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By Hand Delivery

October 2, 2018

Ms. Dayna C. Brown
Secretary and Clerk of the Commission
Federal Election Commission
1050 First Street, NE
Washington, DC 20002

Re: Matter Under Review 6848

Dear Ms. Brown:

We write on behalf of our clients, Mr. George Demos, Friends of George Demos, Mr. Robert Cole in his official capacity as treasurer, and Ms. Chrysanthy T. Demos ("Respondents") in response to the September 17, 2018, letter from the Office of General Counsel ("OGC") informing Respondents that OGC is recommending that the Commission find probable cause to believe Respondents violated the Federal Election Campaign Act (the "Act"). Attached are ten copies of Respondents' Opposition to General Counsel's Brief. We have also provided three copies of Respondents' Opposition to OGC.

Respondents request a hearing pursuant to 72 Fed. Reg. 64919 (Nov. 19, 2007) and 74 Fed. Reg. 55443 (Oct. 28, 2009). Respondents expect to address the following important issues raised in their Opposition Brief, among other issues involved in this matter:

- Whether OGC has failed to properly interpret and apply to this matter the definition of "personal funds" under the Federal Election Campaign Act and agency regulations, that a candidate's personal funds are determined at the time that persons becomes a candidate;
- Whether under the clear definitions in the Act and agency regulations Mr. Demos made loans to his campaign from permissible "personal funds";
- Whether, as to Chrysanthy T. Demos, the five year statute of limitations has run;
- Whether the application of OGC's novel legal theories violates Respondents' Fifth Amendment Due Process rights;
- Whether the contribution limits as applied to spousal contributions in this matter violate the First Amendment.

We do not believe that Respondents' arguments have been fully presented to the Commission prior to this Opposition Brief, and we believe a hearing would provide Respondents

the opportunity to address with the Commission these key issues, and to explain how OGC's new legal theory could affect future candidates.

Please let us know if you need additional information regarding Respondents' Opposition Brief or request for a hearing.

Respectfully submitted,

Robert D. Lenhard
Derek Lawlor

Enclosures

OFFICE OF
GENERAL COUNSEL

BEFORE THE FEDERAL ELECTION COMMISSION

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In the Matter of George Demos Friends of George Demos and Robert Cole in his official capacity as treasurer Chrysanthy T. Demos	MUR 6848

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RESPONDENTS' OPPOSITION TO GENERAL COUNSEL'S BRIEF

Respondents George Demos, Friends of George Demos, Robert Cole in his official capacity as treasurer, and Chrysanthy T. Demos, submit this brief in opposition to the General Counsel's recommendation of a finding of probable cause.

Prior to this case, the Federal Election Campaign Act of 1971 ("the Act"), as amended, Federal Election Commission ("FEC") regulations, and the agency's guidance and decisional law have been consistent that when determining the "personal funds" a candidate may use in his or her campaign, irrespective of the contribution limits, the measurement of "personal funds" occurs at the time the individual becomes a candidate. That was the legal standard underpinning the allegations in the Complaint and the legal standard upon which the Commission voted to find Reason to Believe in 2016. The initial allegation that Mr. Angelo Tsakopoulos transferred funds to Mr. Demos' campaign has now been disproven, and upon OGC's recommendation, the Commission has dismissed this matter as to Mr. Tsakopoulos and his company AKT Development. The Office of General Counsel ("OGC") is now pursuing a novel theory of liability that, despite the Act and the agency's regulations, the FEC should be able to assess the pre-candidacy financial transactions of individuals who later become a candidate, to assess whether those financial transactions were "for the purpose of influencing" a federal election.

Thus, this case is no longer about whether Mr. Tsakopoulos improperly transferred funds during the campaign, it is about whether Mrs. Demos' transfer of her own funds into a joint account with her husband, prior to Mr. Demos becoming a candidate, later became a violation when Mr. Demos used some of those funds as a loan to his campaign.

There are four reasons the FEC should decline to take this precipitous expansion of its jurisdiction. *First*, this position is contrary to law. The Act, FEC regulations, prior agency decisions and guidance have, until now, consistently describe a bright line test: a candidate's personal assets are determined at the time that person becomes a candidate.

Second, this new approach, where OGC would undertake a case-by-case analysis of a candidate's pre-candidacy financial life, is a slippery slope. That risk materialized in this case, where OGC insisted that Mr. Demos produce records of all gifts between Mr. Tsakopoulos and his daughter—Mr. Demos' wife—for the nearly two years before Mr. Demos filed his Statement of Candidacy, including all gifts given by the father to his daughter at their marriage. OGC later abandoned the theory that Mr. Tsakopoulos was the source of the funds Mr. Demos loaned his campaign, but the discovery sought in this case presents a stark reminder that the risks of an expansive reading of the law are not theoretical.

