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1090 Vermont Ave NW, Suite 750
Washington, DC 20005
www.sandlerreiff.com
T: 202-479-1111
F: 202-479-1115

CELA November 29, 2017

Mr. Jeff S. Jordan
Assistant General Counsel
Office of Complaints Examination
and Legal Administration
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 7286

Dear Mr. Jordan:

The undersigned serves as counsel to Indivisible Kentucky, Inc. ("IKY"). This letter responds on behalf of IKY to the Commission's notification that it received a complaint (the "Complaint") alleging that IKY violated the Federal Election Campaign Act (the "Act") and Federal Election Commission (the "Commission") regulations.

As described below, based upon the facts of the Complaint and other information available, there is no reason to believe that IKY has violated the Act or any of the Commission's regulations. Furthermore, even if the Commission were to find reason to believe that a violation has occurred, the Commission should dismiss the Complaint under the prosecutorial discretion afforded to it by Heckler v. Chaney, because to pursue enforcement over such a small matter would not be an efficient use of the agency's time and resources.¹

I. Introduction to Allegations

IKY was incorporated in Kentucky in 2017 as a social welfare organization that operates under Section 501(c)(4) of the Internal Revenue Code.² IKY is a local group that formed as a

¹ Heckler v. Chaney, 470 U.S. 821 (1985); see also MUR 6795 (Citizens for Responsibility and Ethics in Washington) (citing to Heckler v. Chaney to find that it would not be an efficient use of the Commission's resources to pursue a matter in which a Complaint alleged more than 10 communications made by the respondent were independent expenditures and that the respondent did not report these pursuant to disclosure rules that govern political committees).

² See Articles of Incorporation, Indivisible Kentucky Inc. filed February 27, 2017 with the Kentucky Secretary of State available at [http://apps.sos.ky.gov/ImageWebViewer/\(S\(3umtat45314t5myjttayl1yia\)\)/OBDBDisplayImage.aspx?id=6724860](http://apps.sos.ky.gov/ImageWebViewer/(S(3umtat45314t5myjttayl1yia))/OBDBDisplayImage.aspx?id=6724860) (last accessed November 16, 2017).

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part of the Indivisible movement composed of more than 6,000 local groups that have formed under a movement led by the national 501(c)(4) organization, the Indivisible Project. The Indivisible Project's mission is to "cultivate and lift up a grassroots movement of local groups to defeat the Trump agenda, elect progressive leaders, and realize bold progressive policies."³

This Complaint was filed with the Commission by Sarah Pickerel, Executive Director of the Republican Party of Kentucky (the "Complainant") on October 12, 2017. The Complaint is based on two billboards (the "Billboards") paid for by IKY and displayed in July and August of 2017.

The Billboards were designed to express dissatisfaction with Senator Mitch McConnell's "current actions – particularly the Senate health care bill aimed at repealing the Affordable Care Act (Obamacare) – [which] would critically harm hundreds of thousands of Kentuckians on both sides of the aisle."⁴ As such, the Billboards were placed in July-August of 2017 after IKY "repeatedly attempt[ed] to engage Senate Majority Leader Mitch McConnell to no avail" in order to "get his attention."⁵ IKY placed the Billboards to "send a message to Senator Mitch McConnell" that "he won't be able to ignore."⁶ IKY placed a two month order for the billboards and had no intention of renewing or reusing the billboards after the two month placement.

The Billboards feature a photo of Senator Mitch McConnell and a hashtag— #DitchMitch2020 (the "hashtag")—along with the text "Kentucky Deserves Better" and either "You make us sick!" or "We've had enough!" The Complainant alleges that:

1. IKY failed to report the payment for the Billboards as an independent expenditure and subsequently file a report disclosing donors to the alleged independent expenditure under 52 U.S.C. § 30104.⁷
2. IKY's Twitter communications do not contain a required disclaimer, and IKY's website does not include a disclaimer under 11 C.F.R. § 110.11.⁸

³ See INDIVISIBLE, "About the Indivisible Project" available at <https://www.indivisible.org> (last accessed November 20, 2017).

