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One Thomas Circle, N.W.
Suite 1100
Washington, DC 20005
Tel: 202.862.5000
Fax: 202.429.3301
caplindrysdale.com

202.862.7836 Direct
bmorgan@capdale.com

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VIA ELECTRONIC MAIL*(cela@fec.gov)*

Mr. Roy Q. Lockett, Esq.
Acting Assistant General Counsel
Federal Election Commission
Office of Complaints Examination
& Legal Administration
Attn: Kathryn Ross, Paralegal
1050 First Street, NE
Washington, DC 20463

Re: MUR 7982 Response of LUPE Votes

Dear Mr. Lockett:

On behalf of LUPE Votes (filer ID #C90021304), I write in response to the Complaint filed by Alma Espinoza of Hidalgo, Texas in MUR 7982 to the extent that it alleges violations of the Federal Election Campaign Act of 1971, as amended (the “Act”) and Federal Election Commission (the “Commission”) regulations by LUPE Votes.¹ I respectfully urge the Commission to dismiss the Complaint as an exercise of its prosecutorial discretion due to the minor nature of the alleged violations involving incomplete disclaimers on the communications at issue, the minor nature of the alleged failure to file 24 and 48-Hour independent expenditure reports, and the wholly speculative and unsubstantiated allegations of impermissible coordination between LUPE Votes and Michelle Vallejo for Congress.²

LUPE Votes, (La Unión Del Pueblo Entero Votes), is a community based nonprofit organization that was incorporated in Texas in October 2021 and is organized and operating as a social welfare organization under Section 501(c)(4) of the Internal Revenue Code of 1986, as amended (the “Code”). LUPE Votes is the 501(c)(4) affiliate of LUPE, a 501(c)(3) organization founded by labor rights activists César Chávez and Dolores Huerta. LUPE Votes is dedicated to winning justice for working-class South Texans through issue advocacy and a certain amount of

¹ Certain of the allegations raised in the Complaint are also the subject of a Request for Additional Information (“RFAI”) issued by the Commission to LUPE Votes on July 26, 2022 with a response deadline of August 30, 2022. LUPE Votes plans to separately respond to the RFAI on or before the response deadline.

² *Heckler v. Chaney*, 470 U.S. 821 (1985).

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electoral activity to empower and engage its community in the electoral process consistent with its status as a 501(c)(4) organization.

The Complaint focuses on certain activities undertaken by LUPE Votes and its personnel to influence the hotly-contested March 1, 2022 primary election in the Texas 15th congressional district.³ The Complaint's allegations fall into three separate categories: (1) an alleged failure by LUPE Votes to include a complete disclaimer on a door hanger and on a direct mail piece; (2) an alleged failure by LUPE Votes to disclose its independent expenditures in 24 and 48-Hour independent expenditure disclosure reports; and (3) alleged coordination between LUPE Votes and the Michelle Vallejo for Congress campaign. Each of these is addressed in turn.

1. Alleged Omission of Portion of Required Disclaimer

The Complaint alleges that LUPE Votes distributed two pieces of literature, a door hanger that was distributed by paid and volunteer canvassers, and a direct mail piece, in advance of the March 1, 2022 primary election that lacked a complete disclaimer required to be included on printed materials pursuant to 11 C.F.R. § 110.11.⁴ The Complaint admits that both pieces of literature contained a proper "Paid for by LUPE Votes" disclaimer which is visible in the images included below.⁵ This disclaimer was the appropriate size, had an appropriate color contrast, and was properly contained in a printed box set apart from the other contents of the communication.⁶ The disclaimer was printed on both the front and back of the door hanger, even though it was not required to be included on both sides. LUPE Votes' website address was printed immediately above the "Paid for by LUPE Votes" disclaimer box on the back side of the door hanger, and was also included in the footer on the front and back pages of the direct mail piece.

