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August 31, 2016

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Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 7101

Dear Mr. Jordan,

This response is submitted by the undersigned counsel on behalf of Senate Leadership Fund in connection with the Complaint designated Matter Under Review 7101.

This frivolous Complaint should be dismissed as expeditiously as possible and with as little use of Commission resources as the Administrative Procedure Act will allow. The Complainants do not identify any violation of law on the part of Respondents that the Commission can in any way address. The actual targets of this Complaint are the Commission itself, the D.C. Circuit Court of Appeals, and perhaps the United States Supreme Court, which of course means this is a litigation vehicle improperly filed as a "complaint."

This so-called Complaint is brought against several independent expenditure-only committees that organized in response to, and in accordance with, the Commission's decision in Advisory Opinion 2010-11 (Commonsense Ten), which was issued following *SpeechNow.org*.[1] Complainants Representative Ted Lieu, Representative Walter Jones, Senator Jeff Merkeley, State Senator John Howe, Zephyr Teachout, and Michael Wager all complain that "[i]f the FEC does not faithfully enforce § 30116, [they] will be open to attack ... during critical time periods just before the election, in broadcast advertising campaigns mounted by" the named Respondents. Complaint at ¶¶ 10, 12, 14, 16, 19, 21. These officeholders and candidates seek the Commission's assistance in restricting the speech of their fellow citizens who might oppose them.

[1] Advisory Opinion 2010-11 (Commonsense Ten) was adopted by a 5-1 vote, with Commissioners Bauerly, Hunter, McGahn, Petersen, and Weintraub voting to approve, and Commissioner Walther dissenting. The Commission reached the same conclusions in Advisory Opinion 2010-09 (Club for Growth), which was considered the same day.

For present purposes, it is clear that Respondent Senate Leadership Fund has conducted itself in full accordance with applicable judicial precedent and Commission guidance. The Complaint must be dismissed.

I. Senate Leadership Fund

Complainants assert that:

> [R]espondent Senate Leadership Fund has violated 52 U.S.C. § 30116(f) by accepting multiple contributions that substantially exceed the $5,000 limit of 52 U.S.C. § 30116(a)(1)(C). As respondent plainly disclosed these excess contributions, these violations were 'knowing' under 52 U.S.C. § 30166(f).

Complaint at ¶ 89.

The Complainants are well aware that neither claim is true, and they acknowledge as much insofar as they "do not ask the FEC to seek civil penalties or other sanctions for past conduct, but rather only declaratory and/or injunctive relief against future acceptance of excessive contributions." Complaint at ¶ 7. In other words, the Complainants have filed a Complaint alleging violations that they know did not occur, request only prospective relief, and readily acknowledge that what they seek is a change in the law. This is an abuse of the Commission's enforcement process.

In Advisory Opinion 2010-11 (Commonsense Ten), the Commission explained:

> Following *Citizens United* and *SpeechNow*, corporations, labor organizations, and political committees may make unlimited independent expenditures from their own funds, and individuals may pool unlimited funds in an independent expenditure-only political committee. It necessarily follows that corporations, labor organizations and political committees also may make unlimited contributions to organizations such as the Committee that make only independent expenditures. Given the holdings in *Citizens United* and *SpeechNow*, that "independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption," *Citizens United*, 130 S.Ct. at 910, the Commission concludes that there is no basis to limit the amount of contributions to the Committee from individuals, political committees, corporations and labor organizations.
>
> Accordingly, the Commission concludes that the Committee may solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations. The Committee has registered with the Commission as a political committee, and it will report the contributions it accepts and the independent expenditures it makes. The Commission concludes that this course of action complies with sections 432, 433, and 434 of the Act [now 52 U.S.C. §§ 30102, 30133, and 30104] and accompanying Commission regulations.

Advisory Opinion 2010-11 (Commonsense Ten) (footnotes omitted); *see also* Advisory Opinion 2010-09 (Club For Growth).

All Senate Leadership Fund activity is conducted in accordance with Commission guidance, including Advisory Opinion 2010-11 (Commonsense Ten), and the Complainants have not presented any evidence to the contrary.

II. Discussion of Complainant's Legal Arguments

The Complainants do not seriously contend that the named respondents have committed any violation of the Act or Commission regulations, but instead seek a reconsideration of underlying legal issues by the D.C. Circuit and/or U.S. Supreme Court. The Complainants object to the D.C. Circuit's unanimous *en banc* ruling in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*), and to the Commission's subsequent decision to "acquiesce" to that ruling.