⁴ Complaint at Exhibit 6, pages 2-3; see also Tim Peacock, INDIVISIBLE KY, "Billboard Campaign: It's Time To #DitchMitch2020" July 27, 2017 available at <https://indivisibleky.org/billboard-campaign-its-time-to-ditchmitch2020/> (last accessed November 16, 2017).

⁵ *Id.*

⁶ *Id.*

⁷ Complaint at 5-7, paragraphs 24-33.

⁸ Complaint at 5, paragraphs 22-23.

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3. The Complaint alleges that IKY's violations were knowing and willful, and subject to criminal penalties.⁹

II. The Complaint lacks any evidence to substantiate the claim that a violation was made knowingly and willfully.

The Complaint alleges that IKY knowingly and willfully violated the Act, but provided no evidence to support this allegation and justify the demand that IKY be subject to criminal penalties. The Complaint even appears to contradict itself, and also purports that IKY must be either "confused" as to its status as a 501(c)(4) organization versus a political committee, or it must "acknowledge[]" that, as the Complaint alleges, the billboards were express advocacy.¹⁰ However, the Complaint's evidence that IKY considered the Billboards to be express advocacy is the organization's decision to include a disclaimer on them, which IKY did *in the interest of transparency*. It is hard to follow the logic of an argument that relies on IKY's voluntary disclosure on communications as evidence to support a claim that IKY has also made a knowing and willful violation of the Act for a claim of alleged reporting violations related to a "fail[ure] to identify"¹¹

Since this argument lacks any foundation in fact and is circular, it should be dismissed.

III. The Billboards were not an Independent Expenditure.

An Independent Expenditure is a communication not coordinated with a candidate or political party that *expressly advocates the election or defeat* of a clearly identified candidate.¹² The Commission's regulations provide two tests to determine whether a communication is express advocacy: (1) the Buckley "Magic Words" test codified under 11 C.F.R. § 100.22(a), which considers the specific words used in the communication and (2) a modified version of the Furgatch test codified under 11 C.F.R. § 100.22(b), which considers the communication "taken as a whole".¹³ The Billboards do not meet either of these two tests. To be certain, the Commission has previously found other comparable communications to *not constitute express advocacy*.

⁹ Complaint at 7, paragraph 34.

¹⁰ Complaint at 3, paragraph 16.

¹¹ Complaint at 7, paragraph 32.

¹² 11 C.F.R. § 100.16(a).

¹³ See Buckley v. Valeo, 424 U.S. 1, n. 52 (1976); Federal Election Commission v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987).

A. The Billboards are not Express Advocacy under either Buckley's "Magic Words" test or the Furgatch test.¹⁴

Under Buckley's "Magic Words" test, codified under 11 C.F.R. § 100.22(a) of the Commission's rules, a communication constitutes express advocacy if certain phrases or campaign slogans are used, such as:

"vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent" or communications of campaign slogan(s) or individual word(s), *which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate.*¹⁵

Under the Furgatch test, codified under 11 C.F.R. § 100.22(b) of the Commission's rules, a communication is express advocacy if:

when taken as a whole and with limited reference to external events, such as proximity to the election, [the communication] could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because (1) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.¹⁶

First, the Billboards do not contain the specific words under the Magic Words test. None of the words in the Billboards – #DitchMitch2020, "Kentucky Deserves Better", "You make us sick!" or "We've had enough!" – are listed under the regulatory examples for what would constitute express advocacy.

To be certain, the mere use of "2020", which is an election year *three years after the billboards were posted*, would not constitute a magic word. In Advisory Opinion 2012-27, the Commission found the following advertisement did not contain express advocacy:

"Don't Trust Harry Reid" Advertisement

¹⁴ 11 C.F.R. § 100.22.

¹⁵ 11 C.F.R. § 100.22(a) (emphasis added).

¹⁶ 11 C.F.R. § 100.22(b).

