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Jeff S. Jordan  
Office of General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: **MUR 7101**  
**House Majority PAC, Senate Majority PAC, and Specified Individuals**

Dear Mr. Jordan:

We write as counsel to Senate Majority PAC (“SMP”) and House Majority PAC (“HMP”) along with Rebecca Lambe and Alixandria Lapp, in their official capacity as the organizations’ Treasurers, and James H. Simons, Bernard L. Schwartz, and Fred Eychaner (collectively “Respondents”), regarding the Complaint in MUR 7101 (“the Complaint”).

In short, it is lucky for complainants that the Commission has never adopted a sanction for frivolous filings because this would surely fail the threshold for a good faith complaint. The Complaint does not come close to satisfying the threshold requirement for a Federal Election Commission (“FEC” or “the Commission”) complaint because it does not allege a violation of the Federal Election Campaign Act of 1971, as amended (the “Act”), or any other law enforced by the Commission. Thus, the Commission is left merely to dismiss the Complaint for failure to allege a violation of law. Yet, in order to discourage similar stunts in the future, we suggest the Commission indicate in the close out letter that this was a frivolous complaint that wasted government and private resources.

**I. FACTUAL BACKGROUND**

Respondents SMP and HMP are independent-expenditure only political committees (“super PACs”) duly registered with and reporting to the FEC. The Complaint states that SMP and HMP have been accepting – and that the donor Respondents have been contributing – contributions in excess of \$5,000 per year.<sup>1</sup> Notably, the Complaint does not allege that Respondents have violated the Act by accepting or contributing these contributions, and expressly acknowledges that this activity is not illegal. Instead of alleging any violation of law, complainants filed the

<sup>1</sup> 2 U.S.C. § 30016(a)(1)(C).

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Complaint to make the case that the FEC should depart from current law and interpret the Act so as to prevent “the future acceptance of excessive contributions.”<sup>2</sup>

Not only is the receipt of unlimited contributions legal as complainants admit, but both SMP and HMP have expressly received FEC permission to receive unlimited contributions and to operate as super PACs through a series of advisory opinions sought and issued by the FEC since 2010.<sup>3</sup>

## II. LEGAL ANALYSIS

### A. Complainants fail to make a valid complaint

The Act permits “any person who believes *a violation of this Act has occurred*” to file a complaint with the Commission.<sup>4</sup> Commission regulations are clear that a complaint must “contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction.”<sup>5</sup>

Here, there is no alleged violation of the Act whatsoever. Complainants plainly acknowledge that no violation of current law has occurred, stating that 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.”<sup>6</sup> Complainants are not permitted to exploit the FEC’s complaint process to pursue proactive changes to current law. On these grounds alone, the Complaint should be immediately dismissed.

### B. The Commission is bound by federal courts’ interpretation of the law

To justify their request for the Commission to disrupt the current state of the law, Complainants state that the FEC is “not bound by the D.C. Circuit’s ruling” in *SpeechNow*.<sup>7</sup> To the contrary, the Commission is powerless to change the law.

First, the Commission is under clear instruction from the D.C. Circuit that the FEC’s contribution limits are unconstitutional as applied to super PACs.<sup>8</sup> The D.C. Circuit was unambiguous in its finding that the government lacks a sufficient interest in limiting contributions that would justify infringing on First Amendment free speech: “because *Citizens*

<sup>2</sup> FEC Complaint, MUR 7101, ¶ 96.

<sup>3</sup> See, e.g., FEC Adv. Op. 2010-11 (July 22, 2010); FEC Adv. Op. 2011-12 (June 30, 2011); FEC Adv. Op. 2015-09 (Nov. 13, 2015).

<sup>4</sup> 52 U.S.C. § 30109(a)(1).

<sup>5</sup> *Id.* § 111.4(d)(4).

<sup>6</sup> FEC Complaint, MUR 7101, ¶ 7.

<sup>7</sup> *Id.* ¶ 78.

<sup>8</sup> *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc). See *EMILY’s List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

*United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations. No matter which standard of review governs contribution limits, the limits on contributions to *SpeechNow* cannot stand.<sup>9</sup>

This D.C. Circuit mandate is clear; the Act's contribution limits cannot be applied to super PACs. A panel of the U.S. Court of Appeals for the Ninth Circuit concurred in the conclusion of the D.C. Circuit in *SpeechNow*.<sup>10</sup> The Ninth Circuit went even further in its reasoning, noting that the anti-distortion rationale – the historical justification for the ban on corporation and labor organization expenditures – was no longer available to justify limitations on contributions to independent expenditure committees.<sup>11</sup> The Second, Fifth, Seventh, Ninth, and Tenth Circuits have followed suit, all holding that limits on contributions to political organizations that only make independent expenditures violate the First Amendment.<sup>12</sup> In fact, every single federal appeals court that has considered source restrictions or limitations on contributions to independent expenditure-only groups since *Citizens United* has struck them down. In the words of the Second Circuit, “[f]ew contested legal questions are answered so consistently by so many courts and judges.”<sup>13</sup>

Under well-established legal precedent and explicit guidance from the Commission, SMP and HMP have legally accepted, and the respondent donors have legally contributed, contributions in excess of \$5,000.

### **C. Respondents HMP and SMP have express FEC permission to accept unlimited contributions**

While the law is clear that super PACs like HMP and SMP may accept unlimited contributions, SMP and HMP have also expressly requested and received the FEC's approval of their operations as super PACs.<sup>14</sup> In approving SMP's (formerly “Commonsense Ten”) unlimited contributions from individuals, political committees, corporations, and labor organizations for the purpose of making independent expenditures, the Commission noted that “[f]ollowing *Citizens United* and *SpeechNow*, corporations . . . may make unlimited independent expenditures

<sup>9</sup> *Id.* at 696.

