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May 20, 2014

BY HAND DELIVERY

Mr. Jeff S. Jordan
Supervisory Attorney
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 6780 (Americans for Prosperity)

Dear Mr. Jordan:

This office represents Americans for Prosperity ("AFP") in the above-referenced matter. This letter responds to the complaint filed by Garrett Arwa, the Executive Director of the Michigan Democratic Party (the "Complaint"), which AFP received from the Office of General Counsel ("OGC") on April 15, 2014.¹ The Complaint suggests an AFP-sponsored issue advocacy television ad that aired in Michigan (the "AFP Ad" or the "Ad") may have been coordinated with Terri Lynn Land, a candidate for U.S. Senate in Michigan, and her campaign committee.

AFP denies that it coordinated its advertising with Ms. Land or her campaign in any manner. The Complaint's allegations as to purported interactions between AFP and Ms. Land or her campaign are premised on nothing more than inference and speculation, and are devoid of any facts to support a credible claim of coordination under the "conduct prong" of the Commission's coordination rules. In any event, this response and the enclosed Affidavit of AFP Director of Public Affairs Levi Russell affirmatively demonstrate that AFP did not coordinate the Ad.

In addition, the Complaint also misstates and misapplies the “content prong” of the Commission’s coordination rules in alleging that the Ad is the “functional equivalent” of express advocacy. It is not. Accordingly, the Ad does not contain

Notwithstanding its response to the Complaint set forth below, AFP preserves its right to challenge the validity of this proceeding. The Act provides that, “[w]ithin 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation.” 2 U.S.C. § 437g(a)(1) (emphasis added); see also 11 C.F.R. § 111.5(a). The date-stamped copy of the Complaint provided to AFP by OGC indicates the Commission received it on February 7, 2014. Yet, AFP did not receive notification of the complaint until April 15, 2014 by way of OGC’s letter dated April 11, 2014 (63 days after OGC received the complaint). The notification letter cited an “administrative oversight” for the delay.

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content that can qualify it as a coordinated communication. For these reasons, the Commission should find no reason to believe that AFP violated the Federal Election Campaign Act of 1971, as amended (the "Act") and dismiss this matter.

FACTS

AFP is one of the nation's largest grassroots advocacy organizations, with more than 2.3 million activists in all 50 states and more than 30 state chapters. Through educational events; rallies; townhall discussions; attendance at legislative meetings; door-to-door, telephone, and e-mail contacts with citizens; media appearances; and paid advertising, AFP advocates in support of free markets and limited government. AFP has been recognized by the Internal Revenue Service as a 501(c)(4) social welfare organization. AFP is not a super PAC or any other type of political committee.

Of relevance to this matter, AFP sponsored a television advertisement asking viewers to urge Congressman Gary Peters to take notice of the harmful effects that the Affordable Care Act is having on Michigan families. The Ad, which was produced by FP1 Strategies and placed by Target Enterprises, aired on various television stations in Michigan from January 14, 2014 through February 3, 2014. Affidavit of Levi Russell (*hereinafter* "Russell Aff.") (attached as Exhibit 1) ¶¶ 4, 5. AFP spent \$ 718,500 on the ad buy. *Id.* ¶ 4. Video of the Ad is available at <https://www.youtube.com/watch?v=IsLdhwwSwrQ>, and the script is provided on the following page:

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VIDEO	AUDIO
<p>"The Lie Of The Year" – Politifact, 12/12/13</p> <p>Obama Video</p> <p>Congressman Gary Peters</p> <p>Peters Video</p> <p>"225,000 Michiganders... received cancellation letters." –MLive, 1/1/14</p> <p>"CNN: Obamacare is causing Americans to lose access to their doctors, face higher costs" – Real Clear Politics, 12/19/13</p> <p>"health care costs are expected to rise in 2014" – The Detroit News, 12/9/13</p> <p>Tell Congressman Gary Peters Obamacare Isn't Working It's Hurting Michigan Families (202) 225-5802</p> <p>Paid For By Americans For Prosperity</p>	<p>They told us the lie of the year.</p> <p>OBAMA: If you like your health care plan, you will be able to keep your health care plan</p> <p>And Congressman Peters kept telling it</p> <p>PETERS: The Affordable Care Act bars cancellation of insurance policies</p> <p>The truth is 225,000 Michiganders have had their insurance canceled</p> <p>Families are losing their doctors</p> <p>And healthcare costs are skyrocketing</p> <p>Call Congressman Peters and tell him Obamacare isn't working. It's hurting Michigan Families.</p>

