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Via Hand Delivery

September 12, 2016

Mr. Jeff S. Jordan
Federal Election Commission
Office of Complaints Examination
and Legal Administration
Attn: Donna Rawls, Paralegal
999 E Street NW
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OFFICE OF GENERAL
COUNSEL

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17044420708

Re: Response of New York Wins PAC - MUR 7101

Dear Mr. Jordan:

We write on behalf of our client, New York Wins PAC, in response a complaint filed by, among others, political activist and Congressional candidate Zephyr Teachout, which we received on July 28, 2016. The complaint asserts that New York Wins PAC violated the Federal Election Campaign Act by accepting contributions in excess of \$5,000. But binding federal appeals court decisions and controlling FEC advisory opinions, forms, and enforcement manuals make clear that committees such as New York Wins PAC may accept contributions in excess of \$5,000. Indeed, every sitting FEC Commissioner has acknowledged that acceptance of these contributions is legal. Accordingly, as set forth below, this politically-motivated complaint is completely without merit and should be dismissed.

BACKGROUND

New York Wins PAC, an independent expenditure-only political committee (commonly referred to as a "Super PAC"), filed a statement of organization with the Commission on January 12, 2016. Pursuant to the Commission's advisory opinions in Club for Growth (AO 2010-09) and Commonsense Ten (AO 2010-11), the statement of organization made clear that New York Wins PAC "intends to make independent expenditures and, consistent with the U.S. Court of Appeals for District of Columbia Circuit decision in *SpeechNow v. FEC* ... raise funds in unlimited amounts." Following the filing of its statement of organization, New York Wins PAC made and reported independent expenditures opposing the primary election opponent of New

COVINGTON

Mr. Jeff S. Jordan
September 12, 2016
Page 2

York Congressional candidate John Faso. Mr. Faso prevailed in the July 28, 2016 primary election.

Complainant Ms. Teachout is running against Mr. Faso in the general election. Presumably fearful that New York Wins PAC will speak out against her, Ms. Teachout filed this politically-driven complaint against New York Wins PAC alleging that New York Wins PAC violated federal law by exercising its First Amendment right, recognized by controlling federal court decisions, to accept contributions in excess of \$5,000.¹

ANALYSIS

I. Pursuant to Binding Federal Appeals Court Decisions, New York Wins PAC May Accept Contributions in Excess of \$5,000

In its unanimous *en banc* decision, the U.S. Court of Appeals for the District of Columbia Circuit held that limits on contributions to Super PACs are unconstitutional and cannot be enforced. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (“The contribution limits of 2 U.S.C. § 441a(a)(1)(C) [later re-codified as 52 U.S.C. § 30116(a)(1)(C)] ... violate the First Amendment by preventing plaintiffs from donating to SpeechNow in excess of the limits”). This decision is binding on the FEC. *See Carey v. Fed. Election Comm’n*, 864 F. Supp. 2d 57, 63, 63 n.11 (D.D.C. 2012) (citing *Indus. Turnaround Cor. v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997)) (decision of D.C. Circuit was “binding” on the FEC).

Indeed, every federal appellate court in the country that has directly considered the question since *Citizens United v. FEC*, 558 U.S. 310 (2010), including the Second Circuit where New York Wins PAC is located, has concluded that limits on contributions to Super PACs are unconstitutional. *See N.Y. Progress and Protection PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013); *Texans for Free Enterprise v. Tex. Ethics Comm’n*, 732 F.3d 535, 537-38 (5th Cir. 2013); *Wisc. 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, 1113 (9th Cir. 2011); *Republican*

¹ Ms. Teachout has made silencing and attacking critics who support her opponent a centerpiece of her campaign. *See e.g.*, Zach Carter, “This Democrat Isn’t Challenging Her Opponent To A Debate. She’s Challenging a Donor to his Super PAC,” *Huffington Post* (Aug. 15, 2016), available at http://www.huffingtonpost.com/entry/zephyr-teachout-paul-singer-debate_us_57b21d62e4b0718404126567.

COVINGTON

Mr. Jeff S. Jordan
September 12, 2016
Page 3

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).

