

COVINGTON

BEIJING BRUSSELS LONDON LOS ANGELES
NEW YORK SAN FRANCISCO SEOUL
SHANGHAI SILICON VALLEY WASHINGTON

Robert Lenhard

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 5940
rlenhard@cov.com

Via Hand Delivery

September 6, 2016

Mr. Jeff S. Jordan
Federal Election Commission
Office of Complaints Examination
and Legal Administration
Attn: Donna Rawls, Paralegal
999 E Street NW
Washington, DC 20436

Re: Response of Mr. Robert McNair - MUR 7101

Dear Mr. Jordan:

We write to you today on behalf of our client, Mr. Robert McNair, in response to your letter dated July 14, 2016. Your letter states that the Commission "received a complaint that indicates" Mr. McNair may have violated the Federal Election Campaign Act ("the Act").

The Complaint itself does not name Mr. McNair as a respondent. Presumably, Commission staff sent the Complaint to Mr. McNair because the Complaint states he made a \$1,000,000 contribution to the Senate Leadership Fund and the Complaint argues that contributions over \$5,000 to unauthorized political committees are impermissible under 52 U.S.C. § 30116(a)(1)(C). As the Commission well knows, numerous federal courts, including the D.C. Circuit where the Commission is located, and the Fifth Circuit where Mr. McNair resides, have held that application of this contribution limit to independent expenditure-only political committees ("IEOPCs") is inconsistent with the First Amendment of the United States Constitution. Consistent with these decisions, the Commission has, for the past six years, recognized that it cannot and will not enforce the contribution limits against donors to IEOPCs. The controlling law is clear that it does not state a violation of the Act to allege an individual has made a contribution in excess of \$5,000 to an IEOPC. We respectfully request the Commission either rescind its July 14th letter or find No Reason to Believe a violation has occurred.

I. Courts have Repeatedly and Clearly Upheld the Right of Individuals to Make Contributions to an IEOPC

Every federal appellate court in the country that has directly considered the question since *Citizens United v. FEC*, 558 U.S. 310 (2010), has held that limits on an individual's contributions to IEOPCs are unconstitutional and cannot be enforced. This includes a unanimous *en banc* decision of the U.S. Court of Appeals for the District of Columbia Circuit, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), and a subsequent district court decision, *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011). After *Carey*, the Commission explicitly told

170440088

COVINGTON

Mr. Jeff S. Jordan
September 6, 2016
Page 2

the public that it would “no longer enforce statutory and regulatory provisions that . . . limit the amounts permissible sources may contribute to [non-contribution] accounts.” Press Release, FEC, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011).

Similarly, in Texas, where Mr. McNair resides, the U.S. Court of Appeals for the Fifth Circuit has struck down limits on contributions to IEOPCs. *Texans for Free Enter. v. Tex. Ethics Comm’n*, 732 F.3d 535, 537-38 (5th Cir. 2013).

Indeed, every other federal appellate court to have squarely addressed the issue since *Citizens United* has reached the same conclusion. See *N.Y. Progress and Protection PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 154-55 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 696 (9th Cir. 2010); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121 (9th Cir. 2011); *Republican Party of N. M. v. King*, 741 F.3d 1089, 1103 (10th Cir. 2013). Even before *Citizens United*, the Fourth Circuit had reached a similar conclusion. See *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008).

As the Second Circuit noted, “Few contested legal questions are answered so consistently by so many courts and judges.” *N.Y. Progress and Protection PAC*, 733 F.3d at 488; see also *id.* at 487 n.2, 488 (listing federal appellate and district court cases in agreement). This overwhelming weight of authority alone is sufficient for the Commission to find no reason to believe a violation occurred.

II. The FEC Has Upheld and Facilitated the Right to Make Contributions to IEOPCs

If the decisions of the courts were not enough, the Commission collectively and its Commissioners individually have consistently recognized and upheld the right of donors to contribute unlimited sums to IEOPCs.

A. Commission’s Advisory Opinions Have Repeatedly Approved of Contributions like Mr. McNair’s

The Commission’s own advisory opinions have approved individuals making unlimited contributions to IEOPCs. Under the Act and Commission regulations, the Commission may not impose “any sanction” on a person who acts in accordance with an advisory opinion. 52 U.S.C. § 30108(c)(2); see 11 C.F.R. § 112.5. The Commission may not take action against donors, like Mr. McNair, who reasonably relied on those decisions.

