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September 30, 2020

Mr. Jeff S. Jordan  
Assistant General Counsel  
Office of Complaints Examination  
and Legal Administration  
Federal Election Commission  
Attn: Christal Dennis, Paralegal  
1050 First Street, N.E.  
Washington, D.C. 20463

VIA E-mail to CELA@fec.gov

Re: MUR 7773

Dear Mr. Jordan:

The undersigned serves as counsel to Eugene DePasquale (“DePasquale”), Depasquale for PA 10, and Matt Sommer, in his official capacity as Treasurer (“the Federal Committee”). This letter responds on behalf of DePasquale and the Federal Committee to the Commission’s notification that it received a complaint (the “Complaint”) alleging that the Committee violated the Federal Election Campaign Act (the “Act”) and Federal Election Commission (the “Commission”) regulations.

**Background**

The Complaint alleges that DePasquale, the current Auditor General of Pennsylvania, spent funds from his state campaign committee on his campaign for a seat in the U.S. House of Representatives in Pennsylvania’s Tenth District. As the facts outlined below will show, this is simply not the case.

DePasquale was elected for a second term as Auditor General of Pennsylvania in 2016 for a term that will end in January 2021. During the first half of 2019, DePasquale began considering several options, including state and federal elections to be held in 2020 and 2022, to continue his public service after his Auditor General term concluded.<sup>1</sup> During that time, DePasquale’s state campaign committee continued fundraising for a potential future run at the state level and used those funds to modernize his state campaign infrastructure and to amplify DePasquale’s work as Auditor General. DePasquale did not engage in any paid, federal exploratory activities during that time period. As he stated in March of 2019, he consulted with

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<sup>1</sup> See, John Cole, *DePasquale Mulls Next Step, Possibly Congress*, PoliticsPA, Mar. 27, 2019, available at <https://www.politicspa.com/depasquale-mulls-next-step-possibly-congress/90769/>.

“his family, party leaders across the state and country, and activists about what [office] would be best.”<sup>2</sup> He did not undertake any paid federal exploratory activities. In June of 2019, DePasquale made the decision to run for Congress and began raising money for his federal candidacy to fund his federal election activities. On July 1, 2019, he filed a Statement of Candidacy and Statement of Organization with the Commission as a candidate for Congress in the Tenth District of Pennsylvania.

The Complaint alleges that certain state campaign committee disbursements made to update the state committee’s infrastructure and support DePasquale’s officeholder activities were, in fact, made in support of his future congressional campaign. The Complainant selects disbursements to five vendors from DePasquale’s 2019 state campaign finance reports and speculates that because those vendors were later used by the Federal Committee, those disbursements must have been made in connection with a federal election. As described below, those vendors provided services to the state campaign committee in connection with his activities as Auditor General and in support of a potential future run for state office and prior to DePasquale becoming a federal candidate under the Act.

#### A. Rising Tide Interactive

Rising Tide Interactive (“RTI”) is a digital marketing agency hired by the state campaign committee for email marketing and to design a social media plan focused on DePasquale’s accomplishments as Auditor General. As described in the Complaint, the Facebook ads placed in April and May of 2019 were state-specific, focusing on DePasquale’s accomplishments as Auditor General. A total of five different ads were placed on Facebook in April and May of 2019 and are attached hereto as Exhibit A.

Advertisement 1 focused on DePasquale’s efforts to increase transparency and expose corruption as Auditor General and requested that supporters complete a policy survey. Advertisement 2 highlighted DePasquale’s work to fix Pennsylvania’s dysfunctional child abuse hotline and asked supporters to sign a petition of support. Advertisements 3 and 4 centered on his advocacy on prescription drug pricing in Pennsylvania and encouraged supporters to take a policy survey or share their story. Finally, Advertisement 5 promoted DePasquale as Auditor General and sought additional “likes” on DePasquale’s Facebook page. None of the advertisements or emails mentioned any potential future run for federal office, and, in fact, each advertisement was focused on generating support for DePasquale’s accomplishments as Auditor General. The four disbursements to RTI in April and May of 2019 covered the costs of the Facebook advertisements, RTI’s commission on those advertisements, and RTI’s monthly services retainer.