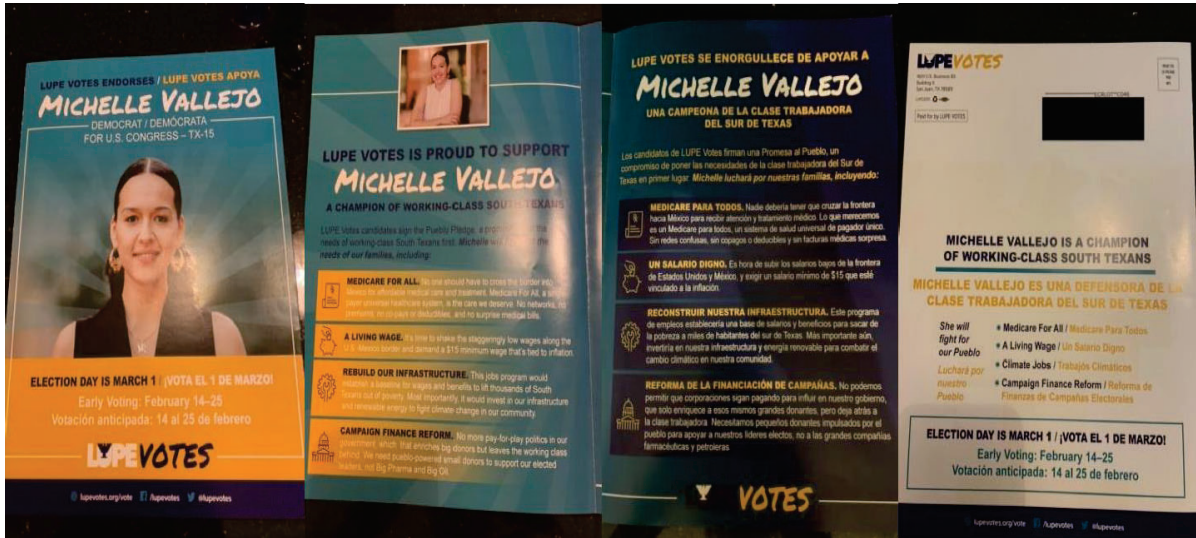
³ Complaint at 1.

⁴ Complaint at 4, 7, 9.

⁵ *Id.*

⁶ 11 C.F.R. 110.11(c)(2).

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The Complaint faults LUPE Votes for failing to include the additional disclaimer text required under 11 C.F.R. §§ 109.11 and 110.11(b)(3) indicating they were “not authorized by any candidate or candidate’s committee.” LUPE Votes admits that the door hanger and direct mail piece did not include this additional disclaimer language, and now understands that such language as well as its address, telephone number, or website address is required to be included within the printed box on printed communications that constitute independent expenditures.

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The door hanger at issue encouraged recipients to vote for Michelle Vallejo during the early voting period between February 14-25 or on primary election day on March 1, 2022. It was designed exclusively by LUPE Votes personnel in mid January 2021 and then printed by Copy Zone in McAllen, Texas at a cost of \$2,574.95 disbursed on January 21, 2022 as reported in LUPE Votes' April Quarterly 2022 FEC Form 5 report filed on April 15, 2022 and amended on April 25, 2022.⁷ The door hanger was distributed throughout the district by volunteers and paid canvassers during the early voting period in advance of the March 1, 2022 primary election as reported by LUPE Votes in these same reports.⁸

The direct mail piece at issue similarly encouraged recipients to vote for Michelle Vallejo during the early voting period between February 14-25 or on election day on March 1, 2022. It was designed exclusively by LUPE Votes personnel with the assistance of a vendor, Wildfire Mail, and then mailed to households in Texas' 15th congressional district in advance of the March 1, 2022 primary election at a cost of \$14,431.97 as reported in LUPE Votes' April Quarterly 2022 FEC Form 5 report filed on April 15, 2022 and amended on April 25, 2022.⁹

The Complaint does not claim that there was any uncertainty regarding who paid for the door hanger or mailer, nor does the Complaint allege facts suggesting that the omission of the additional "not authorized by any candidate or candidate's committee" language was intentional or impacted the electoral process in any way. The Commission has consistently determined that a complaint such as this alleging omission of a required disclaimer – let alone omission of a portion of the required disclaimer language – is a low priority for Commission action under the Commission's established Enforcement Priority System.¹⁰

⁷ LUPE Votes, April Quarterly 2022 Form 5, available at <https://docquery.fec.gov/pdf/838/202204189500011838/202204189500011838.pdf>; Amended April Quarterly 2022 Form 5, available at <https://docquery.fec.gov/pdf/943/202204259502469943/202204259502469943.pdf>.

⁸ LUPE Votes reported several disbursements for "Canvassing" or "Field work" to individuals. These disbursements each related to the distribution of the door hanger throughout Texas' 15th congressional district in advance of the March 1, 2022 primary election. *See id.*

⁹ *See supra* n. 7.