Third, it is a violation of the Fifth Amendment Due Process Clause to seek to impose liability on a party under a legal theory they had no notice of at the time they took the action at issue. To date, OGC has produced no case, no advisory opinion, no regulation, and no agency guidance where the FEC has given notice that the plain meaning of its regulation is not the law, and instead, that the FEC may examine pre-candidacy financial transactions to determine if their purpose was to influence a federal election. The FEC's regulations are drafted to permit examination of transactions that occur during a campaign, but the position OGC advances here

would expand the FEC's jurisdiction to include financial matters that occur in the period *prior* to candidacy.

Fourth, contribution limits—which exist solely to prevent *quid pro quo* corruption—as applied to a spousal contribution, as alleged here, violate the First Amendment. The Supreme Court's 1976 lukewarm endorsement of contribution limits on a candidate's "family" no longer squares with contemporary jurisprudence on the scope of permissible regulation of speech. Applying spousal limits is especially difficult here, where a young newly married couple was in the process of starting a family and combining their finances, and the donating spouse is not a lobbyist, advocate, or otherwise involved in the political process of seeking favors from government, and the risk of *quid pro quo* corruption or its appearance—the sole justifications for contribution limits—are therefore effectively nonexistent.

Respondents have disproved the allegations in the initial Complaint that Mr. Demos' father-in-law contributed $2,000,000 to his campaign. From the initial response to the Complaint until today, Respondents have consistently stated that the source of the funds used were from Mr. Demos' personal funds prior to becoming a candidate and that those funds derived from his wife. The Commission should reject the novel legal theories of liability advanced by OGC for the first time here, and vote to find that there is no probable cause to believe a violation occurred and close the file in this matter.

I. This Matter Should Be Dismissed Because Respondents Disproved All of the Allegations in the Complaint Upon Which the Initial Reason To Believe Finding was Based.

This matter began with a politically motivated complaint to sway voters against Mr. Demos in the days before the primary election in 2014. The Complaint alleges that Mr. Demos' father-in-law, Angelo Tsakopoulos, either directly or indirectly gave $2,000,000 to Friends of

George Demos.[1] Mr. Demos denied the allegations against him, and stated instead that the funds "were from assets he owned jointly with his wife" and "[t]he funds derived from Mrs. Demos' investment assets and were not a gift, loan, or donation from Mr. Tsakopoulos." *See* Response to Complaint (Aug. 25, 2014) at 5. The Factual and Legal Analyses ("FLA") attached to the first Reason To Believe letters advanced the theory that perhaps Mrs. Demos had served as a conduit for funds from Mr. Tsakopoulos during the campaign period, *see* Demos First Factual and Legal Analysis (George Demos), at 5: 13-14; 6:2-3; and 8:13-14. Respondents have disproven that Mr. Tsakopoulos was the source of the funds through sworn declarations and the production of numerous bank records. Recognizing that the allegations in the Complaint were without merit, the Commission determined on July 17, 2018, to take no further action against Angelo Tsakopoulos and AKT Development Corporation. Notice to Angelo Tsakopoulos (July 25, 2018); Notice to AKT Development Corporation (July 25, 2018). This decision should have ended the matter as to all of the Respondents.

Respondents have been forthright in every submission since the initial Response to the Complaint, explaining that the funds Mr. Demos loaned to Friends of George Demos were from assets he owned jointly with his wife, Chrysanthy Demos, prior to becoming a candidate. *See* Response to Complaint (Aug. 25, 2014) at 5; Decl. of George Demos ¶ 6 (Aug. 25, 2014). The undisputed evidence found in the bank records and written submissions Respondents have produced to OGC also demonstrates that the source of funds for Mr. Demos' loans to his campaign was his own bank account, held jointly with his wife. Respondents have produced the

[1] Subsequent to the filing of the complaint, Friends of George Demos reported receiving additional loans of $500,000. The Commission has treated these additional funds as part of its investigation. This explains the discrepancy between the sums described in the complaint and the sums the Commission is now investigating.

checks and bank records from that account, showing the transfer of funds from Mr. and Mrs. Demos' joint account to Friends of George Demos. *See* CitiBank Account Records, produced to the FEC Nov. 21, 2016, MUR6848-00001 to -00037. Respondents have also produced bank records showing that Mr. Demos held these funds at the time he became a candidate. MUR6848-00001 to -00004. Finally, Respondents provided a written summary of the transactions found in these bank records. *See* Letter to the FEC (Nov. 21, 2016), at 2. There is no dispute as to the source of the funds, or that those funds were assets of Mr. Demos as of the day he became a candidate.

The allegations in the Complaint have been shown to be unreliable. However, OGC continues to rely on Complainant's claims as support for its case against Respondents. *See* General Counsel's Brief at 3-4. The Commission should afford no weight to these politically motivated allegations, which have been refuted in sworn declarations. Decl. of George Demos ¶ 8 (Aug. 25, 2014).