According to the Complainants, the D.C. Circuit "departed from both *Buckley* and *Citizens United*" when it held in *SpeechNow.org* that "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." Complaint at ¶ 37. The Complainants' highlight irrelevant academic advocacy, media reports, and polling results that supposedly demonstrate that "the D.C. Circuit's pronouncement that contributions to independent expenditure groups 'cannot corrupt or create the appearance of corruption' has proven empirically wrong." *Id.* Regardless of what the Complainants' evidence does nor does not show, *Citizens United* and *SpeechNow.org* establish that independent expenditures do not corrupt or create the appearance of corruption *as a matter of law*.[2]

Complainants' legal argument is not an original one – it has been rejected before. In *Personal PAC v. McGuffage*, 858 F. Supp. 2d 963 (N.D. Ill. 2012), the State Board of Elections contended that "the sordid political history of Illinois" somehow "refutes [plaintiff's] argument that there is no risk of apparent or perceived corruption from spending by groups that do not coordinate with candidates," and as a result, the state's limits on contributions to independent expenditure committees should be upheld. *Personal PAC v. McGuffage*, 858 F. Supp. 2d 963, 967-968 (N.D. Ill. 2012). The district court rejected this argument, and explained:

> Despite the opposing parties' ample effort to disprove the premise of *Citizens United*, we decline the invitation to study Illinois' political history. As the

[2] *See Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010) ("we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption"); *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010) ("In light of the Court's holding *as a matter of law* that independent expenditures do not corrupt or create the appearance of quid pro quo corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.") (emphasis added); *Fund for Louisiana's Future v. La. Bd. of Ethics*, 17 F. Supp. 3d 562 (E.D. La. 2014) (noting "the Supreme Court's pronouncement that independent expenditures, as a matter of law, do not give rise to corruption").

> Seventh Circuit explained, "this is a legal issue, and resolving it does not require an evidentiary record." *Wisconsin Right to Life*, 664 F.3d at 151. Regardless of what Defendants allege is a fallacy in *Citizens United's* premise, it is not our province to modify the rulings of the Supreme Court or the Seventh Circuit.

Personal PAC, 858 F. Supp. 2d at 968.

Similarly, when the Supreme Court of Montana attempted to exempt Montana from the ruling in *Citizens United*, on the basis of Montana's supposedly unique history, the United States Supreme Court quickly dispensed with the matter: "The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does." *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (*per curiam*).

Complainants hope to re-litigate the underlying premise of *Citizens United* and *SpeechNow.org* at some point in the future and believe that this Complaint is a vehicle for doing so.[3] Regardless of the Complainants' aims, the Commission must acknowledge that the question of whether this *matter of law* should instead be treated as a *matter of fact*, and subjected to empirical analysis, is not a question the Commission may even consider.

The Complainants contend that "the FEC is not bound by the D.C. Circuit's ruling" in *SpeechNow.org* "in cases brought by or against other parties outside the D.C. Circuit" (intercircuit nonacquiescence) and that "an administrative agency need not acquiesce in a court of appeals ruling even in the same circuit as long as the agency is 'embarked on a rational litigation program designed to secure a reasonably prompt national resolution of the question in dispute'" (intracircuit nonacquiescence). Complaint at ¶ 8.[4] Complainants fail to note, however, that a "national resolution of the question in dispute" already exists. As the Second Circuit noted, "[f]ew contested legal questions are answered so consistently by so many courts and judges." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013); *see also Texans for Free Enterprise v. Tx. Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013) ("every federal court that has considered the implications of *Citizens United* on independent groups like

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[3] *See, e.g.*, Free Speech for People, *Free Speech For People & Bipartisan Coalition File FEC Complaint to End Super PACs* (July 7, 2016), http://freespeechforpeople.org/breaking-news-free-speech-people-files-fec-complaint-end-super-pacs/ ("With this filing, we aim to reverse the 2010 federal appeals court ruling in SpeechNow.org v. FEC—a ruling which unleashed a wave of Super PACs, leading to what is now the most expensive election in US history."); Matea Gold, *Can super PACs be put back in the box?*, Washington Post (July 6, 2016), https://www.washingtonpost.com/politics/can-super-pacs-be-put-back-in-the-box/2016/07/06/9beb18ba-43b1-11e6-8856-f26de2537a9d_story.html ("If the commission declines to investigate, the team plans to file a lawsuit in federal court that it hopes will get considered by the Supreme Court.").

[4] The Complainants cite a law review comment in support of their plea for agency nonacquiescence, although it appears the quoted language is academic argument rather than legal principal recognized by the courts. In any event, as the same comment indicates, there is no good-faith argument to be made for agency nonacquiescence where "a national resolution on a particular legal issue" has already been reached by "the courts of appeals themselves by coalescing around a uniform approach." COMMENT: The Uneasy Case Against Intracircuit Nonacquiescence: A Reply., 99 Yale L.J. 831, 831 (1990).

[plaintiff] has been in agreement: There is no difference in principle—at least where the only asserted state interest is in preventing apparent or actual corruption—between banning an organization such as [plaintiff] from engaging in advocacy and banning it from seeking funds to engage in that advocacy (or in giving funds to other organizations to allow them to engage in advocacy on its behalf)").

