BEFORE THE FEDERAL ELECTION COMMISSION

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) **MUR 6918**
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RESPONSE OF SCHOCK FOR CONGRESS, GOP GENERATION Y FUND AND SCHOCK VICTORY COMMITTEE (PAUL KILGORE AS TREASURER)

By and through the undersigned counsel, Schock for Congress, GOP Generation Y Fund, Schock Victory Committee, and Paul Kilgore as Treasurer for each Committee (collectively, "Respondents") submit this response to the Complaint filed in the above-captioned matter. For the reasons set forth below, we respectfully request that the Federal Election Commission ("Commission") find no reason to believe that a violation occurred, the Complaint be dismissed, and the matter closed.

As an initial matter, the Commission has made clear that "reason to believe" is a heightened standard:

> The Commission may find "reason to believe" only if a complaint sets forth sufficient separate facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented.

MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1; *see also* MURs 5878 (Arizona State Democratic Central Committee), Statement of Reasons of Commissioners Donald F. McGahn, Caroline C. Hunter and Matthew S. Petersen at 4-7 (discussing Commission's treatment of heightened reason to believe standard); and 4850 (Committee to Re-Elect Vito Fossella), Statement of Reasons of Commissioners Darryl Wold, David M. Mason and Scott E. Thomas at 2 ("[a] mere conclusory allegation without any supporting evidence does not shift the burden of proof to the respondents."). The Commission has

consistently dismissed complaints that are sparse on facts or heavy on circumstantial evidence. *See* MURs 6611 (Laura Ruderman); 6368 (Friends of Roy Blunt); 6570 (Berman for Congress); 6359 (Voter Response); 6038 (Lamborn); 6077 (Coleman); 6050 (Boswell); 6059 (Parnell for Congress); 6056 (Protect Colorado Jobs, Inc.); 5845 (Citizens for Truth); 6164 (Sodrel for Congress); 5754 (MoveOn.org); 5568 (Empower Illinois); 5576 (New Democrat Network); 5609 (Club for Growth); and 5691 (Whalen).

The Complaint fails to establish "reason to believe." It is long on speculation and innovative legal theory, but short on merit. It parses applicable travel rules and selectively applies them, while at the same time omitting other precedent and context—precisely the sort of "regulation *via* MUR" frowned upon by the Commission.[1] The Complaint ignores what others have already conceded: The rules governing travel by federal officials and candidates is the subject of a long, complicated history that have rendered them "among the most complicated and difficult for people to understand." Amy Keller, "FEC Offers Travel Rules Changes," *The Hill* (Aug. 18, 2003) (quoting FEC Commissioner Michael Toner).

Today a single flight can require one to understand the Rules and Standards of Conduct of the U.S. House and/or Senate, Federal statutes, FEC regulations, and Federal Aviation Administration ("FAA") rules and jargon; make determinations based on the availability of commercial airline service to various cities, whether someone is a candidate and on whose behalf one is flying, and on what kind of plane one is flying at any given time; and determine what the appropriate payment rate is and who may or may not pay it. While many operations of candidates and committees subject to FEC regulations deal with layers of complexity added to everyday

[1] *See, e.g.*, MUR 5835 (Democratic Congressional Campaign Committee), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter And Donald F. McGahn at 9 ("we will not engage in so-called regulation *via* MUR").

transactions, the rules governing air travel are orders of magnitude more complex and sometimes operate devoid of connection to usual industry practice.

The original Commission regulations on travel (at 11 C.F.R. § 114.9(e) (1978)) allowed candidates to use airplanes owned or leased by a corporation or union at a first-class airfare reimbursement rate unless the company was in the business of providing air travel. Being placed in Section 114 of the regulations signaled that the travel rules were a part of the regulations governing corporate activities in federal elections. *See generally* 11 C.F.R. § 114. Relatedly, one of the only explanations the Commission provided for this regulation was that payment for the flight was required ahead of time since such entities were not in the business of offering commercial transportation on credit, tying the use of a plane intimately to whether a contribution resulted. *See* Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44, at 116 (1977).