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The AFP Ad in Michigan was part of a much larger paid media effort, which began at the end of December 2013 and continued into the beginning of February 2014, consisting of thematically similar issue ads asking six other influential members of Congress from five other states to take action to stop the harmful effects of the Affordable Care Act. Russell Aff. ¶ 4. Those other ads are available at: <http://youtu.be/-VVwc60M8zg> (launched Dec 26, 2013); https://www.youtube.com/watch?v=_LOXQ_jom8k (launched Jan 2, 2014); https://www.youtube.com/watch?v=C6_8b8PCAWA (launched Jan 14, 2014); <https://www.youtube.com/watch?v=GK23iT2Bugg> (launched Jan 16, 2014); https://www.youtube.com/watch?v=7K7_msWN1o4 (launched Feb 6, 2014); and <https://www.youtube.com/watch?v=EC0ShygfR8c> (launched Feb 6, 2014).

None of the AFP staff involved in the production of the Michigan Ad had any discussions with Terri Lynn Land, her campaign, or agents thereof, regarding either the Ad or her campaign's plans, projects, activities, or needs, nor has any of these individuals ever been employed by Ms. Land or her campaign. *Id.* ¶¶ 3, 6, 7, 11. AFP staff are required to adhere to, and to receive legal training on, an internal firewall policy that prohibits them from discussing with any candidate for elected office their campaign plans, projects, activities, or needs. *Id.* ¶ 8 and Attachment A. AFP's internal staff firewall policy was followed in the production and placement of the Ad. *Id.* ¶ 10.

Similarly, FP1 Strategies and Target Enterprises implemented their own internal firewalls, and both vendors also were required to adhere to an AFP vendor firewall policy which prohibited the firms from discussing with any candidates in the Michigan U.S. Senate race their campaign plans, projects, activities, or needs. *Id.* ¶¶ 12-14 and Attachments B, C, D, and E.²

THE COMPLAINT

The Complaint alleges that Terry Lynn Land, her campaign committee Terry Lynn Land for Senate, and "independent" outside groups" have been "coordinating . . . in

² The FP1 Strategies internal firewall policy refers to "independent expenditure" clients, and AFP did not engage FP1 Strategies to create express advocacy "independent expenditures." FP1 Strategies nonetheless created AFP's issue advocacy communication pursuant to its internal firewall policy. *See id.* ¶ 14. Additionally, although the vendor firewall policy executed by FP1 Strategies was dated a month before Ms. Land made the comments at issue here, there is no relation between the two; AFP did not retain FP1 Strategies specifically for the Michigan ad and, in fact, FP1 created numerous ads for AFP in various other jurisdictions before and after the Michigan ad. *See id.* ¶ 5.

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violation of the Federal Election Campaign Act of 1971, as amended." In support of this claim, the Complaint cites a video of a speech Ms. Land gave to supporters in August 2013, in which she stated, "we've got new folks out there that are raising money – that's the super PACs," and that her "campaign has talked to a lot of those folks," and that they "really want to support us here in Michigan."

The Complaint contends that, "shortly after Land's admission, outside groups began spending huge amounts of money on political advertisements opposing Congressman Gary Peters." According to the Complaint:

[Land's] speech indicated that her campaign committee has had substantial discussions with Super PACs and requested and obtained their commitment to make expenditures on her behalf. If the substance of these discussions amounted to a "request or suggestion" that the groups run the ads or a "material discussion" regarding the ads, then the ads would be "coordinated communications"

The Complaint accuses several organizations of "coordination," including PURE PAC, the Republican National Committee, the National Republican Senatorial Committee, and AFP. With respect to the content of the AFP Ad, the Complaint characterizes the Ad as "attacking" Congressman Peters and "telling [the Ad's] audience that Peters is a liar." Citing 11 C.F.R. § 114.15(c), the Complaint maintains that the Ad "*likely* constitute[s] the 'functional equivalent of express advocacy' under the content prong of the Commission's coordinated communications regulation by 'taking a position on Congressman Peters' character (calling him a liar); and mentioning an election (referring to 2014 and showing a Peters campaign sign)." (emphasis added).

The Complaint concludes that "[f]urther investigation is needed into Land's campaign discussions with Super PACs and other outside groups . . . to determine if the Super PAC's [*sic*] 'commitment to Michigan' amounted to a pledge to run advertisements on behalf of her candidacy, and to determine the precise nature and content of all discussions between the campaign and any outside groups that have aired advertisements opposing Peters . . . If any ads satisfying the content prong

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were coordinated with the campaign, then those ads amount to excessive or prohibited coordinated communications, and are a violation of federal law.”