¹⁰ *See* MUR 7069 (Ron Hedlund) (alleged disclaimer violation dismissed, with EPS Dismissal Report citing "the fact that it is unlikely the general public would have been misled as to who was responsible for the letter" despite omission of "not authorized" portion of disclaimer). *See also* MUR 7906 (Charles W. Herbster, *et al.*) (allegation of failure to include disclaimer on a \$9,000 magazine advertisement dismissed); MUR 7831 (Jeanne Capello) (alleged disclaimer violation dismissed, with EPS Dismissal Report citing acknowledgement of the violation by the respondent); MUR 7806 (Cory Gardner for Senate, *et al.*) (alleged disclaimer violation dismissed, with EPS Dismissal Report citing "technical nature of the violation"); MUR 7782 (Duane Whitmer for Congress) (alleged disclaimer violation dismissed, with EPS Dismissal Report citing "the unlikelihood that the public was misled as to who paid for the mailings"); MUR 7749 (Romero for Senate) (alleged disclaimer violation dismissed, with EPS Dismissal Report citing "technical nature of disclaimer violations"); MUR 7659 (Joshua Foxworth for Congress) (alleged disclaimer violation dismissed); and MUR 7460 (Coalition for a Safe Secure America), Statement of Reasons of Chair Shana M. Broussard, Vice Chair Allen Dickerson, and Commissioners Sean J. Cooksey, James E. "Trey" Trainor, III, Steven T. Walther, and Ellen L. Weintraub (explaining dismissal of alleged disclaimer and reporting violations).

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2. Alleged Failure to File 24 and 48-Hour Reports of Independent Expenditures

The Complaint alleges that LUPE Votes failed to file required 24-Hour and 48-Hour reports of independent expenditures with the Commission as required by 11 C.F.R. § 109.10 in connection with its printing and distribution of the very same door hanger and direct mail piece discussed above.¹¹

As the Complaint notes, these expenditures were reported by LUPE Votes on April 15, 2022 when it filed its April Quarterly 2022 FEC Form 5.¹² LUPE Votes acknowledges that it did not disclose these expenditures in a timely manner in any 24-Hour or 48-Hour reports of independent expenditures in advance of the March 1, 2022 primary election. Its failure to do so was an unintentional and inadvertent oversight. It was not motivated by any desire to conceal the source or modest nature of its spending, as the door hangers and direct mail piece prominently disclosed that they were paid for by LUPE Votes and LUPE Votes publicized their efforts to influence the March 1, 2022 primary election repeatedly on social media as compiled in the Complaint.

Based on the small amount of spending at issue and the inadvertent nature of the violation, LUPE Votes respectfully requests that the Commission exercise its prosecutorial discretion to dismiss the allegations regarding failure to file 24 and 48-Hour reports or alternatively find that these allegations are appropriate for referral to the Alternative Dispute Resolution Office, as a failure to timely file an FEC Form 5 is mostly commonly resolved through the Commission's Alternative Dispute Resolution process.¹³

3. Alleged Coordinated Communications

Finally, the Complaint speculates that LUPE Votes' communications to influence the March 1, 2022 primary election were impermissibly coordinated with Michelle Vallejo and Michelle Vallejo for Congress or its agents. This allegation is based on nothing more than inference, speculation, and an apparent lack of understanding of the conduct standards contained in Commission's three-pronged coordination test at 11 C.F.R. 109.21. The Complaint fails to assert any probative evidence that these communications were impermissibly coordinated. Instead it asks the Commission to speculate that coordination may have occurred and launch a costly and intrusive investigation into LUPE Votes based on solely the following information:

- A November 1, 2021 online article reporting that "LUPE Votes wants community members to run for Congress"¹⁴;

¹¹ Complaint at 4-7, 9.

¹² *See supra* n. 7.

¹³ *See e.g.*, ADR 979 (Montana Rural Voters); ADR 964 (Case Action Fund); ADR 963 (Communities for a New California C4); ADR 953 (Hotel Workers for Stronger Communities); and ADR 963 (Communities for a New California C4).

¹⁴ Complaint at 2.