II. This Matter Should Be Dismissed Because Respondents Have Fully Rebutted OGC's New Theories of Liability Introduced After the Initial Reason To Believe Finding.

Even though Respondents fully disproved the allegations in the initial Complaint and resolved the concerns expressed in the FLA attached to the initial Reason To Believe letters, Respondents were asked to produce additional family financial records from the period prior to when Mr. Demos became a candidate. The legal basis for these intrusive requests was unclear at the time—the requests did not relate to the allegations in the Complaint, which were disproved, and appeared contrary to the Act and the agency's clear regulations—but Respondents provided the requested documents to OGC nonetheless.

On July 25, 2018, OGC notified Respondents that the Commission had found reason to believe that Chrysanthy T. Demos had violated the Act. This notice occurred four years after the

Complaint was filed, and for the first time articulated the new theory of liability that OGC had been pursuing. This new legal theory—not present in the legal analysis supporting the Commission's initial Reason To Believe finding[2]—was that Mr. Demos' post-candidacy loans are called into question because of pre-candidacy private financial decisions between him and his spouse. This is a surprisingly novel theory, unsupported by statute, regulation, case law, or interpretive guidance.

A. Mr. Demos Made Loans to His Campaign From Permissible "Personal Funds."

A candidate for federal office may make unlimited expenditures from "personal funds." 11 C.F.R. § 110.10. "Personal funds" are defined to include assets that under applicable state law "at the time the individual became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had—(i) legal and rightful title; or (2) an equitable interest." 52 U.S.C. § 30101(26)(A) (emphasis added); *see also*, 11 C.F.R. § 100.33(a). This explicit reference to the time the individual becomes a candidate distinguishes this provision from the provisions on the use of income from a gift or trust, which is measured from "the beginning of the election cycle." *See* 52 U.S.C. § 30101(26)(B); 11 C.F.R §§ 100.33(b)(4), (5), and (6). This distinction demonstrates that Congress and the Commission were aware of the options for the point in time at which to draw the line for personal funds when drafting this statutory language and rule, and unambiguously chose the point at which an individual becomes a candidate.

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[2] Mr. Demos, Friends of George Demos, and Mr. Robert Cole in his official capacity as treasurer, have never received a Reason To Believe finding based on this new legal theory. As Noted in Part I, the allegations and OGC's legal assertions involved in the initial Reason To Believe finding have been fully resolved.

For determining assets, the Commission has upheld this bright line: a person becomes a candidate for federal office when they file a statement of candidacy with the Commission. *See, e.g.*, Factual & Legal Analysis, MUR 6440 (Guinta) (explaining that "Guinta filed a Statement of Candidacy on April 30, 2009. Thus Guinta's 'personal assets' would include amounts from any asset that Guinta had legal right of access to or control over on or before April 30, 2009") (emphasis added). Here, Mr. Demos filed his statement of candidacy for Congress on September 25, 2013. It is upon that date that his "personal funds" should be measured.

Congress itself has recognized the strict dividing line relating to a candidate's personal access to assets as early as the 1974 Amendments to the Act. In striking down limits on a candidate's use of personal funds, the Supreme Court in *Buckley v. Valeo* cited a Senate Conference Report accompanying the Act, which addressed the point at which Congress believed funds would be considered "personal funds":

> It is the intent of the conferees that members of the immediate family of any candidate shall be subject to the contribution limitations established by this legislation. If a candidate for the office of Senator, for example, already is in a position to exercise control over funds of a member of his immediate family before he becomes a candidate, then he could draw upon these funds up to the limit of $35,000. If, however, the candidate did not have access or control over such funds at the time he became a candidate, the immediate family member would not be permitted to grant access or control to the candidate in amounts up to $35,000, if the immediate family member intends that such amounts are to be used in the campaign of the candidate. The immediate family member would be permitted merely to make contributions to the candidate in amounts not greater than $1,000 for each election involved.

Buckley v. Valeo, 424 U.S. 1, 51 n.57 (1976) (citing S. Conf. Rep. No. 93-1237, p. 58 (1974)) (emphasis added). The Commission has long acknowledged the relevance of this Congressional intent in interpreting its regulations on use of familial funds. *See, e.g.*, MUR 149 (Jane Fonda and Hayden for Senate Committee) (explaining that Mr. Hayden could draw upon his wife's

funds because he "was already in a position to exercise control (over all moneys, present and future) of a member of his immediate family before he became a candidate, (and therefore) he could draw upon these funds.").

