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BEFORE THE FEDERAL ELECTION COMMISSION

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) MUR 7101 CELA
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RESPONSE OF FREEDOM PARTNERS ACTION FUND, INC. AND THOMAS F. MAXWELL III, AS TREASURER, TO THE COMPLAINT

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By and through undersigned counsel, Freedom Partners Action Fund, Inc. (the "Committee") and Thomas F. Maxwell III, as Treasurer (collectively, "Respondents") respond to the complaint in the above-captioned MUR. We respectfully request that the Commission find there is no reason to believe a violation has occurred, dismiss the complaint, and close the file.

I. BACKGROUND

Freedom Partners Action Fund, Inc. is registered with the Federal Election Commission as an independent expenditure-only political action committee. In its Form 1, the Committee indicated: "Consistent with the U.S. Court of Appeals for the District of Columbia Circuit's decision *SpeechNow v. FEC*, this committee intends to raise funds in unlimited amounts. This committee will not use those funds to make contributions, whether direct, in-kind or through coordinated communications, to federal candidates or committees." Freedom Partners Action Fund, Inc. FEC Form 1 (June 13, 2014). This statement mirrors Commission reporting guidance. *See* Federal Election Commission, Reports Analysis Division: Political Action Committees (PAC), *available at* http://www.fec.gov/rad/pacs/FederalElectionCommission-RAD-PACs.shtml#IEOnlyCommittees.

The complaint filed in this matter does not allege a violation of the law on the Committee's part or any of the various respondents, but rather urges the Commission to reconsider *SpeechNow v. FEC* – which of course it cannot do. Since the complaint does not

allege a violation of law and instead inappropriately asks for an abrupt about-face, the Commission should dismiss the complaint, find no reason to believe, and close the file.

II. ANALYSIS

A. *The complaint fails to allege a violation of law—and indeed concedes that respondents have not violated the law as the Commission has interpreted it—and should be dismissed.*

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The complaint indicates that Freedom Partners Action Fund has accepted a number of contributions and made independent expenditures, as the Committee has reported in its periodic reports to the Commission. These contributions were accepted in full compliance with applicable law – the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations – as interpreted by the Commission, a number of Federal courts, and the United States Supreme Court. *See McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1442 n.2 (2014) ("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."); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 203 (1981) (opinion of Blackmun, J.) ("contributions to a committee that makes only independent expenditures pose no threat" of "actual or potential corruption," and thus cannot be subject to contribution limits); *see also* Advisory Opinion 2010-11 (Commonsense Ten).

Rather than alleging a violation of any statute or regulation, as complaints must do according to the Act and Commission procedures, complainants acknowledge and concede that the Committee's acceptance of these contributions was indeed permissible under the law and Commission's precedents. Instead, complainants argue that the law should be different—in fact, they argue it should be opposite of the Commission's clear and binding pronouncements. *See* Advisory Opinion 2010-11 (Commonsense Ten). In other words, Complainants seek to impose

limitations on spending in support of independent speech, in contravention of binding judicial precedent and Commission rulings. Because the complaint does not allege a violation of law or meet the minimum requirements under the Act, it should be promptly dismissed. *See* 52 U.S.C. § 30109; 11 C.F.R. § 111.4(d)(3).

B. Complainants' prayer for the Commission to reconsider its stance and employ "intercircuit nonacquiescence" is not only inappropriate for the enforcement process; it is inappropriate and constitutionally suspect in this instance.

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Complainants attempt to use the enforcement process to prod the Commission into changing its application of the law. Specifically, complainants argue for the Commission to employ so-called "intercircuit nonacquiescence" with regard to contribution limits for independent expenditure-only committees. Intercircuit nonacquiescence is inappropriate and constitutionally suspect in this instance. First, the Supreme Court of the United States has recognized the existence and operation of independent expenditure-only committees and relied upon the decision in question in acknowledging that the "base and aggregate limits govern contributions to traditional PACs, but not to independent expenditure PACs" in *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1442 n.2 (2014) (*citing SpeechNow.org v. FEC*, 599 F.3d 686, 695-696 (D.C. Cir. 2010) (*en banc*)).

Second, intercircuit nonacquiescence has been questioned as applied to federal campaign finance laws due to constitutional concerns. *See* Advisory Opinion 2012-11 (Free Speech), Statement of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 4 n.9 (citing *Johnson v. U.S. Railroad Retirement Board*, 969 F.2d 1082, 1091 (D.C. Cir 1992) (explaining the "serious statutory and constitutional questions" raised by intercircuit nonacquiescence)).

Last, intercircuit nonacquiescence, by definition, creates different standards in different geographical locations – raising serious questions about uncertainty created by such differing regulations on speech. *See, e.g., National Environmental Development Association's Clean Air Project v. Environmental Protection Agency*, 752 F.3d 999, 1011 (D.C. Cir 2014) (rejecting EPA's nonacquiescence policy because it preserved regional inconsistency when its regulations required uniform application); *Buckley v. Valeo*, 424 U.S. 1, 40-41 & 41 n.47 (1976) (citing the need for precision of regulation and ensuring no chilling effect on political speech). Here, intercircuit nonacquiescence makes no sense – complainants seem to envision a fantasy world where PACs set up in Washington, DC would lack contribution limits, but PACs set up on the other end of the Key Bridge would have limits.

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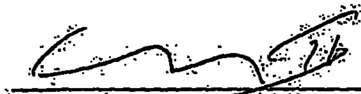
III. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Commission find that there is no reason to believe a violation occurred, dismiss the matter, and close the file.



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