What kind of leader is Harry Reid? Ineffective.
Ultra-liberal. Unrepresentative of Nevada values.
Harry Reid voted for increasing Tricare premiums
to nickel and dime America's heroes. Veterans and
service men and women know better than to trust
Harry Reid. *This November*: support new voices,
support your military, support Nevada values.¹⁷

The "Don't Trust Harry Reid" advertisement uses even more specific references to an election than the Billboards do in this matter.¹⁸ In "Don't Trust Harry Reid", the incumbent is referred to by his full name along with direct attacks against him, and an election *that* November is directly referenced by specifically asking that viewers of the ad "support" certain ideas "[t]his November." Although Senator Reid was not up for reelection in 2012, it is notable that the Commission did not make any further assumptions or interpretations outside of the immediate call to action in the advertisement. If an election year or month were to be considered a "magic word" on its face, this would lead to an overly broad category of communications that would be regarded as express advocacy. In this matter, the Billboards' lead message lacks an express call to electoral action at any time; it is not reasonable that the mere inclusion of the #DitchMitch2020 twitter hashtag more than three years prior to Senator McConnell's next election could be considered at face value a "magic word" urging for a candidate's election or defeat without any further reference to the election.¹⁹

Second, both the Buckley Magic Words and the Furgatch tests allow for a limited contextual examination of the communication at issue when determining whether it is reasonable to conclude that the purpose of the communication is to urge the election or defeat of a clearly identified candidate.

As described above, IKY is "part of a national grassroots movement based on the Indivisible Guide."²⁰ In Kentucky, the group has the express purposes of "social betterment" and engaging the state's Senator, Mitch McConnell.²¹ IKY's billboard campaign was designed

¹⁷ Advisory Opinion 2012-27 at 4 (emphasis added).

¹⁸ The Complaint inaccurately states that the Billboards refer to Mitch McConnell by name. Complaint at 2 paragraph 9.

¹⁹ Although Senator Reid was not up for reelection in 2012, the call to electoral action in connection with him as a leader is more overt in the Nevada advertisement than any language present in the Billboards.

²⁰ Complaint at Exhibit 4, page 4.

²¹ Articles of Incorporation, Indivisible Kentucky Inc. filed February 27, 2017 with the Kentucky Secretary of State available at [http://apps.sos.ky.gov/ImageWebViewer/\(S\(3umtat45314t5myjttaylyia\)\)/OBDBDisplayImage.aspx?id=6724860](http://apps.sos.ky.gov/ImageWebViewer/(S(3umtat45314t5myjttaylyia))/OBDBDisplayImage.aspx?id=6724860) (last accessed November 16, 2017); Complaint at Exhibit 4, page 4.

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to do just that – get Senator McConnell's attention in a heated local climate over a political issue related to the social welfare.²² Senator McConnell was a pivotal figure in the Senate healthcare debate at the time these Billboards were produced. As Senate Majority Leader, Senator McConnell was responsible for deciding what measures were voted on and when.²³ IKY's Billboards were placed as a direct result of McConnell's actions in the Senate.²⁴

In Federal Election Commission v. Furgatch, the Ninth Circuit explained in an express advocacy analysis that external factors should not be ignored when they “contribute to a complete understanding of speech.”²⁵ Both communications under review do not even appear to be targeted at voters or the public; instead, one specifically says “You make us sick!” – a clever pun referring to McConnell's repeated attempts to repeal the Affordable Care Act, and the other says “We've Had Enough!” Both communications include the twitter hashtag #DitchMitch2020, as well as “Kentucky Deserves Better”, and “We Are Indivisible Kentucky”. When looking at the language of these advertisements as a whole – and particularly under the context of when they were published during the healthcare debate – it is reasonable to conclude that they are not directed at voters with the intent to encourage the election or defeat of a candidate. In fact, the language of these billboards demonstrates that the audience is the Senator – the words “You make us sick”, “We've Had Enough!”, “Kentucky Deserves Better” and “We Are Indivisible Kentucky” all indicate that these billboards are not to elicit any act of voters, but rather, to show the Senator how unhappy his constituents are with the decisions he is making regarding issues of the social welfare.