THE LAW

Entities that are prohibited from making contributions to candidates for federal office are also prohibited from paying for a coordinated communication. 2 U.S.C. § 441b; 11 C.F.R. § 109.22. A communication is considered to be coordinated with a candidate if it satisfies three criteria: (1) it is paid for by a person other than the candidate or authorized committee (the “payment prong”); (2) it satisfies at least one of five standards under the “content prong”; and (3) it satisfies at least one of six standards under the “conduct prong.” *Id.* § 109.21. “While no one of these elements standing alone fully answers the question of whether a communication is for the purpose of influencing a Federal election . . . *the satisfaction of all three prongs* of the test set out in new 11 CFR 109.21 justifies the conclusion that payments for the coordinated communication are made for the purpose of influencing a Federal election, and therefore constitute in-kind contributions.” Explanation and Justification for Final Rules on Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 426 (Jan. 3, 2003) (internal citations omitted) (emphasis added).

A) The Content Prong

A communication may satisfy the content prong if it is “the functional equivalent of express advocacy.” *Id.* § 109.21(c)(5).³ As the regulation explains, “a communication is the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.” *Id.*

³ Although not discussed in the Complaint, the content prong also may be satisfied if a communication (1) meets the definition of an “electioneering communication”; (2) meets the definition of a “public communication” and disseminates, distributes, or republishes a candidate’s “campaign materials”; (3) meets the definition of a “public communication” and expressly advocates the election or defeat of a clearly identified candidate for Federal office; or (4) meets the definition of a “public communication” and refers to a House or Senate candidate within 90 days of an election, refers to a presidential or vice presidential candidate within 120 days of an election, or refers to a political party within these timeframes. See generally *id.* § 109.21(c). The Ad does not meet any of these “content” standards.

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Under 11 C.F.R. § 114.15, the Commission provided a safe harbor pursuant to the Supreme Court's ruling in *Wisconsin Right to Life v. FEC*, 551 U.S. 449 (2007) (*WRTL II*), whereby corporations and labor organizations that were prohibited previously from sponsoring electioneering communications could do so, provided that such communications were not the "functional equivalent of express advocacy."⁴ Under this safe harbor, corporate- and union-funded electioneering communications were permissible "unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." 11 C.F.R. § 114.15(a).

The dispositive question in determining whether a communication is the functional equivalent of express advocacy is not whether it contains "indicia" of express advocacy, but rather whether the communication has a reasonable interpretation other than a call to electoral action:

[E]ven if the Commission found that an EC [electioneering communication] does include "indicia of express advocacy," it could determine that the EC nevertheless has content that would support a determination that a EC has an interpretation other than a call to electoral action . . . because, on balance, that interpretation is reasonable despite the presence of indicia of express advocacy.

Explanation and Justification ("E&J") for Final Rule on Electioneering Communications, 72 Fed. Reg. 72,899, 72,905 (Dec. 26, 2007).

The Commission provided the "Bill Yellowtail" ad discussed in *McConnell v. FEC*, 540 U.S. 93, 193 n.78 (2003) as an example of a communication that did not fit within the safe harbor of 11 C.F.R. § 114.15 because, among other things, "the communication focuses on the candidate's own *personal* and legal history." *Id.* at 72,909 (emphasis added).

A more recent authority for the coordination analysis is the E&J the Commission adopted in 2010 specifically for the functional equivalent of express advocacy content standard at issue here. As the Commission explained, the content standard is meant to "separate election-related advocacy from other speech in the periods outside the 90- and 120-day preelection time windows" – namely, "public communications involving legislation, grassroots lobbying, issue advocacy, and

⁴ *WRTL II* has since been superseded by *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

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educational messages that are completely unrelated to elections.” Explanation and Justification for Final Rule on Coordinated Communications, 75 Fed. Reg. 55,947, 55,954 (Sep. 15, 2010).

The Commission recited relevant portions of the movie at issue in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and the ads at issue in *Wisconsin Right to Life v. FEC*, 551 U.S. 449 (2007) (*WRTL II*), as markers, respectively, for communications that constitute the functional equivalent of express advocacy and those that do not. *Id.* at 55,953.

As the Supreme Court explained of the ads at issue in *WRTL II*: [T]heir content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.

Id. (citing *WRTL II*, 551 U.S. at 470).