#### B. Think Big Campaigns

Think Big Campaigns was engaged by the state campaign to redesign DePasquale’s state campaign website to accentuate DePasquale’s work as Auditor General. The website highlighted issues that were important to DePasquale and focused on the audits he had

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<sup>2</sup> John Cole, *DePasquale Mulls Next Step, Possibly Congress*, PoliticsPA, Mar. 27, 2019, available at <https://www.politicspa.com/depasquale-mulls-next-step-possibly-congress/90769/>.

conducted as Auditor General. The website was hosted at [www.EugenePA.com](http://www.EugenePA.com), the same domain name consistently used in DePasquale's Auditor General campaigns. The website did not reference any potential future run for federal office nor was the website, nor any of its content, used by the Federal Committee in connection with its federal activity.

### C. Stanford Campaigns

Stanford Campaigns is a political research firm that the state campaign engaged to produce a self-research book on DePasquale. The research book covered DePasquale's entire political career without any focus on any specific federal or state issue, potential future race, or potential future opponent. The Federal Committee later purchased the self-research book from the state committee so it could be used by the federal committee.<sup>3</sup>

### D. Jackson Media Group

Jackson Media Group is a strategic communications and messaging firm. The state campaign committee hired the firm to provide general communications consulting—including researching, editing, and cataloging public materials for use in future state campaigns—and to produce videos and photos for DePasquale's state campaign website and social media pages. The Federal Committee later licensed a portion of the raw video footage and photos from the state campaign committee for use in the federal campaign.<sup>4</sup>

### E. EveryAction Inc.

EveryAction is a software company that provides various tools for political campaigns. In this instance, the state campaign committee utilized EveryAction's data management and email tool to manage and email the state campaign's supporters.

Each of the disbursements at issue was made to support DePasquale's activities as the Auditor General of Pennsylvania or to support a potential future run for state office, not to test the waters for any potential federal campaign or to benefit a future federal campaign. The disbursements were made between March and May of 2019 prior to DePasquale making any decision as to whether or when to run for some future federal or state office. He was neither a federal candidate during this period nor engaging in any paid federal exploratory activities, and therefore, these disbursements were not subject to the restrictions and prohibitions under the Act. As he stated in March of 2019, DePasquale was considering several different options to continue his public service at the end of his Auditor General term, including a run for multiple federal offices, but was primarily focused on his role as Auditor General of Pennsylvania.<sup>5</sup> In June of 2019, DePasquale decided to run for Congress and began raising money for his federal candidacy to fund all federal election activities. He filed his Statement of Candidacy and

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<sup>3</sup> See, DePasquale for PA 10, Year-End 2019 Form 3 at page 334 <https://docquery.fec.gov/cgi-bin/fecimg/?202001299182369380>.

<sup>4</sup> See, DePasquale for PA 10, October Quarterly 2019 Form 3 at page 218 <https://docquery.fec.gov/cgi-bin/fecimg/?201910159163908540>

<sup>5</sup> John Cole, *DePasquale Mulls Next Step, Possibly Congress*, PoliticsPA, Mar. 27, 2019, available at <https://www.politicspa.com/depasquale-mulls-next-step-possibly-congress/90769/>.

Statement of Organization on July 1, 2019. In July and October of 2019, the Federal Committee properly purchased certain assets of the state campaign committee to be used in the federal campaign.

### **Legal Analysis**

The Compliant makes two broad claims that DePasquale and the Federal Committee violated the Act and regulations by using state campaign funds in support of a federal campaign and by accepting an impermissible in-kind contribution from the state campaign. Specifically, the Complaint alleges that DePasquale violated 52 U.S.C. § 30125(e) by spending funds not subject to the limitations, prohibitions, and reporting requirements of the Act in connection with an election for federal office.<sup>6</sup> However, the Complaint does not specifically allege how any of this reported spending by Auditor General DePasquale’s non-federal committee relates, in any way, to his campaign for federal office. The Complaint goes on to allege a violation of 11 C.F.R. § 110.3(d) which prohibits a transfer of funds or assets from a state campaign committee to a federal campaign committee. As outlined below, the Complaint fails to allege any facts that would lead to a violation of federal law and the Commission should find no reason to believe DePasquale and the Federal Committee violated the Act or Commission Regulations.

