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Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
999 E Street NW
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VIA FAX: (202) 219-3923

Re: MUR 6860 – Response to General Counsel's Brief in Support of Finding Probable Cause

Dear Ms. Stevenson:

We are writing this letter on behalf of Terri Lynn Land ("Land"), Dan Hibma ("Hibma"), Terri Lynn Land for Senate (the "Committee"), and Kathy Vosburg in her official capacity as Treasurer of the Committee (collectively, the "Respondents"), in response to your letter dated August 15, 2017, in which you inform Respondents of the Office of General Counsel's ("OGC") intention to recommend finding probable cause to believe Respondents violated the Federal Election Campaign Act of 1971, as amended (the "Act"). Included in your letter is OGC's brief in support of its recommendation to find probable cause.

We respond to OGC's recommendation and brief not to challenge any material facts, as the specifics of this case are not in dispute. Instead, Respondents take issue with the constitutionality of the Act's contribution limits as applied to contributions between spouses. *See* 52 U.S.C. § 30116(a)(1)(A); 11 CFR § 110.1(i). Specifically, Respondents contend that contributions between spouses do not amount to *quid pro quo* corruption or its appearance, and that the Act's contribution limits, as applied to spouses, do not further a "sufficiently important interest" and are not "closely drawn to avoid unnecessary abridgement of associational freedoms." *McCutcheon v Federal Election Com'n*, 134 S. Ct. 1434, 1444 (2014). In short, the contribution limits, as applied to Hibma's contributions to Land, are unconstitutional.

I. The governmental interest in imposing contribution limits is limited to preventing actual or apparent *quid pro quo* corruption.

The Supreme Court has consistently held that there is only one governmental interest sufficient to justify contribution limits: the prevention of actual or apparent *quid pro quo* corruption. *McCutcheon*, 134 S. Ct. at 1450; *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *see also Nixon v Shrink Missouri Government PAC*, 528 U.S. 377, 388 (2000). In *McCutcheon*, the Supreme Court restated the contours of this *quid pro quo* corruption. Chief Justice Roberts summarized the standard as follows:

> In a series of cases over the past 40 years, we have spelled out how to draw the constitutional line between the permissible goal of avoiding corruption in the political process and the impermissible desire simply to limit political speech. We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. Ingratiation and access...are not corruption. They embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.
>
> Any regulation must instead target what we have called *quid pro quo* corruption or its appearance. That Latin phrase captures the notion of **a direct exchange of an official act for money**. The hallmark of corruption is the financial *quid pro quo*: **dollars for political favors**. Campaign finance restrictions that pursue other objectives, we have explained, impermissibly inject the Government into the debate over who should govern. And those who govern should be the last people to help decide who should govern.

McCutcheon, 134 S. Ct. at 1441-1442 (citations and quotation marks omitted).

Consequently, it is beyond dispute that contribution limits must target this understanding of *quid pro quo* corruption. But the government must offer more than a naked assertion of a "corruption" interest to justify a burden on the fundamental right to associate via political contributions. *Nixon v Shrink Mo.*, 528 U.S. at 392 (citing and discussing *Colo. Republican Fed. Campaign Comm. v FEC*, 518 U.S. 604, 616 (1996) (opinion of Breyer, J.)). "In the First Amendment context, fit matters." *McCutcheon*, 134 S. Ct. at 1456. And that is where "closely drawn" scrutiny comes in. A contribution limit must be closely drawn to the government's interest in preventing actual or apparent *quid pro quo* arrangements—dollars for favors. Otherwise, it is unconstitutional. *McCutcheon*, 134 S. Ct. at 1462.

II. The Supreme Court's decision in *Buckley* did not explicitly address contributions between spouses.

OGC's brief explains that "[i]n *Buckley v. Valeo*, the United States Supreme Court stated that Congress may subject a candidate's family members to the Act's contribution limits." OGC Brief at 4. The brief notes that the *Buckley* Court rationalized its upholding the Act's application of the contribution limits to family members by pointing to the Act's legislative history:

> 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...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, 424 U.S. at 53 n. 59 (citing S. Conf. Rep. No. 93-1237, p. 58 (1974), U.S. Code Cong. & Admin. News 1974, p. 5627).

OGC further notes that the *Buckley* Court conceded that "the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members," but that the Court could not "say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors." OGC Brief at 5 (citing *Buckley*, 424 U.S. at 53 n. 59).