The modern travel rules, promulgated in 2003, moved the travel rules to 11 C.F.R. Part 100, Subpart C, as one of the "enumerated exceptions to the definition of 'contribution.'" 68 Fed. Reg. 69583, 69583 (2003). Today, the bulk of the travel rules continue to constitute an enumerated exception to the definition of "contribution." 11 C.F.R. § 100.93. This makes sense due to the fact that, from their inception until the 2007 passage of the Honest Leadership and Open Government Act ("HLOGA"), the travel rules allowed the payment of less-than-market rate for flights in many circumstances. As such, it was necessary to carve out the payment of less-than-market rate for air travel from the definition of "contribution," since otherwise it might be deemed an in-kind contribution. Even though the payment of first-class equivalent rate has been phased out in some instances, today's rules continue to work from a framework of supplying the usual and normal charge for a non-commercial flight when such a rate may not be apparent since "candidates who

travel aboard a commercial airliner or other conveyance for which a fee is normally charged must pay the usual and normal charge for that service to avoid receiving an in-kind contribution from the person providing the travel service." 74 Fed. Reg. 63951, 63951-52 (2009).

The travel rules have long been a source of mystification and consternation among those governed by them. Former FEC Commissioner Michael Toner said "the FEC's travel rules have definitely been among the most complicated and difficult for people to understand for a long time." Amy Keller, "FEC Offers Travel Rules Changes," *The Hill* (Aug. 18, 2003). At one point, the rules for reimbursement at a first-class rate turned on who owned a plane, whether they were in the business of providing air travel, and which cities were flown to and from. *See* 11 C.F.R. § 114.9(e)(1978); FEC Advisory Opinion 1999-13 (NRCC) (discussing previous travel rules). These arbitrary distinctions led to inequitable results and confusion. *See, e.g., FEC v. Arlen Specter, '96*, 150 F. Supp. 2d 797 (E.D. Pa. 2001) (in a matter originating with a FEC audit, respondent challenged FEC travel rules that required candidates to pay vastly different rates for the use of similar planes based on whether the corporation providing the plane was licensed to provide charter air services). But subsequent amendments have only complicated matters further. The 2003 amendments to the travel rules introduced terminology and standards borrowed from the FAA in an attempt to clarify, but retained the different rates for different circumstances construction.

HLOGA and the Commission's 2009 amendments implementing it added yet another layer of complexity, now additionally differentiating between travel on behalf of different committees, and even which federal office is sought. The Commission has recognized HLOGA as "an effort to end subsidization of air travel provided by corporations and others to candidates, and thereby reduce the potential for corruption or the appearance thereof." 74 Fed. Reg. 63951, 63952 n.4. HLOGA and the Commission's regulations, at their essence, removed the exception to "contribution" for travel

on behalf of candidates and their campaign committees (though not other types of committees) at the first-class rate because such a deal ran counter to the Act's goals "in deterring corruption or the appearance of corruption." *Id.* at 63954. HLOGA also removed the specific references to FAA Parts 121, 129, and 135 that had been a part of the 2003 regulations and replaced them with more general and forgiving references to air carriers and safety rules.

The travel rules, at their core, attempt to solve the problem of valuing the cost of a flight that is obvious when chartering a flight on the market. *See* 74 Fed. Reg. at 63952 ("[T]he usual and normal charge for a chartered aircraft is the publicly available charter or lease rate. The usual and normal charge for travel aboard a non-commercial flight, however, may not be as apparent.").[3] But in reality, they have introduced layers of complexity when taking the simple and often-repeated act of air travel. The result is that today, the same person, when flying on different planes (or even the same plane operating under different FAA standards), from different cities or for different types of committees, could be subject to vastly different rules and reimbursement rates—anything from paying coach rate to first class to charter rate to being prohibited from flying at all.[4] For example, if

[3] The FEC's prescription of the full charter rate as the rate of reimbursement may, in fact, be artificially high in that it fails to account for other travel arrangements available to the public in the commercial market and by FAA regulations.

