Wiley Rein LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000

www.wileyrein.com

Jan Witold Baran
jbaran@wileyrein.com
202.719.7330

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Mr. Jeff S. Jordan, Assistant General Counsel
Attn: Donna Rawls, Paralegal
Office of Complaints Examination and Legal Administration
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Matter Under Review 7101

Dear Mr. Jordan:

On September 6, 2016, the Federal Election Commission ("FEC" or "Commission") notified our client, the Congressional Leadership Fund ("CLF") of a complaint filed against it by two organizations, Free Speech for People and the Campaign for Accountability, and several candidates for the U.S. Senate and House of Representatives.

The complaint's central allegation is that CLF – along with nine other similarly situated independent expenditure-only committees – are violating the statutory $5,000 per year limit on contributions to political committees by accepting contributions in excess of that amount. *See* 52 U.S.C. § 30116. As the complaint itself recognizes, both the Commission and the United States Court of Appeals for the District of Columbia Circuit have held that the $5,000 statutory limit on contributions cannot be applied to independent expenditure-only committees like CLF. In fact, a federal judge has permanently enjoined the FEC from enforcing the statutory contribution limits.

At bottom, this complaint is a misuse of the enforcement process that should have been rejected by the Commission's staff at the threshold. *See* 11 C.F.R. §§ 111.4, 111.5 (requiring the Office of General Counsel ("OGC") to reject complaints that fail to allege facts that describe a violation of law). Because OGC did not exercise that authority, the Commission itself should now find no reason to believe that CLF violated the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"), and close the file in this matter.

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FACTUAL BACKGROUND

CLF is an independent expenditure-only committee, i.e., a super PAC. It was incorporated in Delaware in 2011 and maintains its principal place of business at 1747 Pennsylvania Avenue, N.W. in Washington D.C. *See* CLF Amended Statement of Organization (Jan. 24, 2014).[1] CLF first registered with the Commission in 2011. *See* CLF Statement of Organization (Oct. 4, 2011).[2] As its FEC filings reflect, CLF has raised contributions in excess of $5,000 since its inception.

THE COMPLAINT

Free Speech for People and its co-complainants filed their complaint with the FEC on July 7, 2016. The essence of the complaint is that notwithstanding federal appellate court decisions – including *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) – and FEC advisory opinions that have relieved super PACs of the FECA's statutory contribution limits, the FECA's text still states that contributions to political committees are limited to $5,000 per calendar year. *See* 52 U.S.C. § 30116(a)(1)(C); *see also* 11 C.F.R. § 110.1. The complaint speculates that the explosion of super PACs since the *SpeechNow.org* case has given "rise to a widespread perception of quid pro quo corruption" that warrants enforcement of the $5,000 statutory limit, regardless of legal precedent to the contrary. Compl. at 3.

The complaint makes two principal arguments. First, the complaint argues that the D.C. Circuit's *SpeechNow.org* decision does not prevent "cases brought by or against other parties outside the D.C. Circuit." *Id.* at 4. Second, even for respondents that are within the D.C. Circuit, the complaint cites an article in the Yale Law Journal that is more than twenty-five years old to postulate that an administrative agency can ignore binding precedent as part of a "rational litigation program designed to secure a reasonably prompt national resolution of the question in dispute." *Id.* However, the complaint provides no explanation as to how or when it is appropriate for the FEC to do so in this matter, nor does the complaint

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1 Available at http://docquery.fec.gov/pdf/294/14960053294/14960053294.pdf. CLF's incorporation information is available through the Delaware Department of State's website at https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx.

2 Available at http://docquery.fec.gov/pdf/996/11030681996/11030681996.pdf.

cite any federal authority where a court has accepted this heretofore academic argument.

THE LAW

In *Citizens United v. FEC*, the Supreme Court of the United States held that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." 558 U.S. 310, 357 (2010). In the months that followed, both the D.C. Circuit and the FEC applied this language authoritatively to construe federal law to allow certain kinds of political committees to accept unlimited funds for the purpose of making independent expenditures.