#### A. State Campaign Activities

The provisions of the Act and regulations cited by the Complaint apply only to federal candidates. Under the Act, an individual becomes a “candidate” when he or she raises or spends more than \$5,000 for his or her election to federal office.<sup>7</sup> With the exception of certain “testing the waters” activities, only upon becoming a federal candidate do the Act’s prohibitions on raising and spending funds not subject to the Act’s limitations and prohibitions apply. As discussed above, DePasquale did not become a federal candidate until mid-June of 2019 when he decided to run for Congress and began raising money for his federal campaign. While it is true that funds raised and spent on testing the waters activities are subject to the same limitations and prohibitions that apply to candidates, DePasquale’s activities here do not qualify as exploratory activities. An activity is considered testing the waters if it is “conducted to determine whether an individual should become a candidate” for federal office and traditionally includes activities like polling, telephone calls, and travel.<sup>8</sup> DePasquale did not undertake any such activities with his state campaign committee funds. As he stated in March of 2019, he intended to talk with “his family, party leaders across the state and country, and activists about what [office] would be best.”<sup>9</sup> He did not undertake any paid federal exploratory activities.

Finally, even if DePasquale were found to have been a federal candidate during the period in question, there is a state officeholder exemption which permits a federal candidate “who is or was also a candidate for a State or local office” to raise and spend money permitted

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<sup>6</sup> See also, 11 C.F.R. § 300.61

<sup>7</sup> 52 U.S.C. § 30101(2).

<sup>8</sup> 11 C.F.R. § 100.72(a).

<sup>9</sup> John Cole, *DePasquale Mulls Next Step, Possibly Congress*, PoliticsPA, Mar. 27, 2019, available at <https://www.politicspa.com/depasquale-mulls-next-step-possibly-congress/90769/>.

under State law if that spending only refers to the State candidate.<sup>10</sup> As described above, the expenditures in question were in support of his activities as Auditor General of Pennsylvania and a potential future run for state office.

The issue of using state campaign or PAC funds prior to a federal candidacy has been considered time and time again by the Commission. The allegations in this Compliant are similar to many previously resolved matters where the Commission found no reason to believe a violation occurred.

In 2017, a similar complaint was filed against Josh Hawley, then the sitting Attorney General of Missouri and a 2018 candidate for U.S. Senate, alleging that he used his state campaign to test the waters for a federal candidacy and to finance federal campaign activity.<sup>11</sup> The facts in that Matter are remarkably similar to the facts at hand. Leading up to the filing of his federal statement of candidacy in August of 2017, Hawley used surplus funds in his state campaign committee for “media production, advertising, media consulting, media buys, strategic planning, and direct mailing.”<sup>12</sup> Specifically, those disbursements included payment for a digital advertisement related to his work and accomplishments as Attorney General of Missouri. The Complainant alleged that those advertisements were made to boost his image ahead of a U.S. Senate run and cited to media reports that Hawley was considering a run or had already decided to run for U.S. Senate to demonstrate that he was either testing the waters or already a federal candidate. That Complaint also relied heavily on the fact that the vendors used by the state committee were ultimately used by the federal committee to support its claims that the spending was in connection with a federal election.

The Commission voted 4-0 to find no reason to believe that Hawley violated the Act by spending or transferring soft money in connection with federal testing the waters or campaign activities. Regarding the video highlighting Hawley’s accomplishments as Attorney General, the Commission found it was not “a use of general public political advertising to publicize Hawley’s intention to campaign for office” but rather was “related to Hawley’s duties as a state officeholder”. And due to Hawley’s explanation of how each disbursement by the state committee was related to his activities as Attorney General, the Commission found that those disbursements did “not appear to be related to Hawley’s federal candidacy and therefore do not establish that Hawley was testing the waters or became a candidate before July 2017.”

The same analysis should be applied in the instant case. The Facebook ads in question were designed to amplify the work DePasquale was doing as Auditor General of Pennsylvania and to collect information from his supporters across the state. To be sure, the ads did not publicize an intention to campaign for federal office. Just like in the Hawley matter, the advertisements were related to state officeholder duties. Furthermore, the other disbursements in question were not related to any federal candidacy and therefore were neither testing the waters activities nor activities that triggered federal candidacy status.

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<sup>10</sup> 52 U.S.C. § 30125(e)(2); 11 C.F.R. § 300.63

<sup>11</sup> MUR 7267 (Hawley for Missouri), Factual and Legal Analysis at 1.

<sup>12</sup> *Id.* (internal quotations omitted).