By contrast, of the movie at issue in *Citizens United*, the Court stated:

The movie concentrates on alleged wrongdoing during the Clinton administration, Senator Clinton’s qualifications and fitness for office, and policies the commentators predict she would pursue if elected President . . . there is no reasonable interpretation of Hillary other than as an appeal to vote against Senator Clinton.

Id. (citing *Citizens United*, 130 S. Ct. at 890).

B) The Conduct Prong

With respect to the conduct prong, the Commission’s regulations set forth the following conduct standards that are of particular relevance here:

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(1) Request or suggestion. (i) The communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee; or
(ii) The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, or political party committee assents to the suggestion.

(2) Material involvement.... A candidate, authorized committee, or political party committee is materially involved in decisions regarding:

- (i) The content of the communication;
- (ii) The intended audience for the communication;
- (iii) The means or mode of the communication;
- (iv) The specific media outlet used for the communication;
- (v) The timing or frequency of the communication; or
- (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.

(3) Substantial discussion.... The communication is created, produced, or distributed after one or more substantial discussions about the communication between the person paying for the communication, or the employees or agents of the person paying for the communication, and the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee. A discussion is substantial within the meaning of this paragraph if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.

Id. §§ 109.21(d)(1), (2), and (3).⁵

⁵ Although not discussed in the Complaint, the conduct prong also may be satisfied if the sponsor of the communication (1) contracts with or employs a vendor who also has worked for a



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The Commission's regulations provide for a safe harbor under which a rebuttable presumption exists that a communication is not coordinated if a commercial vendor or ad sponsor implements a firewall that:

(1) . . . [P]rohibit[s] the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee; and

(2) The firewall must be described in a written policy that is distributed to all relevant employees, consultants, and clients affected by the policy.

Id. § 109.21(h).

C) The "Reason to Believe" Standard

Any complaint alleging a legal violation "should contain a clear and concise recitation of the facts which describe a violation." 11 C.F.R. § 111.4(d)(3). When alleging impermissible coordination, a "[c]omplaint's inference" of coordination is not enough. MUR 6077 (Coleman), Factual and Legal Analysis at 5. As the Commission has explained:

Unwarranted legal conclusions from asserted facts, or mere speculation, will not be accepted as true and such speculative

(Continued . . .)

candidate, candidate's opponent, or political party committee during the previous 120 days, and that vendor provides certain services and material information to the sponsor of the communication; (2) employs an employee or independent contractor who also has worked for a candidate, candidate's opponent, or political party committee during the previous 120 days, and that individual provides certain material information to the sponsor of the communication; or (3) the sponsor of the communication disseminates, distributes, or republishes "campaign materials." See generally *id.* § 109.21(d).

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charges, especially when accompanied by direct refutation, do not form an adequate basis to find reason to believe that a violation of the FECA has occurred.

Id. at 6 (internal quotations and citation omitted); *see also* MUR 6679 (Renacci), Factual and Legal Analysis at 7-8 (noting the complaint drew “this inference of coordination,” and which “inference . . . is not supported by any available information”); MUR 6366 (Norton), Factual and Legal Analysis at 9 (citing “the speculative nature of the complaint” in concluding that “the conduct prong of the coordinated communications regulations has not been met”); MUR 6164 (Sodrel), Factual and Legal Analysis at 10 (“[b]ased on the speculative nature of the allegations as to the coordination between the [respondents], the Commission finds no reason to believe that” coordination occurred). *See also* MUR 6192 (Madison County Democratic Central Committee), Factual and Legal Analysis at 3 (“speculative information absent personal knowledge is insufficient to meet the threshold for ‘reason to believe’”); MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.), Statement of Reasons at 4 (“Absent personal knowledge, the Complainant, at a minimum, should have made a sufficiently specific allegation . . . so as to warrant a focused investigation that can prove or disprove the charge.”).

DISCUSSION

The Complaint fails to allege sufficient facts to support a “reason to believe” finding that the AFP Ad satisfies either the conduct or content prongs, and AFP affirmatively refutes the Complaint’s allegations.

A) The Complaint’s Allegation That the Conduct Prong Has Been Satisfied Is Based on Mere Inference and Speculation and AFP Refutes It

The Complaint cites three conduct standards in particular to support its suggestion that AFP’s Ad may have satisfied the conduct prong: the “material involvement” standard, the “substantial discussion” standard, and the “request or suggestion” standard. However, the Complaint points to nothing in Ms. Land’s speech or any other facts suggesting that Ms. Land, her campaign, or any of her agents ever had *any* interactions with AFP. In fact, Ms. Land’s speech makes clear that AFP was not one of the groups to which she was referring. Ms. Land spoke of “super PACs.” AFP is not a super PAC, but rather a 501(c)(4) social welfare organization.