²² Complaint at Exhibit 6, pages 2-3; see also Tim Peacock, INDIVISIBLE KY, “Billboard Campaign: It's Time To #DitchMitch2020” July 27, 2017 available at <https://indivisibleky.org/billboard-campaign-its-time-to-ditchmitch2020/> (last accessed November 16, 2017).

²³ See, e.g. THE NEW YORK TIMES, “Senate Braces for Health Showdown With McCain on Hand but a Plan Unclear” July 24, 2017 available at <https://www.nytimes.com/2017/07/24/us/politics/senate-health-bill-obamacare-repeal-and-replace-trump-mcconnell.html> (last accessed November 16, 2017); CNN, “Mitch McConnell refuses to pull the plug on stalled Obamacare repeal plan” July 18, 2017 available at <http://www.cnn.com/2017/07/18/politics/mcconnell-repeal-and-replace-obamacare-not-successful/index.html> (last accessed November 16, 2017).

²⁴ Complaint at Exhibit 6, pages 2-3; see also Tim Peacock, INDIVISIBLE KY, “Billboard Campaign: It's Time To #DitchMitch2020” July 27, 2017 available at <https://indivisibleky.org/billboard-campaign-its-time-to-ditchmitch2020/> (last accessed November 16, 2017).

²⁵ Federal Election Commission v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987). The Ninth Circuit Court in Furgatch additionally explained that the context of a communication may “supply necessary premises that are unexpressed but widely understood by readers or viewers.” Id. at 863-64.

In Furgatch, the Ninth Circuit Court of Appeals and the Commission's regulations also consider the timing of the communication in its analysis.²⁶ There, the advertisement appeared less than a week before an election. Here, the Billboards appeared 1,195 days (three years, three months, and seven days) before Senator McConnell's name will next appear on a ballot. The Commission's regulation specifically includes a consideration, while limited, of external events, including the "proximity of the election".²⁷ Since the Billboards were placed in July and August of 2017, more than three years before Senator McConnell's next election date, and in the midst of the healthcare debate in the Senate, it is more than reasonable that the public and Senator McConnell would view the Billboards in light of the Senate healthcare debate, rather than urging a vote more than three years away. To be certain, both definitions of "expressly advocates" allow for this type of contextual analysis by the Commission when determining whether the definition has been met.

Therefore, it is reasonable to find that the purpose of the Billboards is to send a message to Senator McConnell that his constituents are not happy with the decisions he is making regarding social welfare issues, and specifically, healthcare. As such, it would be wholly inaccurate to say that the Billboards are not subject to any reasonable interpretation other than that they are seeking in some way for a call to vote or for voters to support or oppose a clearly identified candidate.

Of course, the information provided by the Complainant regarding the intent of IKY makes it clear that the intent, purpose, and effect of the ads were to get Senator McConnell's attention, not to influence an election over three years away.²⁸

IV. No disclaimers were required on IKY's Website or Twitter Communications

A. IKY's Website does not require any disclaimer under the Act because IKY is not a political committee

Current Commission regulations require disclaimers on Internet websites of *political committees* that are available to the general public.²⁹ To qualify as a political committee, the organization must either raise or spend \$1,000 or more for the purpose of influencing any election for Federal office and its "major purpose" must be engaging in Federal election activity.³⁰ Additionally, as this Commission has previously explained, "the Supreme Court has held that, '[t]o fulfill the purposes of the Act,' and to avoid 'reach[ing] groups engaged purely in

²⁶ Furgatch, 807 F.2d at 865.

²⁷ 11 C.F.R. § 100.22(b).

²⁸ Complaint at Exhibits 5, 6 & 8.

²⁹ 11 C.F.R. § 110.11(a)(1).