The Commission also addressed this issue in a Complaint filed against Patricia Madrid, then the Attorney General of New Mexico who became a candidate for Congress.<sup>13</sup> That complaint alleged, *inter alia*, that Ms. Madrid used a state PAC to pay for federal testing the waters activities, including polling, travel, and survey expenses. After Madrid responded asserting that the expenses were related to the state PAC's activities, not federal exploratory activities, the Commission only examined more closely the disbursement for a poll that was put into the field one month before Ms. Madrid announced her candidacy for Congress. After reviewing the poll questions which made no mention of a potential federal candidacy, the Commission determined that the poll was designed "to test her viability in certain State races" and was not "made for the purpose of testing the waters for Ms. Madrid's federal candidacy."<sup>14</sup>

The same conclusion should be drawn in this case. There were simply no paid federal exploratory activities — none of the public communications made any mention of a potential future federal candidacy. As such, those activities are not subject to federal contribution limits or restrictions.<sup>15</sup>

Additionally, a Complaint was filed against Lizbeth Benacquisto, who was a Florida State Senator who then ran for Congress, alleging state campaign funds were used to pay for television and radio ads that aired prior to her federal candidacy to benefit her yet-to-be-announced federal campaign.<sup>16</sup> The ads aired shortly before the incumbent Congressman resigned his seat, as was expected due to a recent scandal, but *after* Benacquisto registered the domain name "LizbethforCongress.com".<sup>17</sup> The ads highlighted Benacquisto's activities as state Senator and did not mention any potential federal candidacy. In the Controlling Statement of Reasons, the Commissioners found that Benacquisto was not a federal candidate and stated that "even if Benacquisto had already decided to become a federal candidate and had already met the \$5,000 threshold to be a federal candidate ... the State Committee's advertisements would have been legal under the Act" under the state candidate exception.<sup>18</sup> The same analysis should apply here. When the DePasquale Facebook ads were running, DePasquale was not a federal candidate, and so was not subject to the Act's restrictions and *even if* he were a federal candidate, the ads in question were permissible under the state candidate exception.

The Complaint's notion that because the Federal Committee later hired the same vendors used by the state committee is simply not enough to justify any further investigation by the Commission. Without any further evidence those "circumstances alone are insufficient to draw an inference that such scheme occurred."<sup>19</sup>

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<sup>13</sup> MUR 5761 (Madrid for Congress), Factual and Legal Analysis at 6.

<sup>14</sup> *Id.* at 9. See also, MUR 6750 (Carl DeMaio for Congress) where the Commission voted 6-0 to find no reason to believe that state PAC expenditures on consulting, polling, database, and digital marketing with a stated state purpose were federal testing the waters activity.

<sup>15</sup> 11 C.F.R. § 100.72(a).

<sup>16</sup> MUR 6784 (Lizbeth Benacquisto for Congress), Controlling Statement of Reasons by Commissioners Petersen, Hunter, and Goodman at 2.

<sup>17</sup> MUR 6784 (Lizbeth Benacquisto for Congress), Factual & Legal Analysis at 2.

<sup>18</sup> MUR 6784 (Lizbeth Benacquisto for Congress), Controlling Statement of Reasons by Commissioners Petersen, Hunter, and Goodman at 3.

<sup>19</sup> MUR 7007 (Kyle McCarter for Congress Committee), Factual & Legal Analysis at 10.



## B. Transfer of Assets

The Complaint also alleges that the Federal Committee may have accepted an impermissible in-kind contribution from the state committee because “some of the expenses were for list building” and requests that the Commission investigate whether or not fair market value was paid for those assets. The Complaint offers no additional evidence that the Federal Committee did not pay fair market value for any assets transferred from the state committee and conveniently leaves out the fact that both the federal and state committees publicly reported the sale of assets on their respective campaign finance reports. Of course, it is both permissible and routine for a federal campaign committee to purchase assets from a former state campaign committee.<sup>20</sup>

As described above, the Federal Committee paid the state committee for both the usable portion of the self-research book and a license for relevant raw video footage and photos the federal campaign wished to use.<sup>21</sup> Indeed, in the Benacquisto matter discussed above, the Commission voted 6-0 to find no reason to believe a violation occurred when images used by the state campaign were later purchased by the federal committee for fair market value.<sup>22</sup> Furthermore, the Federal Committee paid fair market value for data from the state campaign committee as reported to the Commission on its first quarterly report.<sup>23</sup> No other assets were transferred to the Federal Committee. Without any additional evidence to the contrary, there is simply no reason to justify any further investigation into this issue.