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Given the absence of any indication in Ms. Land's speech regarding which particular groups she may have spoken with (other than her statement that they were super PACs), the suggestion that AFP was one of those groups fails to rise even to the level of an inference. And even inference, as explained above, is not a sufficient basis for a "reason to believe" finding that a violation has occurred. The Complaint's allegation as to AFP is nothing but unfounded speculation.

Although the Commission should dispose of this matter based solely on the Complaint's deficiencies, AFP nonetheless has offered additional facts which conclusively refute the Complaint's inference and speculation. Specifically, while the Complaint alleges the ads by "outside groups" began running "shortly after" Land's speech in August of 2013, the AFP Ad did not begin running until roughly five months later. *See* Russell Aff. ¶ 4. As discussed above, far from being a coordinated effort with any candidate's campaign, the Michigan Ad was part of AFP's own, much larger paid media effort, beginning in late December 2013 and continuing into early February 2014, asking a total of seven influential members of Congress from a total of six states to take action on the Affordable Care Act.

Additionally, AFP has demonstrated that the organization, as well as its vendors involved in the production and placement of the Ad, implemented and adhered to firewall policies that prohibited their employees from discussing with any candidate in the Michigan U.S. Senate race any matters pertaining to the Ad or any campaign plans, projects, activities, or needs, and that no such discussions had occurred. *See id.* ¶¶ 8-10, 12-15.

In summary, the Complaint fails to sufficiently allege that AFP engaged in coordinating conduct, and AFP has affirmatively demonstrated that it did not engage in coordinating conduct. Therefore, one of the three factors necessary to establish coordination – namely, the "conduct prong" – is lacking, and consequently the Complaint should be dismissed.

B) The AFP Ad Does Not Contain the Functional Equivalent of Express Advocacy

The Commission also should find no reason to believe that AFP has violated the Act because the AFP Ad does not satisfy the content prong, which is another requisite element for establishing coordination.

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The Complaint states the AFP Ad "*likely* constitute[s] the 'functional equivalent of express advocacy' by 'taking a position on Congressman Peters' character (calling him a liar); and mentioning an election (referring to 2014 and showing a Peters campaign sign)."⁶ These claims are frivolous and fail to establish that the ad satisfies the content prong.

First, the Ad does not take issue with Congressman Peters' character or call him a "liar." Rather, the Ad discusses President Obama's claim that, under the Affordable Care Act, "If you like your health care plan, you can keep it," and informs viewers that the influential Politifact.com deemed this claim the "Lie of the Year" in 2013. *See* Lie of the Year, Politifact.com, Dec. 12, 2013, at <http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it> (last visited Apr. 21, 2014). While the Ad points out that Congressman Peters repeated the claim, the Ad does not suggest that this is a reflection on the Congressman's *personal* character – which, as explained above, is the relevant question under the regulation at 11 C.F.R. § 114.15 cited by the Complaint. *See* E&J for Final Rule on Electioneering Communications, 72 Fed. Reg. at 72,909.

Second, the Ad's sole reference to "2014" was to a December 9, 2013 Detroit News headline stating, "Health care costs are expected to rise in 2014." The headline was no more of a reference to an election than a headline about "New Year's Day 2014," the "2014 Winter Olympics," or any other non-election-related event that happens to occur in the year 2014.

Finally, the Complaint's contention that the Ad's fleeting display of a Peters campaign sign constitutes a reference to an election is grasping at straws. The sign, which is not the focus in the last few frames of the Ad, is obscured by Rep. Peters standing in front of it, to the point where it is hardly recognizable as a campaign sign. To the extent the sign is discernable in the Ad, the sign that is displayed relates to Rep. Peters's previous campaigns for the U.S. House of Representatives, which used the following sign:

⁶ The Complaint does not allege the AFP Ad satisfies any other content standard. Although the Ad references a candidate for federal office, it is not an electioneering communication because it was not disseminated within 30 or 60 days preceding a primary or general election, respectively. *See* 11 C.F.R. §§ 109.21(c)(1). Additionally, the Ad was not disseminated within 90 days preceding a primary or general election. *See id.* § 109.21(c)(4)(i).