On July 22, 2010, the Commission issued two advisory opinions that held IEOPCs may solicit and accept unlimited contributions despite the statutory limitations in the Act. See FEC AO 2010-09 (Club for Growth); FEC AO 2010-11 (Commonsense Ten). The Commission explained, “Given the holdings in *Citizens United* and *SpeechNow*, . . . there is no basis to limit the amount of contributions to the Committee from individuals, political committees, corporations and labor organizations.” FEC AO 2010-11; see also FEC AO 2010-09 (“[B]ecause the Committee, like *SpeechNow*, intends to make only independent expenditures, there is no

COVINGTON

Mr. Jeff S. Jordan
September 6, 2016
Page 3

basis to impose contribution limits on the Committee.”). Both of these decisions were unanimous on the right of individuals to make unlimited contributions to IEOPCs. *See* FEC AO 2010-11 (Commonsense Ten) Certification (July 23, 2010); FEC AO 2010-09 (Club for Growth) Certification (July 23, 2010); FEC AOs 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten), Statement of Commissioner Steven T. Walther (July 22, 2010) (explaining his approval of unlimited contributions from individuals to IEOPCs but not from entities).

Since then, the Commission’s advisory opinions have consistently upheld the right of individuals to make unlimited contributions to IEOPCs. In FEC AO 2011-12, the Commission stated, “The Committees have registered as IEOPCs, and therefore may accept unlimited contributions from individuals, political committees, corporations, and labor organizations.” FEC AO 2011-12 (Majority PAC and House Majority PAC). Similarly, in FEC AO 2012-34, the Commission explained that making an unlimited contribution to an IEOPC was “a lawful purpose” for a campaign committee. FEC AO 2012-34 (Freedom PAC and Friends of Mike H.). Multiple other Advisory Opinions accept the legality of “Super PACs.” *See, e.g.*, FEC AO 2011-11 (Colbert); FEC AO 2011-24 (StandLouder.com); FEC AO 2012-03 (ActRight); FEC AO 2012-18 (National Right to Life Committee, Inc.); FEC AO 2015-09 (Senate Majority PAC and House Majority PAC).

Donors like Mr. McNair have reasonably relied on these decisions as valid statements of law and having done so, the Commission now cannot reasonably take the position that it constitutes an alleged violation of the Act to contribute more than \$5,000 to an IEOPC.

B. The Commission has Facilitated the Creation of Committees Designed to Accept Contributions like Mr. McNair’s

After approving the creation of political committees that could accept contributions in unlimited amounts, the Commission has repeatedly and continually facilitated the creation of those committees.

In both Commonsense Ten and Club for Growth, the Commission provided a method to create committees that could accept unlimited contributions for independent expenditures. A committee “may include a letter with its Form 1 Statement of Organization clarifying that it intends to accept unlimited contributions for the purpose of making independent expenditures.” FEC AO 2010-11 at n.4; *see also* FEC AO 2010-09 at n.1. The Commission suggests the form that letter should take, including that the contribution limits do not apply. It reads in relevant part, “This committee intends to make independent expenditures and, consistent with the U.S. Court of Appeals for the District of Columbia Circuit decision in *SpeechNow v. FEC*, it therefore intends to raise funds in unlimited amounts.” *Id.* at Attachment A (emphasis added). After *Carey*, the Commission did the same for the non-contribution account of hybrid PACs. Press Release, FEC, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011). The Commission now makes a version of these letters available online in an easily-fillable format. *See* FEC, *IE-Only Letter*, http://www.fec.gov/pdf/forms/ie_only_letter.pdf; FEC, *Non-contribution Letter*, http://www.fec.gov/pdf/forms/noncontribution_letter.pdf.

COVINGTON

Mr. Jeff S. Jordan
September 6, 2016
Page 4

Having allowed and assisted the creation of a committee that could accept unlimited contributions from individuals, the Commission cannot now take the position that it constitutes a violation of the Act for a donor to comply with these rules.

C. Prior MURs Indicate that the Commission Does not Enforce the Contribution Limits Against Donors like Mr. McNair

The Commission's enforcement actions also make clear it does not enforce any limits on contributions to IEOPCs.

For example, in MUR 6801 (Senate Majority PAC), an IEOPC was alleged to have coordinated with a campaign. FEC MUR 6801 (Senate Majority PAC), Compl. at ¶¶ 1-4. This, the complainants argued, violated its status as an IEOPC, so any contribution it accepted would be subject to the limits. *Id.* at ¶¶ 32-33. The committee had accepted contributions of \$200,000 from a labor union, \$25,000 from a corporation, and \$2.5 million from an individual. *Id.* at n.1. The Complaint did not name, nor did the Commission add, any of these donors as respondents. *Id.* at p. 1; FEC MUR 6801 (Senate Majority PAC), First General Counsel's Report at 1. At no time did it allege that any of these contributions, standing alone, constituted a violation of the Act or Commission regulations.