This bright line, now codified at 11 C.F.R. § 100.33(a), provides candidates with a clear understanding of which assets they can use to contribute or loan to their campaign. Mr. Demos' "personal assets" consisted of any assets to which he had a legal right of access to or control over on or before September 25, 2013, when he filed his statement of candidacy with the FEC. These assets included any funds contained in the joint account held with his wife on or before that date. Because Mr. Demos made loans to his campaign with funds drawn from the joint account, to which he had legal right of access to and control over before he became a candidate on September 25, 2013, those loans were made with permissible "personal funds."

Mr. Demos has therefore rebutted the allegations on which the Commission found reason to believe against Chrysanthy Demos.

B. FEC Precedent and New York State Banking Law Upholds Mr. Demos' Right to Use All of the Funds in the Family Joint Account.

OGC has noted that the "Commission . . . has not always been consistent in how it determines how much of the funds in a joint account are the personal funds of the candidate." *See* Demos Second Factual and Legal Analysis (Chrysanthy T. Demos), at 5. While this characterization of precedent demonstrates the weakness of OGC's legal arguments on this point, Respondents respectfully disagree and believe that the Commission has been consistent. Under FEC precedent and New York banking law, Mr. Demos' legal right to all of the funds in joint account is clear.

If assets are jointly held, the candidate's "personal funds" include either (1) the portion of assets that is equal to the candidate's share under the instrument of conveyance or ownership, or

(2), if no specific share is indicated, the value of one-half of the jointly owned property. 11 C.F.R. § 100.33(c). The FEC has found that joint bank accounts are governed by § 100.33(c)(1), because the state law determining the treatment of such accounts constitutes the "instrument of conveyance or ownership" under the regulation. The FEC General Counsel's Office has a long history of treating funds in joint bank accounts as "assets" under §§ 100.33(a) and (c) and precursor regulations. *See* Addendum to Legal Analysis on Proposed Interim Audit Report on Friends for Menor (LRA 732) (July 2, 2008); OGC Memorandum on Proposed Audit Report, Bauer for President 2000, Inc. (LRA 543) (May 6, 2002); General Counsel's Report, MUR 3505 (Klink); and General Counsel's Report, MUR 2292 (Stein).

Furthermore, these matters explain that the "one-half rule" for the treatment of joint assets under § 100.33(c) does not generally apply to joint bank accounts because, among other reasons cited by OGC, "each party ha[s] access to and control over the entire account and could withdraw all the funds from the account at any time without the other party's consent." *See* Addendum to Legal Analysis on Proposed Interim Audit Report on Friends for Menor (LRA 732) (July 2, 2008), at 2 n. 1; *see also* MUR 2292 ("In a joint bank account where joint tenancy is established, each party has 'access to and control over' the entire bank account, as either can withdraw any part, or the entire amount, of the funds from such account"); MUR 3505 (describing joint bank accounts as "the exception to the 'one-half interest rule' because each account holder has access and control over the whole"). Therefore, the funds within the Citibank joint account were "assets" available to Mr. Demos under § 100.33.

This is entirely consistent with New York banking law, which provides that any funds deposited into a joint bank account are jointly owned by both owners, and "may be paid or delivered to either during the lifetime of both or to the survivor after the death of one of them."

N.Y. Banking Law § 675(a). Mr. Demos as joint tenant in New York had legal right to access and control any and all funds deposited in his and Mrs. Demos' joint bank account. *See* MUR 2292 (Stein) ("In a joint bank account where joint tenancy is established, each party has 'access to and control over' the entire bank account, as either can withdraw any part, or the entire amount, of the funds from such account"); MUR 2754 (Lowey), at 11 ("New York law makes the entire balance of such joint money market accounts the 'personal funds' of Nita Lowey under the regulatory definition."); *see also* MUR 149 (Jane Fonda and Hayden for Senate Committee) (finding that Hayden had "management and control over Ms. Fonda's monies . . . from the time of their marriage in 1973, which preceded and included the time of his candidacy for the California Senate race in June of 1975."). This is consistent with how Mr. and Mrs. Demos acted in practice, and how Citibank treated the account.[3] As Respondents have demonstrated, Mr. Demos transferred $1 million in November 2013, from the joint account to a personal money market account owned solely by him, and made a similarly sized transfer from his personal funds to the joint account later that year. *See* Letter to FEC (Nov. 21, 2016) at 2; MUR6848-00010, MUR6848-00020. Nor is there any dispute that the joint account was used for joint living expenses.[4] This demonstrates that both the legal right and the practice of Mr. and Mrs. Demos

[3] OGC cites to *Phillips v. Phillips*, 70 A.D.2d 30,38 (1979), a case involving a dispute over funds in a joint account, for the proposition that all funds in a joint account may not be available to both account holders in certain situations. Unlike the parties in *Phillips*, however, Mr. and Mrs. Demos do not have a dispute over the funds in the account. The couple have used the account for both joint and individual activities. *Phillips* does not address facts similar to the ones before the Commission in this matter, and when similar facts have been presented, as noted in this section, the Commission concluded that both account holders have access to and control over all of the funds in a joint account under New York law.