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See Jonathan Oosting, Census 2010: Michigan may lose \$10k per resident, Gary Peters could lose his district, MICHIGAN LIVE, Dec. 20, 2010 at http://www.mlive.com/news/detroit/index.ssf/2010/12/census_2010_michigan_may_lose.html (last visited Apr. 22, 2014).

Whereas Rep. Peters's previous campaign signs for his U.S. House seat read, "Peters * *for U.S. Congress*" (emphasis added), his current U.S. Senate campaign is using the following sign:



See Gary Peters U.S. Senate, at <http://www.petersformichigan.com> (last visited Apr. 22, 2014).

To the extent the obscured campaign sign fleetingly shown in the AFP Ad can be considered a reference to an election, it is to an election that was already held, and not to an election in which Rep. Peters is running currently.⁷

⁷ The Michigan Secretary of State's website indicates Rep. Peters has not filed to run for reelection for his House seat in Michigan's 14th Congressional District. Michigan Department of State, 2014 Unofficial Michigan Primary Candidate Listing, at http://miboecfr.nictusa.com/election/candlist/14PRI/14PRI_CL.HTM (last visited Apr. 22, 2014); see

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However, all of the Complaint's focus on these trivial details should not divert attention from the big picture. As the Commission explained in its E&J for 11 C.F.R. § 114.15, the dispositive question in determining whether a communication contains the functional equivalent of express advocacy is not whether it contains "indicia" of express advocacy, but rather whether the communication has a reasonable interpretation other than a call to electoral action. E&J for Final Rule on Electioneering Communications, 72 Fed. Reg. at 72,905.

Like the *WRTL II* example cited by the Commission in the 2010 coordinated communications E&J as an ad that is not the functional equivalent of express advocacy, the AFP Ad clearly has a reasonable interpretation other than as a call to electoral action. The Ad fits squarely within the Supreme Court's description of a "genuine issue ad" – the type of speech that is not express advocacy or the functional equivalent thereof. E&J for Final Rule on Coordinated Communications, 75 Fed. Reg. at 55,953.

The AFP Ad went on the air at a time when the Affordable Care Act ("ACA") was still very much a live issue in Congress. Just four days before the Ad began running, the U.S. House of Representatives voted on a measure related to the Affordable Care Act ("ACA"), and just two days into the ad buy the House voted on another measure related to the ACA. Ed O'Keefe, The House has voted 54 times in four years on Obamacare. Here's the full list., WASHINGTON POST, Mar. 21, 2014, at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list> (last visited May 12, 2014). The House then proceeded to vote on ACA-related bills at least five more times in the following weeks. *Id.*

The AFP Ad exclusively "focus[ed] on [the] legislative issue" of the ACA, "[took] a position on the issue, exhort[ed] the public to adopt that position, and urge[d] the public to contact [Congressman Peters] with respect to the matter." Moreover, the Ad did "not mention an election, candidacy, political party, or challenger" and, as explained above, did not "take a position on a candidate's character, qualifications,

(Continued . . .)

also Kathleen Gray, "Candidates scramble for 8th District House seat," DETROIT FREE PRESS, Apr. 1, 2014 ("[S]tate Sen. Vince Gregory, D-Southfield, said he's decided to run for re-election to the state Senate instead of running for the 14th Congressional District seat currently held by U.S. Rep. Gary Peters, a Bloomfield Township Democrat, who is giving up the seat to run for the U.S. Senate.") (emphasis added).



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or fitness for office." See E&J for Final Rule on Coordinated Communications, 75 Fed. Reg. at 55,953 (citing *WRTL II*, 551 U.S. at 470).

Unlike the movie at issue in *Citizens United*, the AFP Ad did not focus on Rep. Peters's "qualifications and fitness for office" or the "policies... [he] would pursue if elected [to the U.S. Senate]," nor did it discuss voting for or against Rep. Peters. See *id.* (citing *Citizens United*, 130 S. Ct. at 890).

Accordingly, the AFP Ad was not the functional equivalent of express advocacy and did not satisfy the content prong, and therefore the Complaint should be dismissed on this basis as well.

CONCLUSION

The Complaint fails to allege any particular facts indicating that AFP may have coordinated with Terri Lynn Land or her campaign committee concerning the Ad in question, and AFP emphatically denies any such coordination. Additionally, the Ad does not satisfy any of the content standards for a coordinated communication. With two of the three requisite criteria for coordinated communications lacking here, the Commission should find no reason to believe that AFP violated the Act.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Witold Baran".

Jan Witold Baran
Eric Wang

cc: Victor E. Bernson, Jr.

Enclosures