## **Conclusion**

As described above, the state committee did not engage in any federal exploratory activities or federal campaign activity. Each of the disbursements at issue was related to DePasquale’s role as the Auditor General of Pennsylvania or to support a potential future run for state office at a time when DePasquale was considering running for multiple state and federal offices. When DePasquale later decided to run for federal office, the Federal Committee purchased assets from the state campaign committee to be used in the congressional campaign. The Complaint offers no substantive evidence that any of the state campaign funds were used for federal campaign activity. It merely speculates that based on the timing of the disbursements, the activities of the state campaign committee *must* have been related to DePasquale’s future federal candidacy. The facts in this case and Commission precedent do not support that conclusion and the Commission should dismiss this Complaint.<sup>24</sup>

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<sup>20</sup> See, 58 Fed Reg 3474, 3475 stating that the prohibition of transfer of assets from a state campaign committee “should not be read to proscribe the sale of assets by the state campaign committee to the federal campaign committee, so long as those assets are sold at fair market value.”

<sup>21</sup> See, DePasquale for PA 10, Year-End 2019 Form 3 at page 334 (“research materials”) <https://docquery.fec.gov/cgi-bin/fecimg/?202001299182369380>; DePasquale for PA 10, October Quarterly 2019 Form 3 at page 218 (“licensing”) <https://docquery.fec.gov/cgi-bin/fecimg/?201910159163908540>

<sup>22</sup> MUR 6784 (Lizbeth Benacquisto for Congress), Factual & Legal Analysis at 7-8.

<sup>23</sup> See, DePasquale for PA 10, October Quarterly 2019 Form 3 at page 218 (“data purchase”) <https://docquery.fec.gov/cgi-bin/fecimg/?201910159163908540>.

<sup>24</sup> See, MUR 5952 (Hillary Clinton for President) where the Commission found no reason to believe a violation occurred when the Complaint failed to provide any specific allegations or factual information to support the alleged violation.

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

Sincerely,

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

Neil P. Reiff  
Erin Tibe  
Counsel to Eugene Depasquale, DePasquale  
for PA 10, and Matt Sommer, Treasurer



# **EXHIBIT A**

## Advertisement 1



**Eugene A. DePasquale**

Sponsored • Paid for by DePasquale for Pennsylvania

Eugene DePasquale is fighting to make sure that Pennsylvania's government works for us. As Auditor General, he has increased transparency, exposed corruption, and kept our families safe. Now he wants to hear from you. Take Eugene's policy survey today: <https://bit.ly/2JE9dNH>



Take Eugene's  
**PA Policy Survey!**

**TAKE THE SURVEY**

[SECURE.NGPVAN.COM](https://secure.ngpvan.com)

Share your thoughts with Eugene >>>

## Advertisement 2



**Eugene A. DePasquale**

Sponsored · Paid for by DePasquale for Pennsylvania

Before Eugene DePasquale took office, 58,000 calls to Pennsylvania's child-abuse hotline went unanswered. By fixing ChildLine Eugene joined the fight to keep our kids safe from abuse. Sign on to stand with Eugene DePasquale and protect PA children! <https://bit.ly/2QqANhT>



Stand with  
Eugene DePasquale  
**Protect Pennsylvania's  
Children from Abuse**

**SIGN THE PETITION**

[SECURE.NGPVAN.COM](https://secure.ngpva.com)

[Defend Pennsylvania's Children](#)

[Eugene DePasquale is a champion for our kids.](#)

### Advertisement 3



**Eugene A. DePasquale**


Sponsored • Paid for by DePasquale for Pennsylvania

ID: 2359889504288917



Eugene DePasquale is shining a light on the prescription drug system to help Pennsylvania lower drug prices.

Do you support lower prescription drug costs? <https://bit.ly/2JExQd5>

 Ad removed



**Do you support  
lower prescription  
drug costs?**

**YES** **NO**

SECURE.NGPVAN.COM

Take Eugene's prescription drug survey:



Advertisement 4



**Eugene A. DePasquale**

Sponsored • Paid for by DePasquale for Pennsylvania

Have you experienced the high cost of prescription drugs?  
Tell me your story: [EugenePA.com/pharma](https://EugenePA.com/pharma)

I recently released a special report calling for increased oversight of pharmacy benefit managers raking in huge profits at the expense of people whose health depend on the medication that is increasingly difficult, if not impossible, to...

Have you experienced **high pharmaceutical costs?**

**TELL ME YOUR STORY**

**Eugene DePasquale**

PHARMACY BENEFIT MANAGERS

Advertisement 5



**Eugene A. DePasquale**

Sponsored • Paid for by DePasquale for Pennsylvania

Former mediocre college athlete now Auditor General. Dad,  
American Legion Baseball Coach



Eugene DePasquale for Pennsylvania

Politician

10,141 people like this

 Like...