[4] Respondents have provided the FEC with information that Mr. and Mrs. Demos routinely used funds from Mrs. Demos' investment account for family and personal expenses, including to purchase an apartment in New York City. *See* Letter to FEC (March 24, 2017). These funds were used alongside other receipts into the joint account for regular living expenses before and after any declaration of candidacy. *See* MUR6848-00001 through See MUR6848-00034.

was to treat funds placed into their joint account as assets available for individual or joint expenses.

Accordingly, because he had legal access or control over all of the funds in the account jointly held with his wife, funds in that account at the time he declared his candidacy were "personal funds" available for use in connecting in his campaign.

C. Activity Between Spouses Prior to Candidacy Is Not a Factor in Determining What Constitutes "Personal Funds" at the Time of Candidacy.

The foundation of OGC's new legal theory is that Mr. and Mrs. Demos' family financial decisions prior to Mr. Demos' declaration of candidacy somehow convert his "personal funds" into not his "personal funds." General Counsel's Brief, at 10. This conclusion is unsupported by statue, agency regulations, decisions, and guidance. OGC's attempt to create an exception to the definition of "personal funds" is contrary to the plain meaning of the Act and FEC regulations.

As discussed in Part II.A, the definition of "personal funds" creates a bright line rule for determining what funds are available for a candidate to use to support his or her federal campaign. 52 U.S.C. § 30101(26)(A); 11 C.F.R. § 100.33(a). OGC cannot cite any statute or regulation that modifies or trumps the definition of personal funds based on unproven allegations of motive by non-candidates and their families. Furthermore, as noted in Part IV.A, OGC cannot cite to a single matter that finds that the scope of "personal funds" available at the time of candidacy is altered by pre-candidacy family financial decisions. OGC's new theory would create a dangerous situation where the plain language of the Act and regulations are replaced by a facts-and-circumstances test that would create uncertainty to future candidates.

Moreover, there is a sound basis for the Commission repeatedly having hesitated to regulate pre-candidacy political activity, much less family financial transactions, of individuals who are not candidates for federal office. *See, e.g.*, Advisory Op. 2004-08 (American Sugar

Cane League) (finding that American Sugar Cane League could provide a severance package to an employee who resigned his employment to run for federal office); Statement of Reasons of Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Lee E. Goodman, at 3–4, MUR 6784 (Lizbeth Benacquisto) (arguing that where a candidate has engaged in otherwise lawful pre-candidacy activity—in this case using state campaign funds to fund state campaign advertising while also running for Congress—the Commission should not read motive into the transaction). This matter makes the reasons for this hesitation clear. Mr. and Mrs. Demos have undergone over four years of burdensome scrutiny into their activities and financial transactions, which occurred prior to Mr. Demos' declaration of candidacy. Permitting such probing investigations of pre-candidacy activities and motives based on an open-ended facts-and-circumstances test will certainly chill the protected speech and actions of those deciding whether to run for federal office.

III. This Matter Should Be Dismissed as to Chrysanthy Demos Based on the Statute of Limitations.

The only action Chrysanthy Demos has taken related to OGC's allegations in this matter is her transfer of funds into the couple's joint account on September 6, 2013. *See* Demos Second Factual & Legal Analysis (Chrysanthy T. Demos) at 4-5. This has never been a secret to the FEC, and in fact, Mr. Demos' initial response to the complaint highlighted it. *See* Response to Complaint (Aug. 25, 2014). The subsequent loans to Mr. Demos' campaign from his personal funds were authorized and executed by him. OGC's brief neither suggests nor states that Mrs. Demos had any involvement with that decision, and the Complaint makes no allegations as to Mrs. Demos. Therefore, as to Mrs. Demos, the five-year statute of limitations has run and she should be dismissed from this matter. *See* 28 U.S.C. § 2462.

IV. This Matter Should Be Dismissed To Avoid Additional Constitutional and Jurisdictional Issues Inherent in this Investigation.

The previous sections demonstrate that Mr. Demos' loans to Friends of Demos were permissible under statutory law, regulations, and interpretive guidance, which is sufficient for the Commission to find no probable cause to believe a violation has occurred and close the file in this matter. In addition, this expanded investigation suffers from several constitutional and jurisdictional flaws that should provide the Commission further reason to dismiss this matter.

A. The Commission's Investigation of Pre-Candidacy Financial Activities Deprives Respondents of Due Process by Failing to Provide Them With Fair Notice of What Activities Violate the Act.