Courts across the country have reached the same conclusion as the D.C. Circuit. *See, e.g., Texans for Free Enterprise v. Tx. Ethics Comm'n*, 732 F.3d 535, (5th Cir. 2013); *Republican Party v. King*, 741 F.3d 1089 (10th Cir. 2013); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483 (2d Cir. 2013); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 143 (7th Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. Cal. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696 (9th Cir. 2010); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008); *Hispanic Leadership Fund, Inc. v. Walsh*, 42 F. Supp. 3d 365, 386-387 (N.D.N.Y 2014); *General Majority PAC v. Aichele*, 2014 U.S. Dist. LEXIS 111905 (M.D. Pa. Aug. 13, 2014); *Fund for Louisiana's Future v. La. Bd. of Ethics*, 17 F. Supp. 3d 562 (E.D. La. 2014); *Stay the Course W. Va. v. Tennant*, 2013 U.S. Dist. LEXIS 111608 (S.D. W. Va. Aug. 6, 2013); *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 404 (D. Vt. 2012); *Yamada v. Weaver*, 872 F. Supp. 2d 1023 (D. Haw. 2012); *Lair v. Murry*, 871 F. Supp. 2d 1058 (D. Mont. 2012); *Personal PAC v. McGuffage*, 858 F. Supp. 2d 963 (N.D. Ill. 2012); *Mich. Chamber of Commerce v. Land*, 725 F. Supp. 2d 665 (W.D. Mich. 2010).

Nonacquiescence is not an option available to the Commission in this matter. In a 1992 decision, the D.C. Circuit wrote:

> When the Board's position is rejected in one circuit, after all, it should have a reasonable opportunity to persuade other circuits to reach a contrary conclusion. And there is an additional value to letting important legal issues "percolate" throughout the judicial system, so the Supreme Court can have the benefit of different circuit court opinions on the same subject. *See, e.g., United States v. Mendoza*, 464 U.S. 154, 160, 78 L. Ed. 2d 379, 104 S. Ct. 568 (1984). But now that three circuits have rejected the Board's position, and not one has accepted it, further resistance would show contempt for the rule of law. After ten years of percolation, it is time for the Board to smell the coffee.

Johnson v. United States R.R. Ret. Bd., 969 F.2d 1082, 1093 (D.C. Cir. 1992). In the present matter, the Complainants urge the Commission to defy at least *seven* Circuit Courts of Appeals. Doing so would be an egregious, perhaps unprecedented, showing of agency "contempt for the rule of law."

Finally, while the Complainants apparently are hopefully that a new Justice (or Justices) at the United States Supreme Court will produce a change in the meaning of the First Amendment, we note that the Supreme Court has already recognized the holding in *SpeechNow.org*. In *McCutcheon v. FEC*, the Court explained:

> A so-called "Super PAC" is a PAC that makes only independent expenditures and cannot contribute to candidates. The base and aggregate limits govern contributions to traditional

PACs, but not to independent expenditure PACs. See *SpeechNow.org v. Federal Election Comm'n*, 599 F. 3d 686, 695-696, 389 U.S. App. D.C. 424 (CADC 2010) (en banc).

McCutcheon v. FEC, 134 S. Ct. 1434, 1442 n.6 (2014).

III. Conclusion

The Commission's conclusions in Advisory Opinions 2010-09 and 2010-11 were legally correct at the time, compelled by *SpeechNow.org*, and subsequent court decisions have affirmed this repeatedly. There are no serious arguments to be made for "agency nonacquiescence," and to change course at this time, in response to this Complaint, would be an exercise in lawlessness.

At the Commission's open session consideration of Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten), Commissioner Weintraub characterized the two advisory opinion requests as requests for the Commission to consider the holdings of *Citizens United* and *SpeechNow.org* and then conclude that "one plus one equals two." Commissioner Weintraub stated that the two draft responses that were approved reached "the only logical conclusion from these court cases" and that she "didn't anticipate any way that the courts wouldn't come to these same conclusions." Lastly, Commissioner Weintraub acknowledged the Commission's limited role in administering the Act, stating, "I don't have to love these opinions to be able to read them and apply them."[5]

This Complaint raises no difficult legal issues for the Commission and should be dismissed.

Sincerely,

Thomas J. Josefiak
Michael Bayes
Counsel to Senate Leadership Fund

[5] Federal Election Commission, Open Meeting, July 22, 2010, audio available at http://www.fec.gov/audio/2010/20100722_00.mp3.

FEDERAL ELECTION COMMISSION
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STATEMENT OF DESIGNATION OF COUNSEL

Provide one form for each Respondent/Witness

FAX 202-219-3923

MUR # 7101

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The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

8/31/16	Caleb Crosby	Treasurer
Date	Signature (Respondent/Agent)	Title

RESPONDENT: Senate Leadership Fund; Caleb Crosby, Treasurer
(Committee Name/ Company Name/Individual Named in Notification Letter)

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This form relates to a Federal Election Commission matter that is subject to the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A). This section prohibits making public any notification or investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.

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