However, OGC cannot rely on *Buckley* or any other prior case here because there is simply no prior case explicitly addressing the constitutionality of the Act's contribution limits as applied to spousal contributions. In particular, the *Buckley* Court's rejection of a facial challenge to the very existence of contribution limits does not support OGC's argument. As the Supreme Court has stated, its "rejection of [a] plaintiffs' facial challenge to [a] requirement . . . does not foreclose possible future challenges to particular applications of that requirement." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 199; *see also Wis Right to Life, Inc. v Federal Election Comm'n*, 546 U.S. 410, 411-412 (2006) ("*WRTL I*") ("In upholding [a statute] against a facial challenge, we did not purport to resolve future as-applied challenges.").[1]

[1] Furthermore, the *Buckley* Court applied a different standard of review *Buckley* dealt with a facial challenge to the Act, *Buckley*, 424 U S at 35, rather than an as applied challenge to the Act's contribution limits, as applied specifically to spousal contributions. Courts have a "preference for as-applied review," *United States v Farhane*, 634 F 3d 127, 138 (2d Cir. 2001), because facial challenges "mount[] gratuitous wholesale attacks upon state and federal laws" rather than confining themselves to "the plaintiff's own right not to be bound by a statute," *Bd of Trs. v. Fox*, 492 U.S. 469, 485 (1989). *Cf Wash State Grange v. Wash State Republican Party*, 552 U.S. 442, 450 (2008). Consequently, the Supreme Court forces those making facial challenges to "shoulder [a] heavy burden to demonstrate that [a law] is 'facially' unconstitutional," making it "the most difficult challenge to mount successfully " *United States v Salerno*, 481 U S 739, 745 (1987).

By contrast, as-applied challenges invalidate a law only under the plaintiff's specific circumstances, leaving other potentially constitutional applications in place *See e g*, *FEC v Mass Citizens for Life, Inc.*, 479 U.S. 238 (1986) (striking down campaign finance statute as-applied) Furthermore, in cases where fundamental rights are

Thus, OGC must demonstrate that the specific, as-applied question raised here was at issue in *Buckley*'s facial challenge. This it cannot do, as the *Buckley* opinion never even mentions the words "spouse," "husband," or "wife," other than explaining, in dicta, the lower court's interpretation of the statute in footnote 57.[2] Instead, in its limited discussion of this issue, confined to two footnotes, the Court's *Buckley* opinion (and the Conference Report it cites) only addresses contributions from a "candidate's immediate family." *Buckley*, 424 U.S. at 53 n. 57 & 59.

To be clear, Respondents do not dispute that *Buckley* foreclosed challenges to the general imposition of individual contribution limits. *Buckley*, 424 U.S. at 28-29 (facially upholding individual limits as targeted to "the narrow aspect of political association where the actuality and potential for corruption have been identified"). However, as stated above, a contribution limit must be closely drawn to the government's interest in preventing actual or apparent *quid pro quo* arrangements, i.e. dollars for favors; and if it does not satisfy that test, it is unconstitutional. *McCutcheon*, 134 S. Ct. at 1462. Despite OGC's point that "[i]n numerous past cases, the Commission has conciliated with respondents where spouses or other family members made excessive contributions to the candidate's campaign," it does not change the fact that no case—in the Supreme Court or elsewhere—has explicitly considered the constitutionality of the Act's contribution limits, as applied to spousal contributions, let alone subjected them to the closely drawn scrutiny the Constitution requires.

The specific issue of spousal contributions, regardless of the Commission's previous enforcement matters in this area, is far from settled law. To the contrary, the constitutionality of the Act's contribution limits, as applied to spouses, is novel and one which should be comprehensively addressed by the courts. As the D.C. Circuit recently stated in *Holmes v Fed. Election Comm'n*, "what may appear to be 'settled' Supreme Court constitutional law sometimes turns out to be otherwise," and "*McCutcheon* and *Citizens United v Fed Election Comm'n*, 558 U.S. 310 (2010), may be seen as examples of the Court disagreeing with 'settled law' in the context of federal campaign finance law." *Holmes v. Fed. Election Comm'n*, 823 F.3d 69, 73 (D.C. Cir. 2016). In fact, "it is entirely possible to mount a non-frivolous argument against what might be considered 'settled' Supreme Court constitutional law." *Id.* Respondents' argument against the constitutionality of the Act's contribution limits, as applied to spouses, is not only "non-frivolous"—it is premised on the reality that there is no actual or apparent *quid pro quo* corruption implicated by spousal contributions.