Respondents relied upon a clear statute and agency regulation, and neither the Complaint nor the initial Reason To Believe finding showed an alternative legal theory upon which Respondents could reasonably have been aware prior to when Mr. Demos filed his Statement of Candidacy. Four years after the Complaint, and five years after the activities in question, OGC offered a new legal theory based on an unprecedented deviation from the statutory and regulatory text and past precedent. To hold Respondents liable for activities in the absence of fair notice is a violation of their due process rights.

The Due Process Clause of the Fifth Amendment requires that an individual must receive sufficient notice of the conduct prohibited by a statute. *See, e.g., Skilling v. United States*, 561 U.S. 358, 402–03 (2010). The Commission recently emphasized this important protection when it decided to exercise its prosecutorial discretion and dismiss matters because the Respondents lacked notice of a new legal interpretation and application of the Act:

> The Supreme Court has observed that "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." This concern is particularly acute where First Amendment rights are at stake. To decide otherwise would not only create due process concerns but would risk chilling vitally important political speech

> that is strictly protected by the First Amendment. Indeed, these "vagueness and notice concerns carry special weight" in the Commission's enforcement decisions: As the Court of Appeals for the District of Columbia has recognized, "[u]nique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity — 'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" Thus, the "Commission has [a] 'unique prerogative to safeguard the First Amendment when implementing its congressional directives,'" particularly in the enforcement process.

Statement of Reasons of Chairman Hunter and Commissioner Peterson, at 6-7, MURs 6969, 7031, and 7034 (MMWP12 LLC et al) (quoting *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976)); Statement of Reasons of Vice Chairman McGahn and Commissioners Hunter and Petersen, at 23, MUR 6081 (American Issues Project) ("[D]ue process requires that the public know what is required *ex ante*, and that the Commission acknowledge and provide the public with prior notice of any regulatory change."); *see also Campaign Legal Center v. FEC*, 312 F. Supp. 3d 153, 164 (D.D.C. 2018).

Here, as described more fully in Part I, the type of pre-candidacy financial transactions involved in this matter are not regulated by the Act. This is the guidance of Congress, the agency's regulations, the holding of the Commission in numerous matters dating back to the 1970s, and the guidance given to candidates. *See, e.g.*, FEC Campaign Guide, Congressional Candidates and Committees, June 2014, at 29 ("The personal funds of a candidate include: Assets which the candidate has a legal right of access to or control over, and which he or she has legal title to or an equitable interest in, at the time of candidacy.") (emphasis added).

The FEC has looked at pre-candidacy financial transactions in only two contexts, neither of which is applicable here. *First*, when an individual has engaged in exploratory committee or testing the waters activity by raising or spending money to determine if they should become a candidate, the FEC has sometimes reviewed this pre-candidacy activity to determine if it shows

that the individual had in fact ceased to explore whether to enter the race and instead made the decision to become a candidate before filing their statement of candidacy. 11 C.F.R. 100.72 & 100.131. The FEC's regulations include specific references to the types of activity that can show that a person has ceased "testing the waters" and decided to become an candidate, including use of general public advertising to publicize her or his intention to campaign for federal office; raising funds in excess of what would be required for exploratory activities, making or authorizing statement that refer to her or him as candidate; conducting activity in close proximity to the election or over a protracted period of time; and taking action to qualify for the ballot under state law. 11 CFR § 100.131(b). There are no allegations in this matter that Mr. Demos engaged in testing the waters activity before he declared his candidacy.

Second, when a candidate has received funds <u>during</u> the campaign, there are several cases where the candidate has relied upon a Commission regulation that permits the candidate to use such funds for her or his campaign if the candidate can show the funds were part of a pattern of routine family transactions that occur irrespective of the campaign. *See* 11 C.F.R. 100.33(b)(6). *See also* MUR 5138 (Ferguson); MUR 5321 (Robert); MUR 5724 (Feldkamp); MUR 6417 (Huffman); and MUR 6440 (Guinta). Evidence of pre-candidacy financial activity is presented most often as a defense, to show that post-candidacy transactions were routine and unrelated to the campaign. Respondents do not need to rely on a defense of a pattern of similar gifts, for the primary regulatory test has been met: Mr. Demos' loans derived from assets he held prior to becoming a candidate.[5]

[5] While Respondents do not believe it is relevant to this matter, at the agency's request, Respondents produced a narrative that shows Mrs. Demos provided personal funds for a range of family expenses, including the purchase of a home and ongoing family expenses during and after the 2014 campaign. Letter from Counsel to the FEC (March 24, 2017).

The Commission offers no regulations or guidance that advise individuals who have not yet become a candidate that the agency will review their pre-candidacy financial activities, nor what legal standard it will use to determine if a violation has occurred. Indeed, this approach would be in conflict with the statute and Commission regulations that expressly govern candidates and set forth when a person becomes a candidate. *See, e.g.*, 52 U.S.C. 30101(2);11 C.F.R. §100.3 (definition of "candidate").