II. The Commission Has Repeatedly and Consistently Concluded that Super PACs May Accept Contributions in Excess of \$5,000

The Commission itself has frequently and explicitly stated that Super PACs may accept contributions in excess of \$5,000. In two 2010 advisory opinions, the Commission held that federal Super PACs may solicit and accept unlimited contributions despite the statutory limitations in the Act. See AO 2010-09 (Club for Growth); AO 2010-11 (Commonsense Ten) (“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”); see also AO 2010-09 (“[B]ecause the Committee, like *SpeechNow*, intends to make only independent expenditures, there is no basis to impose contribution limits on the Committee.”).² Both decisions were unanimous as to the right of individuals to make unlimited contributions to Super PACs. 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 20, 2010) (explaining his approval of unlimited contributions from individuals to Super PACs but not from entities). In deciding whether there is reason to believe a violation occurred, the FEC is bound by these advisory opinions. See 52 U.S.C. § 30108(c)(2) (those acting in good faith reliance on commission advisory opinion shall not “be subject to any sanction”); see also 11 C.F.R. § 112.5.

² Since 2010, the Commission’s advisory opinions have consistently upheld the right of Super PACs to accept contributions in excess of \$5,000. In FEC AO 2011-12, the Commission stated that Super PACs “may accept unlimited contributions from individuals, political committees, corporations, and labor organizations.” AO 2011-12 (Majority PAC and House Majority PAC). Similarly, in FEC AO 2012-34, the Commission explained that making an unlimited contribution to a Super PAC was “a lawful purpose” for a campaign committee. FEC AO 2012-34 (Freedom PAC and Friends of Mike H.). Many other advisory opinions acknowledge the legality of Super PACs. See, e.g., AO 2011-11 (Colbert); AO 2012-03 (ActRight); AO 2015-09 (Senate Majority PAC and House Majority PAC); 2011-24 (StandLouder.com); AO 2012-18 (National Right to Life Committee, Inc.).

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COVINGTON

Mr. Jeff S. Jordan
September 12, 2016
Page 4

Indeed, both opinions expressly 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.” AO 2010-11 at n.4; *see also* AO 2010-09 at n.1. The Commission suggests the form that letter should take, including a statement making clear that the contribution limits do not apply: “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). 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.

Consistent with these forms, the FEC explicitly told 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 Statement on Carey v. FEC: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account* (Oct. 5, 2011); *see also* FEC, *Reports and Analysis Division Review and Referral Procedures for the 2015-2016 Election Cycle* at 48 n.13 (“Independent Expenditure only PACS or non-contribution accounts of Hybrid PACs will not be questioned for receipt of excessive contributions.”). Having created forms and issued other public statements making clear that Super PACs may accept unlimited contributions, the Commission cannot find reason to believe a violation occurred when a Super PAC acts good faith in reliance on these statements. Because New York Wins PAC acted in accordance with these advisory opinions and statements, the Commission may not impose “any sanction” whatsoever on it. *See* 52 U.S.C. § 30108(c)(2); *see also* 11 C.F.R. § 112.5.

III. Every Sitting FEC Commissioner Has Acknowledged That Super PACs May Accept Contributions in Excess of \$5,000

All six Commissioners on the FEC have acknowledged that federal Super PACs may accept contributions in excess of \$5,000:

- 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 [independent expenditure only political committees] and the soft money non-contribution accounts that political committees *are allowed to establish* pursuant to the Commission’s interim guidance.” Statement of Chair Ellen L. Weintraub, January 31, 2013,

COVINGTON

Mr. Jeff S. Jordan
September 12, 2016
Page 5

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 acknowledging that “[a]n organization like Crossroads GPS, which does not make direct contributions to candidates, would in no way be restricted from accepting unlimited contributions” even if it had to register as a political committee. MUR 6396 (Crossroads GPS) Statement of Reasons of Vice Chair Ann M. Ravel and Commissioners Steven T. Walther and Ellen L. Weintraub.
- Vice Chair Walther and Commissioners Ravel and Weintraub wrote in MURs 6487, 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 ...” MURs 6487, 6485, 6711, and 6930, Statement Reasons of Vice Chair Steven T. Walther and Commissioners Ann M. Ravel and Ellen L. Weintraub (footnote omitted).
- 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” MURs 6487, 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).

CONCLUSION

The Commission should find no reason to believe that a violation occurred. Binding federal court decisions, the Commission's own advisory opinions and manuals, and the public statements of all six current FEC Commissioners make clear that New York Wins PAC may accept contributions in excess of \$5,000.

COVINGTON

Mr. Jeff S. Jordan
September 12, 2016
Page 6

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert K. Kelner" with a flourish at the end. The signature is written over a horizontal line.

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