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- A December 13, 2021 online article reporting that LUPE Votes “nominated” (*i.e.*, endorsed) Michelle Vallejo in the March 1, 2020 Texas 15th congressional district primary election¹⁵;
- Attendance by Michelle Vallejo and one or more individuals affiliated with LUPE Votes at the same widely attended event, namely the Hidalgo County Tejano Democrats Gala at the Memorial Event Center in Edinburg, Texas on Thursday, January 13, 2022¹⁶;
- Participation by a LUPE Votes staff member as a panelist in a January 26, 2022 education policy roundtable discussion hosted by Michelle Vallejo on Facebook Live that was open to the general public and, according to Facebook, received more than one thousand views¹⁷;
- Two LUPE Votes staff members, acting in their personal capacities, co-hosting a fundraiser for Michelle Vallejo for Congress held on Sunday February 20, 2022 that was attended by Michelle Vallejo and which occurred after the communications at issue in the Complaint were produced and disseminated¹⁸; and
- A third-party organization, LUPE PAC, made a disbursement on March 31, 2022 for a poll that LUPE Votes understands was conducted weeks after the communications at issue in the Complaint were produced and disseminated.¹⁹

To determine whether a communication constitutes a “coordinated communication” and therefore an in-kind contribution, Commission regulations require the application of the three-pronged coordination test found at 11 C.F.R. § 109.21. Under this test, in order for a communication to constitute a “coordinated communication” it must: (1) satisfy the “payment prong” by being paid for by a person other than a candidate committee or political party committee; (2) satisfy at least one of five content standards (the “content prong”); and (3) satisfy at least one of six conduct standards (the “conduct prong”).²⁰ Importantly, in order to constitute a “coordinated communication,” a communication must satisfy *all three prongs* of this coordination test.²¹

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 8.

²⁰ 11 C.F.R. § 109.21(a), (c), (d).

²¹ 11 C.F.R. § 109.21(a). *See also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003).

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LUPE Votes concedes that the communications at issue in the complaint, namely the door hangers and direct mail piece, satisfy the “payment prong” and the “content prong” of the Commission’s coordination test. Indeed, the door hanger and direct mail piece contained express advocacy encouraging recipients to vote for Michelle Vallejo in the March 1, 2022 primary election. The Complaint does not, though, allege any conduct by LUPE Votes, Michelle Vallejo, or Michelle Vallejo for Congress or its agents that satisfies the “conduct prong” of the Commission’s coordination test. For this reason, the Complaint fails to provide a sufficient factual basis for a reason to believe finding regarding impermissible coordination.²²

In November and December of 2021 LUPE Votes publicly expressed a desire for someone from their community to run for Congress in the 15th congressional district. To that end, LUPE Votes interviewed potential candidates to understand where they stood on the issues of importance to the community and in order to decide who, if anyone, LUPE Votes would endorse. The LUPE Votes Board of Directors ultimately decided to endorse Michelle Vallejo.

An organization’s publicly-expressed desire for a member of its community to run for federal elective office does not satisfy any content or conduct standard. An organization’s vetting of potential candidates or candidates on legislative or policy issues also does not satisfy any conduct standard. The Complaint portrays LUPE Votes’ efforts to identify, endorse, and elect a candidate of its community’s choosing as somehow improper, yet the Commission’s coordination regulation specifically provides a “safe harbor” for such activity.²³ And an organization’s “nomination” (*i.e.*, endorsement) of a specific candidate following such an issue-based vetting process and its independent communication of that endorsement to the general public also does not satisfy any conduct standard.²⁴ Instead, this is precisely how communities can and should participate in American democracy.

The Commission’s conduct prong also is not satisfied if an organization’s personnel and a candidate or an agent of a candidate’s campaign are acquaintances or attend the same events such as the widely-attended Hidalgo County Tejano Democrats Gala, the education policy roundtable discussion hosted by Michelle Vallejo on Facebook Live, or the fundraising event co-hosted by LUPE Votes personnel that occurred on their own personal time and *after* the communications at issue were produced and disseminated.

²² See 11 C.F.R. 109.21(d); 11 C.F.R. 300.64; Fed. Elec. Comm’n Adv. Op. 2011-12 (Majority PAC). *See also* MUR 7378 (Anthony Gonzalez for Congress), First General Counsel’s Report at 5 (“There is no information to indicate any contact between the Committee and CLN that would qualify as a ‘request or suggestion,’ ‘material involvement,’ or ‘substantial discussion,’ and no allegation that there was a common vendor, former employee, or independent contractor involved. . . . Because the conduct prong of the coordinated communications test was not satisfied here, we recommend that the Commission find no reason to believe”); and MUR 7839 (Westerleigh Press, Inc., *et al.*), First General Counsel’s Report at 18 (“Given that there is no information to satisfy the conduct prong, the mailings do not constitute coordinated communications, and thus did not constitute in-kind contributions . . .”).