The Commission's reasoning for examining pre-candidacy transactions is totally devoid of any standards to guide future candidates in financial transactions that they might make prior to becoming a candidate for federal office. Respondents should not be held to account for a standard that was not clearly articulated at the time of the conduct at issue.

B. The Commission's Questionable Jurisdiction over Pre-Candidacy Activities Have Long Led to Caution in Investigations and Enforcement.

There is a strong argument that the Commission lacks jurisdiction to regulate activities that occur prior to a person becoming a candidate for federal office. *See, e.g.*, *UnityQS v. FEC*, 596 F.3d 861 (D.C. Cir. 2010); *FEC v. Fla. for Kennedy*, 681 F.2d 1281 (11th Cir. 1982); *FEC v. Citizens for Democratic Alternatives in 1980*,655 F.2d 397 (D.C. Cir. 1981); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981)).

This has led Commissioners to frequently decline to pursue pre-candidacy allegations, even in an area the Commission does have clear regulations: *i.e.*, "testing the waters." *See,* Statement of Reasons of Chairman Petersen and Commissioners Hunter and Goodman, at 4 n. 18, MURs 6470, 6482 & 6484 (Romney) ("[B]ecause the Commission's testing-the-waters regulation is extra-statutory and addresses non-candidate activity, the Commission must apply the rule narrowly to unambiguous testing-the-waters activity."); Statement of Reasons of Commissioners Caroline C. Hunter and Lee E. Goodman at 6, MUR 6509 (Friends of Herman

Cain, *et al*) (finding pre-candidacy corporate travel expenditures were unrelated to "testing the waters") ("[The testing the waters regulation] abides by clear limitation on the Commission's jurisdiction, and "courts have repeatedly held that political activity in support of persons who are not candidates for federal office is outside the FEC's jurisdiction, even if the aim of the activity is to convince a specific individual to become a candidate for office.") (quoting Statement of Reasons of Commissioners Caroline C. Hunter and Donald F. McGahn at 8, MUR 6462 (Trump)). Similarly, in MUR 6417 (Huffman), when the FEC found that improper transfers from the candidate's spouse constituted a violation, the agency was careful to *omit* the one pre-candidacy transfer from the final conciliation agreement. *Compare* MUR 6417, First General Counsel's Report at 5 *with* Conciliation Agreement at 3–4.

The reluctance to expand the agency's jurisdiction to pre-candidacy activities finds recent support in the Commission's conclusion that a state legislator's pre-candidacy activities were unrelated to influencing a subsequent federal election. *See* Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee Goodman, MUR 6784 (Benacquisto) (Finding a state candidate's airing of advertisements for the month before she announced candidacy supported OGC's recommendation not to find Reason to Believe when it was "used to benefit a federal campaign that did not yet exist for an election that had not yet been called to fill a House seat that was not yet vacant.").

C. The Contribution Limits on a Spouse are Unconstitutional As-Applied, Because There is No Risk Of *Quid-Pro-Quo* Corruption

In addition to the prior arguments presented in this Brief, this matter should be dismissed because enforcement of spousal contribution limits, as applied to Respondents, violates the First Amendment. The Supreme Court has repeatedly held over the past four decades that "target[ing] *quid pro quo* corruption or its appearance" is the *sole* governmental justification for campaign

contribution limits that can withstand First Amendment scrutiny. *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (citing *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)). In light of the heavy burden on the Commission to show that the regulation targets *quid pro quo* corruption or its appearance, a contribution from a candidate's spouse cannot pass constitutional muster. *See id.* at 1452 ("When Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." (internal quotation marks omitted)).

The *McCutcheon* Court emphasized that "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id.* at 1441 (quoting *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 497 (1985) (internal quotation marks omitted)). The Supreme Court has consistently affirmed the government's interest in "combatting corruption and its appearance," but explicitly cautioned that in order to satisfy the First Amendment, the government may only pursue that interest with regulations, including contribution limits, that are narrowly tailored to prevent such *quid pro quo* arrangements that trade money for political favor. *Id.* at 1462. Even this requirement has been read narrowly. *See SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010) (explaining that contributions to independent expenditure only committees, like independent expenditures by individuals and corporations, "cannot corrupt or create the appearance of corruption").

Here, the Commission cannot demonstrate that contribution limits, as applied to contributions from a candidate's spouse, are narrowly drawn to prevent *quid pro quo* corruption. Ever since the Supreme Court first considered the constitutionality of contribution limits over 40 years ago, it has expressed skepticism of the corruptive power of political contributions from family members of candidates. In grudgingly upholding contribution limits for family members in *Buckley v. Valeo*, the justices acknowledged that the arguments in support of limits for family

members were weaker than for other categories of donors. *Buckley v. Valeo*, 424 U.S. 1, 51, 53 (1976) (the "core problem of avoiding undisclosed undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family."); *see also id.* at 53, n.59 (acknowledging that ". . . the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members . . . .").