³⁰ 11 C.F.R. §§ 100.5(a); 100.52; *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

issue discussion,' only organizations whose major purpose is campaign activity can be considered political committees under the Act."³¹ In interpreting this, the Commission has provided that "[a]n organization's 'major purpose' may be established through its own public statements."³²

IKY is not, and has at no time, qualified or acted in any way as a political committee under the Act. First, the major purpose of IKY is clearly not that of a political organization; IKY is a social welfare organization and as such, according to IKY's Articles of Incorporation filed with the Kentucky Secretary of State, the purpose of the organization is "social betterment."³³ The Complaint offers no public statements made by IKY to support an allegation that IKY is a political organization. In fact, the Complaint attached as an Exhibit the "Who We Are" page from IKY's website, which includes the organization's public statement that it is a "part of a national grassroots movement based out of the Indivisible Guide" and that the organization "believe[s] that protecting our values, our neighbors, and ourselves will require mounting a strong, united, indivisible resistance to the Trump agenda".³⁴ Specifically, for IKY, this means making sure in Kentucky that Senator McConnell "is accountable to us, his constituents."³⁵ ***Therefore, not only is IKY a 501(c)(4) social welfare corporation under the tax code, but it is also a registered Kentucky nonprofit corporation with a social welfare purpose, and its public communications – including those cited by the Complaint – are consistent with IKY's major purpose being the social welfare of citizens.***

Further, IKY is not a political organization because it has not raised \$1,000 for political purposes. The Complaint includes a page from IKY's website where it encourages individuals to make donations in support of these advertisements; ***there is absolutely no reference to these***

³¹ Advisory Opinion 2006-20 at 4 (citing Buckley v. Valeo, 424 U.S. 1, 79; FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 262 (1986)).

³² Advisory Opinion 2006-20 at 4-5 (citing to "[s]ee e.g., FEC v. Malenick, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004) (finding the organization evidenced its 'major purpose' through its own materials which stated the organization's goal of supporting the election of Republican Party candidates for Federal office and through efforts to get prospective donors to consider supporting Federal candidates); FEC v. GOPAC, Inc., 917 F. Supp. 851, 859 (D.D.C. 1996) (finding that the 'organization's [major] purpose may be evidenced by its public statements of its purpose or by other means')").

³³ Articles of Incorporation, Indivisible Kentucky Inc. filed February 27, 2017 with the Kentucky Secretary of State available at [http://apps.sos.ky.gov/ImageWebViewer/\(S\(3umtat45314t5myjttaylyia\)\)/OBDBDisplayImage.aspx?id=6724860](http://apps.sos.ky.gov/ImageWebViewer/(S(3umtat45314t5myjttaylyia))/OBDBDisplayImage.aspx?id=6724860) (last accessed November 16, 2017).

³⁴ Complaint at Exhibit 4, at 4.

³⁵ Id.

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*solicited contributions being used for a specific political purpose.*³⁶ *IKY's website specifically provides that the advertisements are to get the Senator's attention, and the purpose for this is to "send a message" to the Senator for his recent actions related to healthcare and other issues.* Instead of referencing any political purpose, this page specifically focuses on social welfare issues facing the state and provides that "Kentuckians deserve access to the same fundamental rights as even the wealthiest Americans: the right to affordable, quality healthcare, a good education, clean water, and freedom from discrimination based on our gender, race, or sexual orientation."³⁷ Therefore, there is no evidence to support the allegation that any money was raised for a political purpose; there is no evidence to support a proposition that IKY's major purpose is anything other than that of promoting the social welfare; and there are no facts to support the Complaint's suggestion that IKY is "confused" as to its own purpose.³⁸

The fact that IKY chose to be transparent on its Billboards by including a disclaimer does not change what kind of entity it is, nor does it mean that IKY is "confused" as to what kind of entity it is, as the Complaint suggests.³⁹ The voluntary disclaimer was a decision that IKY made which only provided greater transparency to the public than was required under law.

Therefore, even if the Commission were to find the Advertisements to be an Independent Expenditure, IKY would not be a political committee under the Act. As such, no disclaimer is required on IKY's website.

