super PACs can't take materials from the campaign, but it is not clear whether it can go the other way."

Hasen also noted that the FEC has been deadlocked for months – "on ideological grounds, not political" – and that any complaint would not be resolved before the 2012 elections.

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