Similarly, in MUR 6726 a corporation contributed \$2.5 million to an IEOPC. FEC MUR 6726 (Chevron USA, Inc.), Compl. at ¶ 1. The complaint alleged that the corporation was a government contractor and that the contribution was therefore illegal. *Id.* at ¶¶ 10-11. Neither the complainant nor the Commission alleged that the contribution was otherwise subject to any dollar limits. Both of these cases are consistent with the Commission's settled position that there are no limits on the amount an individual may contribute to an IEOPC.

D. The Commission's Enforcement Procedures Explicitly State Contributions to IEOPCs are not Subject to Any Limits

The Commission's internal procedures for its Reports Analysis Division ("RAD") explicitly state that contributions to IEOPCs are not subject to any limits, and that the amount of such contributions should not trigger any further investigation.

RAD reviews "reports and statements to determine whether . . . [t]he contribution limits and prohibitions may have been violated . . ." *FEC, Reports Analysis Division Review and Referral Procedures for the 2015-2016 Election Cycle* at 6-7. RAD will send a Request for Additional Information ("RAFI") to a committee if it thinks the committee has accepted a contribution that is over the limits by a certain amount (that amount is redacted from the public version of the manual). *Id.* at 27, 45. The manual clearly states, "*Independent Expenditure only PACs or non-contribution accounts of Hybrid PACs will not be questioned for receipt of excessive contributions.*" *Id.* at 48 n.13 (emphasis added). Therefore, the Commission's own internal guidance is that it will not attempt to enforce any limits on contributions.

COVINGTON

Mr. Jeff S. Jordan
September 6, 2016
Page 5

E. Statements from Current Commissioners Reflect that Unlimited Contributions to IEOPC's Are Permissible

Statements of individual Commissioners acknowledge that the contribution limits do not apply to an individual's contributions to an IEOPC. For example:

- In her statement opening her year as Chair of the Commission, Commissioner Ellen L. Weintraub wrote, "I use the term 'super PAC' here to connote both IEOPCs and the soft money non-contribution accounts that political committees *are allowed to establish pursuant to the Commission's interim guidance.*" Ellen L. Weintraub, Chair, FEC, Statement of Chair Ellen L. Weintraub at n.2, January 31, 2013, http://www.fec.gov/members/weintraub/statements/weintraub_statement_20130131.pdf (emphasis added).
- Commissioner Weintraub joined with Commissioner Ann M. Ravel and Vice Chair Steven T. Walther in a Statement of Reasons in MUR 6396 (Crossroads GPS). They wrote that, as a result of *Citizens United* and *SpeechNow*, "An organization like Crossroads GPS, which does not make direct contributions to candidates, *would in no way be restricted from accepting unlimited contributions or from continuing to engage in multi-million dollar political advocacy campaigns,*" even if it had to register as a political committee. FEC MUR 6396 (Crossroads GPS) Statement of Reasons of Vice Chair Ann M. Ravel and Commissioners Steven T. Walther and Ellen L. Weintraub (emphasis added).
- Vice Chair Walther and Commissioners Ravel and Weintraub wrote in MURs 6487, 6488, 6485, 6711, and 6930 that, "*the ability of individuals and corporations to make unlimited contributions to super PACs is a post-Citizens United and SpeechNow phenomenon . . .*" FEC MURs 6487, 6488, 6485, 6711, and 6930, Statement Reasons of Vice Chair Steven T. Walther and Commissioners Ann M. Ravel and Ellen L. Weintraub (footnote omitted) (emphasis added).
- In the same matter, Chair Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman wrote that *Citizens United* "compelled the U.S. Court of Appeals for the District of Columbia to hold unconstitutional the Act's contribution limits as applied to individuals' contributions to political committees that only made independent expenditures . . ." FEC MURs 6487, 6488, 6485, 6711, and 6930 Statement of Reasons of Chair Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at n.1 (citing *SpeechNow*, 599 F.3d 686). This in turn "compelled the Commission to determine that corporations and labor organizations could also make contributions to similar political committees . . ." *Id.*

Based on these and other statements, it is clear that no Commissioner, even those who think that contributions to IEOPCs *should* be subject to limits, believe that those contributions *are* currently subject to any limits.

17044400000