[4] Different reimbursement rates apply for travel on behalf of a candidate or candidate's campaign (full charter rate) to travel on behalf of a party or other political committee (first class sometimes, charter sometimes, and non-discounted coach sometimes). The rate can change depending on whether a city flown from (or to) is serviced by regularly scheduled commercial flights (such as those by American or United Airlines or even Cape Air), and whether those air carriers offer first class service between the cities of arrival and departure. Travel by a Senator must be reimbursed at different rates depending on whether the Senator is traveling on behalf of his own campaign or his leadership PAC and the cities from which he departs and arrives. Travel by a House Member running for re-election on a non-commercial flight may be prohibited and may not be paid for by certain sources, but may be allowable and paid for at various rates by other sources. A retiring House Member may take the same plane on the same route without being prohibited by section 100.93(c)(2) since he is no longer a "candidate," but may run into a paradox because his committee is restricted from paying for such flights by section 113.5 and cannot accept in-kind contributions in certain amounts and from certain sources. That the Commission has always drawn a distinction between the making of a contribution and the acceptance of a contribution only magnifies the confusion. Although at first blush counterintuitive, even if a contribution is made, it made not necessarily have been accepted by a political committee. *See* MUR

a presidential candidate flies from New Hampshire to Iowa in his capacity as a chairman of a Leadership PAC for a related event, the PAC need only pay first-class equivalent. But if the same candidate takes the same flight, but in his capacity as a candidate, the amount to be paid is significantly higher. The applicable rules even differ depending on whether one is a candidate for re-election or an officeholder who is retiring.

In addition, the rules governing candidate travel are intimately tied to the House and Senate Rules governing travel, which are set at the commencement of each new Congress and govern air travel by their Members and specifically contemplate personal travel, official travel, and political travel. *See* Statement of Sen. Feingold, 153 Cong. Rec. S267 (daily ed. Jan. 9, 2007) ("Any legislation on corporate jets must include campaign trips as well as official travel because one thing is for certain---the lobbyist for the company that provides the jet is likely to be on the flight, whether it is taking you to see a factory back home or a fundraiser for your campaign."); Statement of Sen. Lieberman, 153 Cong. Rec. S320 (daily ed. Jan. 10, 2007) ("When a Member of Congress or a candidate for Federal office uses a private plane, the ethics rules, as well as the Federal Election Commission rules, require payment to the owner of the plane..."). In an effort to harmonize the unwieldy regulatory morass, in its 2009 rulemaking implementing HLOGA, the Commission adopted an amendment to the government aircraft rules "[i]n order to avoid a regulatory gap" between Senate Ethics Rules and the FEC's rules on the subject. 74 Fed. Reg. 63951, 63958 n.12.

Notwithstanding any desire to harmonize the ethics rules with the Commission regulations, serious conflicts still exist—conflicts which the Complaint ignores. Although one would never know it from reading the Complaint, the permissibility of using air services at charter market rates—whether the provider is certificated under Part 135 or otherwise operating a plane at commercial

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6357 (Portman for Senate), First General Counsel Report at 16-18 (explaining how although one respondent made a contribution, it was not accepted by the respondent campaign committee).

rates—has long been allowed for all other federal candidates other than House Candidates. And in 2013, the House of Representatives changed its air travel rules, lifting the previous restrictions in House Rules on its Members traveling on private, non-commercial aircraft so long as the flights were paid for at the full charter rate. *See* House Rule XXIII, Clause 15, Rules of the One Hundred Thirteenth Congress. With this amendment, Members of the House—like their counterparts in the Senate—are permitted to fly on and expend personal, campaign, and official funds for flights for which "the owner or operator of the aircraft is paid a pro rata share of the fair market value of the normal and usual charter fare or rental charge for a comparable plane of comparable size..." under the rules of their own chamber. House Rule XXIII, Clause 15(b)(5).