Buckley, however did not squarely address the constitutionality of *spousal* contribution limits, much less to facts such as these. While in other cases OGC has suggested that the interest in preventing *quid pro quo* corruption encompasses spousal contributions, *see* MUR 6860 (Terry Lynn Land, *et al*), the Commission has not adduced evidence—much less carried its burden—that spousal contributions present the appearance of *quid pro quo* corruption. Indeed, to the contrary, there is ample authority throughout federal law—including in the Commission's own regulations—for treating marital status differently from other relationships for the purposes of assessing the risk of corruption. More than *one thousand* provisions of federal law grant "significant status" to a "valid marriage." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

The Commission's regulations also grant certain specific recognition to valid marriages. First, the regulations under the Act specifically permit *both* spouses to contribute separately to candidates, "even if only one spouse has income." 11 C.F.R. §110.1(i). The regulations also recognize that a joint bank account—including one held with a spouse—constitute "assets" to the candidate. *See* Section II.B (citing 11 C.F.R. §§ 100.33(a) and (c) and precursor regulations); *see also* Addendum to Legal Analysis on Proposed Interim Audit Report on Friends for Menor (LRA 732) (July 2, 2008); OGC Memorandum on Proposed Audit Report, Bauer for President 2000, Inc. (LRA 543) (May 6, 2002); General Counsel's Report, MUR 3505 (Klink); General

Counsel's Report, MUR 2292 (Stein). Moreover, in developing its rules for attribution of contributions from joint bank accounts, the Commission rejected a requirement that each contributor state that he or she "has sufficient personal funds in the joint account to cover his or her portion of the joint contribution because each account holder enjoys the right to draw upon the entire amount in the account." FEC, Contributions by Persons and Multicandidate Committees, 52 Fed. Reg. 760, 766 (Jan. 9, 1987). In other words, spouses may contribute out of joint accounts, even if their allocated portion of the account would not have sufficient funds to make the contribution.

These special rules for spousal contributions support the contention that there is simply no risk of corruption arising from a contribution from a candidate's spouse. Our society understands—and indeed expects—spouses to influence one another. That is, after all, the underpinning of the marital vow, the agreement that the couple will join together as a unit and work collectively for mutual support and success. Whatever weak arguments that could have been raised in *Buckley* as to "immediate family members," those arguments cannot provide a compelling case that a spouse will gain some corrupt advantage over a candidate if personal assets are used to aid the campaign. A candidate's spouse makes substantial non-monetary contributions to the campaign through appearances, the presentation of a happy home life, and the essential emotional support through the trials and tribulations of the campaign and, if successful, while holding public office. The Commission's rules exempt all of these activities from the definition of a "contribution" and its associated limits. *See, e.g.*, 11 C.F.R. §§ 100.74 (uncompensated services by volunteers); 110.75 (use of a volunteer's real or personal property. Providing financial support to one's candidate-spouse presents no constitutionally cognizable increased risk of corruption.

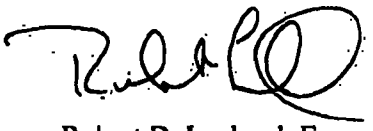
Over time, various Commissioners have understood the infirm footing of the contribution limits when applied to close family members. *See* Statement of Reasons of Vice Chairman Michael E. Toner, MUR 5453 (Trovato); Statement of Reasons of Chairman Bradley A. Smith and Commissioner Michael E. Toner, MUR 5321 (Robert); Statement of Reasons of Commissioners Smith and Toner, MUR 5138 (Ferguson for Congress) (dissenting from imposition of a fine in light of "the Supreme Court's admonition in *Buckley* that contributions from family members do not have the same potential for actual or apparent corruption as other kinds of contributions . . . .").

These concerns are especially true here, where there is no evidence that Mrs. Demos had any policy or matter she sought to influence. She was not a lobbyist, an advocate, or otherwise trying to influence the actions of Mr. Demos, were he to be elected to office. Moreover, as a candidate who lost in the primary, Mr. Demos was ultimately never in a position to influence policy. Because contributions from a spouse simply do not give rise to corruption or the appearance of corruption, an enforcement action against a candidate and his or her spouse based on such spousal contributions violates the First Amendment. Therefore, the Act's limits on spousal contributions to a candidate are unconstitutional as applied to Respondents, and this matter should be dismissed.

V. Conclusion

For the foregoing reasons, the Commission should find that no probable cause exists to find a violation of the Act, and close this matter. In the alternative, the Commission should decline to exercise jurisdiction over this matter and dismiss the Matter Under Review.

Submitted October 2, 2018.



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