<sup>10</sup> See *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010).

<sup>11</sup> See *id.*

<sup>12</sup> See *Republican Party of N.M. v. King*, -- F.3d --, 2013 WL 6645428, at \*7 (10th Cir. Dec. 18, 2013); *N.Y. Progress & Protection PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013); *WRTL State PAC v. Barland*, 664 F.3d 139, 143 (7th Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118 (9th Cir. 2011); *Long Beach Area Chamber of Commerce*, 603 F.3d 684, 696 (9th Cir. 2010).

<sup>13</sup> *N.Y. Progress*, 733 F.3d at 487.

<sup>14</sup> See FEC Adv. Op. 2010-11 (July 22, 2010); FEC Adv. Op. 2011-12 (June 30, 2011); FEC Adv. Op. 2015-09 (Nov. 13, 2015).

from their own funds, and individuals may pool unlimited funds in an independent-expenditure-only political committee.”<sup>15</sup> Therefore, the Commission concluded that since *Citizens United* and *SpeechNow* held that “independent expenditures do not lead to, or create the appearance of, quid pro quo corruption,”<sup>16</sup> there was no longer any basis to “limit the amount of contributions . . . from individuals, political committees, corporations and labor organizations.”<sup>17</sup>

The Commission followed the clear instructions of the D.C. Circuit Court in *SpeechNow* and stopped enforcing statutory contribution and expenditure limits against super PACs. The Commission reiterated its interpretation of the law in a joint advisory opinion to HMP and SMP, stating “[i]t is clear that under *Citizens United*, the Committees may accept unlimited contributions from individuals, corporations, and labor organizations.”<sup>18</sup>

The Act explicitly permits Respondents to rely upon an advisory opinion issued to them by the Commission.<sup>19</sup> An advisory opinion issued by the FEC can be relied upon by “the persons involved in the specific transaction or activity with respect to which such advisory opinion is rendered.”<sup>20</sup> Furthermore, the Act permits good faith reliance on an advisory opinion by any person involved in a transaction or activity “which is *indistinguishable in all its material aspects* from the transaction or activity with respect to which such advisory opinion is rendered.”<sup>21</sup>

The activity at issue in the Complaint, accepting and contributing unlimited contributions to independent-expenditure only committees, is the precise activity, “indistinguishable in all its material aspects,” for which Respondents sought and received FEC approval in previous advisory opinions.<sup>22</sup> Therefore, Respondents are entitled to rely upon the Commission’s sanction of this activity.

#### **D. The proper recourse for complainant’s grievances is a petition for rulemaking**

Relying on current law regarding contributions as set forth by the D.C. Circuit and implemented by the Commission, Respondent super PACs and donors accepted and contributed contributions within full compliance of the law. Yet Complainants ask the Commission to upset established law to “reconsider, in light of later experience,” its interpretation of the Act’s contribution limits.

<sup>15</sup> FEC Adv. Op. 2010-11 (July 22, 2010), at 3.

<sup>16</sup> *Citizens United*, 130 S.Ct. at 910.

<sup>17</sup> FEC Adv. Op. 2010-11 (July 22, 2010), at 3.

<sup>18</sup> FEC Adv. Op. 2011-12 (June 30, 2011), at 4.

<sup>19</sup> 52 U.S.C. § 30108(c).

<sup>20</sup> *Id.* § 30108(c)(1)(A).

<sup>21</sup> *Id.* § 30108(c)(1)(B).

<sup>22</sup> See FEC Adv. Op. 2010-11 (July 22, 2010); FEC Adv. Op. 2011-12 (June 30, 2011); FEC Adv. Op. 2015-09 (Nov. 13, 2015).

Complainants plainly do not allege that Respondents have violated any law. Therefore, they fail to make a complaint under the Act.<sup>23</sup> Rather than remedying a violation of current law, complainants admit that they seek to *change* current law.<sup>24</sup> The proper course of action for those seeking to change the law as it is implemented by federal agencies is to initiate a petition for agency rulemaking. A petition for rulemaking is the mechanism through which members of the public such as Complainants can properly argue in favor of new rules or changes to existing rules.<sup>25</sup> The complaint process is not the appropriate venue for Complainant's request to the Commission.

### III. CONCLUSION

The Complaint fails to state "a violation of any statute or regulation over which the Commission has jurisdiction."<sup>26</sup> Rather, while plainly acknowledging that no violation of law occurred, on the basis of an apparent ideological aversion to super PACs<sup>27</sup>, Complainants seek to force the FEC's hand in changing the law in contravention of a clear mandate from the D.C. Circuit and every federal court of appeals that has considered the issue.

The Act and regulations are clear; the Commission's complaint procedures were put in place to address violations of existing law, not to create new law. A complaint must allege "a violation of any statute or regulation over which the Commission has jurisdiction."<sup>28</sup> Since Complainants do not allege that Respondents violated any law, they fail to state a valid complaint under the Act. Accordingly, the Commission must dismiss the matter immediately for failure to state a valid complaint.

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<sup>23</sup> 52 U.S.C. § 30109(a)(1).

<sup>24</sup> FEC Complaint, MUR 7101, ¶ 7.

<sup>25</sup> See Administrative Procedure Act, 5 U.S.C. § 553(e). The APA requires federal agencies to "give an interested person the right to petition for the issuance, amendment, or repeal of a rule." *Id.* See also 47 C.F.R. 1.401(a), (b) (setting forth the process for rulemaking petitions filed with the FEC).

<sup>26</sup> 11 C.F.R. § 111.4(a).

<sup>27</sup> FEC Complaint, MUR 7101, ¶ 6 (alleging that Super PACs "give rise to a widespread perception of quid pro quo corruption").

<sup>28</sup> 11 C.F.R. § 111.4(a).