²³ 11 C.F.R. § 109.21(f).

²⁴ See 11 C.F.R. § 109.21; 11 C.F.R. § 114.4(c)(6) (candidate endorsements communicated beyond the restricted class).

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Mr. Daniel Diaz was invited to participate in the education policy roundtable discussion due to his education policy background, having served as a college access and financial aid specialist for the La Joya Independent School District from 2016 to 2019. Co-hosting a fundraising event for Michelle Vallejo for Congress did not make Mr. Diaz an “agent of the campaign” as the Complaint asserts.²⁵ And finally, a third party’s – here LUPE PAC’s – later disbursement for a poll simply could not cause the communications disseminated by LUPE Votes at issue in the Complaint to satisfy any conduct prong, because it is not possible for public opinion survey research conducted in late March 2022 to inform communications made weeks prior.²⁶

The Complaint suffers from the same fatal flaws as many complaints that have come before the Commission that alleged but failed to establish any reasonable basis to believe that a conduct standard was satisfied.²⁷ In place of facts, the Complaint speculates, assumes wrongdoing, and invites the Commission to do the same. It fails to assert any specific evidence that impermissible coordination satisfying any conduct standard occurred. It is well established that speculation and presumption are insufficient grounds to find reason to believe a violation occurred. Instead, the reason to believe standard at 52 U.S.C. § 30109(a)(2) “means more than merely a reason to suspect”²⁸ and “is not met if the Commission simply did not have sufficient information to find *no* reason to believe,” because the Commission “must have more than unanswered questions before it can vote to find RTB and thereby commence an investigation.”²⁹

4. Conclusion

²⁵ See 11 C.F.R. § 109.3(b).

²⁶ See MUR 7797 (Sara Gideon for Maine, *et al.*), First General Counsel’s Report at 9 (“The available information appears consistent with SMP’s assertion that the advertisements were developed before Coyle’s tweet because they were published within hours of Coyle’s tweet and aired on television stations throughout Maine the day after the tweet. Without more information concerning the sequencing of events, the record fails to support a reasonable inference [of coordination]”).

²⁷ In MUR 7139 (Maryland USA), three Commissioners found that the allegations were “entirely speculative” and the complaint “failed to establish any coordinating conduct.” Statement of Reasons of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor, III at 1. Similarly, in MUR 6821 (Shaheen for Senate, *et al.*), the Office of General Counsel noted that “temporal proximity” and “similarities” of communications “do not give rise to a reasonable inference that any of the conduct standards were satisfied . . . particularly where no other information suggests that the Respondents engaged in any of the activities outlined in the relevant conduct standards.” First General Counsel’s Report at 8-9.

²⁸ MUR 7135 (Donald J. Trump for President, *et. al.*), Statement of Reasons of Commissions Hunter and Petersen at n. 31 and n. 32; MUR 6296 (Buck for Colorado), Statement of Reasons of Vice-Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 7 (“the Act’s complaint requirements and limits on Commission investigative authority serve no purpose if the Commission proceeds anytime it can imagine a scenario under which a violation may have occurred.”).

²⁹ MUR 6056 (Protect Colorado Jobs, Inc.), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at n. 12 (internal quotations and spacing omitted for clarity). See also MUR 7870 (Google LLC, *et al.*), First General Counsel’s Report at 8 (noting “the Complaint’s allegations are vague and speculative”).

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For the reasons stated above, I respectfully urge the Commission to find that the Compliant fails to supply an adequate reason to believe that the LUPE Votes communications at issue were impermissibly coordinated with Michelle Vallejo or with Michelle Vallejo for Congress or its agents. With regard to the allegations concerning incomplete disclaimers and the failure to file 24 and 48-Hour reports of independent expenditures, I respectfully urge the Commission to dismiss the allegations as an exercise of its prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 281 (1985). The alleged amounts in violation here are modest when compared to the amount of Commission resources that would be required to pursue this matter, and they do not raise novel or complex legal issues or recent developments in the law that merit Commission attention. Alternatively, I respectfully request the Commission to find that the reporting allegations are appropriate for referral to the Alternative Dispute Resolution Office.

Sincerely,



Bryson B. Morgan

Member

Caplin & Drysdale, Chartered

Counsel to LUPE Votes