B. IKY's Website and Twitter solicitations do not require any disclaimers under the Act.

The Complainant alleges that IKY's website and Twitter solicitations for the Billboards and future issue campaigns require disclaimers, and includes a vague reference to the Commission's disclaimer requirements under 11 C.F.R. § 110.11. This section of the Commission's rules provides for disclaimer requirements under the Act for "public communications," including those public communications that solicit contributions. *However, "communications over the Internet" are specifically exempted from the definition of public communication and the disclaimer requirements under 11 C.F.R. § 110.11, unless they are*

³⁶ In order for a solicitation to be subject to the Federal Election Campaign Act, its request for funds must "clearly indicate[] that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *FEC v. Survival Education Fund*, 65 F.3d 285, 295 (2nd Cir. 1995). See also *Emily's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009) (striking down a Commission regulation (Former 11 C.F.R. § 100.57) that considered funds to be contributions if they were received in connection with a solicitation that indicated that *any portion* of the contribution would be used to support or oppose a clearly identified federal candidate).

³⁷ Complaint at Exhibit 6, at 2. See also Tim Peacock, INDIVISIBLE KY, "Billboard Campaign: It's Time To #DitchMitch2020" July 27, 2017 available at <https://indivisibleky.org/billboard-campaign-its-time-to-ditchmitch2020/> (last accessed November 16, 2017).

³⁸ Complaint at 3, paragraph 16.

³⁹ *Id.*

*placed for a fee on another person's website.*⁴⁰ The solicitations on IKY's website are specifically within this exemption. Additionally, Twitter is a free social media platform, such that Twitter posts by IKY are not public communications and therefore do not require disclaimers. Therefore, IKY has at no time violated the Act for omitting a disclaimer on its website or Twitter communications.

V. Conclusion

As provided above, IKY has not violated the Act or any of the Commission's rules with regard to this Complaint. The Complaint alleges that IKY failed to report Independent Expenditures to the Commission and to disclose donors on those reports. In fact, the Complaint alleged that IKY did this knowingly and willfully, and provided absolutely no support for this claim and allegation that IKY should be subject to criminal penalties.

The Billboards are not Independent Expenditures because they are not express advocacy; these communications were directed at Senator McConnell to place pressure on him with regard to his voting as an incumbent on social welfare issues relevant to his constituents; to be certain, these were in no way political advertisements made by a political committee. The communications are within the major purpose of IKY as a 501(c)(4) social welfare organization that has formed in Kentucky for the exact stated purposes of "social betterment" and making sure that Senator McConnell "is accountable to us, his constituents".⁴¹

The Complaint also alleges that IKY failed to include certain disclaimers on its website and Twitter communications. This argument fails for two reasons: (1) IKY is not a political committee subject to the disclaimer requirements in 11 C.F.R. § 100.11(a)(1) and (2) IKY's website and Twitter messages are specifically exempted from the disclaimer requirements of public communications because they are unpaid Internet communications.

Finally, even if the Commission were to find reason to believe that a violation had occurred, the Commission has broad discretion under Heckler v. Chaney to determine whether it is worth using additional Commission resources to move forward.⁴² Due to the *de minimis* nature of the expenditures at issue, the Commission should exercise its prosecutorial discretion and dismiss this Complaint.

⁴⁰ 11 C.F.R. § 100.26. See Concurring Statement of Chairman Matthew S. Petersen and Commissioners Lee E. Goodman and Caroline C. Hunter, Advisory Opinion 2016-16 (IAPAC) at 1-2, n. 5 (concluding that unless Internet communications are placed for a fee on another person's website, they are not 'public communications').

⁴¹ Articles of Incorporation, Indivisible Kentucky Inc. filed February 27, 2017 with the Kentucky Secretary of State available at [http://apps.sos.ky.gov/ImageWebViewer/\(S\(3umtat45314t5myjttaylyia\)\)/OBDBDisplayImage.aspx?id=6724860](http://apps.sos.ky.gov/ImageWebViewer/(S(3umtat45314t5myjttaylyia))/OBDBDisplayImage.aspx?id=6724860) (last accessed November 16, 2017); Complaint at Exhibit 4, page 4.

⁴² Heckler v. Chaney, 470 U.S. 821 (1985).

If you have any questions regarding this Response, my daytime number is (202) 479-1111.
My email address is reiff@sandlerreiff.com.

Sincerely,

A handwritten signature in black ink, appearing to read "N. P. Reiff".

Neil P. Reiff
Counsel to Indivisible Kentucky, Inc.

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