That the body which passed the law now codified at 52 U.S.C. § 30114, from which the Commission regulations were promulgated, which regulates its own Members, has now publicly and officially refined its view on the issue underlying both rules is significant. That the Commission has not kept pace, and has not yet revisited its regulations to account for this change, has only added to the chaos, as Members of Congress might be governed by conflicting edicts on the subject. Fortunately, the Commission has previously declined to disturb Congress's regulation of its own Members on a subject that implicates federal election laws. For example, in Advisory Opinion 2003-15 (Majette), the Commission determined corporate legal defense fund contributions were in fact allowed despite the fact that they seemingly violated federal election laws. In doing so, the Commission relied on the fact that the House of Representatives, after enacting BCRA, adopted a rule that allowed contributions for legal expense funds that arguably violated the restrictions on funds raised by federal candidates and officeholders that formed a cornerstone of the new law. *See House Ethics Manual*, Committee on Standards of Official Conduct, 110th Congress, 2d Session, at 394. Similarly, the change in House Rules in 2013 indicates Congress's willingness to have its own Members use non-commercial planes so long as the market rate (charter rate or rental charge) is paid

to the service provider. After all, the change in rules clearly contemplated Members using "personal funds, official funds, or campaign funds" for such flights. House Rule XXIII, Clause 15(a). This rule change confirms the central theme of the applicable law: so long as the appropriate value is paid, no contribution results, and there are a variety of ways to comply with this goal.

Ultimately, the Complaint seeks to create a standard that would burden committees even beyond the already-complicated travel rules,[5] and beyond that contemplated by Congress.[6] The Complaint's rendition of the law is a mix of speculation, innovation and selective use. For example, the Complaint speculates that paying a plane's owner rather than the charter company somehow means that the flights are not in fact operating under the air carrier safety rules. No provision specifies that payment must be remitted to the charter operator; in fact in many cases, committees remit payment for charter flights to entities other than the certificated charter operator itself. In fact, the House Rules specifically accommodate such arrangements, providing that Members may take flights for which "the owner or operator of the aircraft is paid. . ." House Rule XXIII, Clause 15(b)(5). One example of such an arrangement occurs when a committee pays a broker service for charter flight services rather than the charter operator directly. Such arrangements are commercially reasonable and customary; similar arrangements occur with regularity in other aspects of commerce. It is not evidence of a violation.

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[5] For example, a single flight can require cross-referencing and parsing numerous rules including the Honest Leadership and Open Government Act, the Federal Election Campaign Act, Federal Election Commission Regulations, Federal Aviation Administration terminology and certifications, and, for federal officeholders, the applicable (and sometimes conflicting) House or Senate ethics rules, as well as determining whether someone is a candidate or just an officeholder, whether a city is served by commercial air service and first class service, and on whose behalf the travel is undertaken.

[6] The FEC has strayed beyond its statutory limitations before, with adverse results. *See Emily's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2010). *See also FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); *FEC v. Citizens for Democratic Alternatives in 1980*, 655 F.2d 397 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981); *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281 (11th Cir. 1982); *Unity '08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010).

Similarly, the Complaint makes much of 52 U.S.C. § 30114 and 11 C.F.R. § 100.93, and restrictions on House campaign committees and leadership PACs controlled by House candidates making expenditures on certain types of aircraft. But there is a clear exception to both those provisions for "aircraft operated by an air carrier or commercial operator certificated by the [FAA]" and "the flight is required to be conducted under air carrier safety rules." *See* 52 U.S.C. § 30114(c)(2)(A); 11 C.F.R. § 100.93(a)(3)(iv)(A). The Commission's regulations at 11 C.F.R. § 100.93 address a proper reimbursement rate for "non-commercial travel," which is travel that does not meet the standards quoted in the sentence above.

What is clear from these examples, as well as the history and application of the travel rules and guidelines, there are many ways to achieve compliance.[7] Respondents respectfully request that the Commission find no reason to believe that a violation occurred, dismiss the Complaint, and close the matter.

Respectfully submitted,

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[7] In other words, the FEC's mandate is narrow, and lacks any other free-ranging power to simply regulate politics. Certainly, the notion of some contribution limitations has withstood constitutional attack, but efforts to go beyond such limits into other prohibitions has failed repeatedly. *See Buckley v. Valeo*, 424, U.S. 1 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007); *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon v. FEC*, 572 U.S. ___ (2014).