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involved, the government must bear the burden of showing that the law passes heightened scrutiny *See McCutcheon*, 134 S. Ct at 1444. And because the Supreme Court has created such a high standard for facial challenges to encourage parties to seek the more limited relief of as-applied challenges, the government cannot simply point to the denial of a facial challenge to say that an as-applied challenge is foreclosed. *Cf WRTL I*, 546 U S at 411-12 ("In upholding [a statute] against a facial challenge, we did not purport to resolve future as-applied challenges.").

[2] "The Court of Appeals treated s 608(a) as relaxing the$1,000-per-candidate contribution limitation imposed by s 608(b)(1) so as to permit any member of the candidate's immediate family spouse, child, grandparent, brother, sister, or spouse of such persons to contribute up to the $25,000 overall annual contribution ceiling to the candidate." *Buckley*, 424 U S. at 51 n 57

III. Spousal contributions do not give rise to actual or apparent *quid pro quo* corruption.

In *Maynard v. Hill*, the "[Supreme] Court echoed de Tocqueville, explaining that marriage is the foundation of the family and of society, without which there would be neither civilization nor progress. Marriage, the Maynard Court said, has long been a great public institution, giving character to our whole civil polity." (internal quotations omitted) *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (quoting *Maynard v. Hill*, 125 U.S. 190, 211; 213 (1888)). More recently, the Supreme Court recognized the numerous benefits that government confers on married couples, stating:

> [w]hile the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules...Valid marriage under state law is also a significant status for over a thousand provisions of federal law.

Obergefell, 135 S. Ct. 2601.

It is indisputable that the government has held the institution of marriage, and the spousal relationship, to be a foundation of our society for hundreds of years. There are simply no other relationships, including those with immediate family, which are benefitted more than the spousal relationship in this country. As the *Obergefell* Court noted, "[t]here is certainly no country in the world where the tie of marriage is so much respected as in America." *Obergefell*, 135 S. Ct. 2601.

Despite the universal governmental, judicial, and societal regard for the marital relationship, OGC suggests that its enforcement of the Act's limits against Land and Hibma is constitutionally sound because those limits guard against actual or apparent *quid pro quo* corruption. But the government cannot hold marriage in such high regard and confer enormous benefits to married couples on one hand and on the other hand dictate how much a husband can contribute to his wife if she happens to be running for federal office. Congress and state governments were clearly not concerned about marital corruption when they crafted the thousands of laws conferring benefits on married couples. In spite of this fact, OGC has argued that the Act's limits are constitutional, as applied to spouses, to guard against corruption. But as stated above, the government must offer more than a naked assertion of a "corruption" interest to justify a burden

on the fundamental right to associate via political contributions. *Nixon v. Shrink Mo*, 528 U.S. at 392.

There is no actual or apparent *quid pro quo* corruption—an exchange of dollars for political favors—in the spousal contribution context, and the Commission would be hard pressed to argue otherwise. In as-applied situations like these, it is the Commission's burden to show that the law is closely drawn to the anticorruption interest in that circumstance. *McCutcheon*, 134 S. Ct. at 1452 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." (internal quotations omitted)).

In this case, both prior to and during her campaign, Land shared joint accounts and held joint assets with Hibma. The fact that Hibma maintained his long time practice of depositing money in his wife's bank accounts when she became a candidate hardly rises to the level of *quid pro quo* corruption. Hibma was not seeking political favors by making such transfers to his wife—he merely sought to be a supportive and loving husband. As the Supreme Court stated in *Griswold v Connecticut*, marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold v Connecticut*, 381 U.S. 479, 486 (1965). Consistent with this reasoning, Hibma made those transfers out of loyalty and support for his wife, not because he expected anything in return, and certainly not political favors. Without any evidence of such *quid pro quo* corruption or its appearance, the Act's limits, as applied to Hibma's transfers to Land, are unconstitutional and should not be enforced against Respondents.

IV. Conclusion

In light of the foregoing, we respectfully request that the Commission reject OGC's recommendation to find probable cause to believe Respondents violated the Act and dismiss this matter.

Respectfully submitted,

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