In March 2010, the D.C. Circuit sitting *en banc* unanimously held that the FECA's $5,000 annual limit on contributions to political committees "violate[d] the First Amendment by preventing plaintiffs from donating to [an independent expenditure-only committee] in excess of" that limit. *SpeechNow.org*, 599 F.3d at 696. Applying *Citizens United*, the D.C. Circuit held that because "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." *Id.* Upon remand, the federal district judge "permanently enjoined" the FEC "from enforcing the contribution limits" against SpeechNow.org. Order Granting Pls.' Mot. for Entry of Judgment, *SpeechNow.org v. FEC*, Civ. Case. No. 1:08-cv-00248 (D.D.C. May 27, 2010); *see also* Amended Judgment, *SpeechNow.org v. FEC*, Civ. Case. No. 1:08-cv-00248 (D.D.C. Oct. 29, 2010).[3]

During the months following *Citizens United* and *SpeechNow.org*, the FEC applied these precedents in a pair of advisory opinions issued to the Club for Growth, *see* FEC Adv. Op. 2010-09, and Commonsense Ten, *see* FEC Adv. Op. 2010-11. In the Club for Growth advisory opinion, the Commission held that,

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[3] Other federal appellate courts reached a similar conclusion when reviewing equivalent state campaign finance laws. *See, e.g., N.Y. Progress and Prot. PAC v. Walsh*, 733 F.3d 483 (2d. Cir. 2013); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535 (5th Cir. 2013); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); *Republican Party of N.M. v. King*, 741 F.3d 1089 (10th Cir. 2013). These cases generally arose when states or localities refused to accept that *Citizens United* mandated the outcome that the D.C. Circuit reached in *SpeechNow.org*.

in light of the extant authority, "there is no basis to impose contribution limits" on a committee that intends to only make independent expenditures. FEC Adv. Op. 2010-09 at 4. Similarly, in response to Commonsense Ten's request, the Commission affirmed that:

> Following *Citizens United* and *SpeechNow.org*, . . . [it] necessarily follows that corporations, labor organizations and political committees . . . may make unlimited contributions to organizations such as [Commonsense Ten] that make only independent expenditures. . . . Accordingly, the Commission concludes that [Commonsense Ten] may solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations."

FEC Adv. Op. 2010-11 at 3. Others in materially indistinguishable circumstances are statutorily entitled to rely on these advisory opinions:

> Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion . . . and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by [the FECA]."

52 U.S.C. § 30108(c) (emphasis added); *see also* 11 C.F.R. § 112.5 (stating the same rule).

Subsequent to these two advisory opinions, and in direct response to *Citizens United* and *SpeechNow.org*, the Commission announced in the *Federal Register* that (1) the $5,000 annual contribution limit "may not be applied to contributions from individuals to these 'independent-expenditure-only' political committees;" and (2) the Commission "has recognized that the statutory and regulatory prohibitions on contributions by corporations and labor organizations to such independent-expenditure-only political committees and accounts are no longer enforceable." *Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations*, 79 Fed. Reg. 62,797, 62,800 (Oct. 21, 2014). The Commission also appended the following note in its book of regulations to solidify the point:

> Pursuant to *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), . . . corporations and labor organizations may make contributions to non-connected political committees that make only independent expenditures.

Id. at 62,819.

The *Citizens United* decision, the D.C. Circuit's *SpeechNow.org* ruling, the federal judge's permanent injunction against the FEC, the Club for Growth advisory opinion, the Commonsense Ten advisory opinion, and the Commission's *Federal Register* and rulebook notices all remain in effect today.

DISCUSSION

Since its inception, CLF has relied upon and conducted its activities in a manner consistent with the foregoing legal authorities. Nothing in the complaint suggests otherwise. Therefore, there is no reason to believe a violation has occurred and the complaint must be dismissed.

Nonetheless, the complainants in this matter ask the FEC to defy binding federal appellate precedent, to effectively disobey a permanent injunction issued by a federal judge, and to disregard the Commission's own advisory opinions, other regulatory pronouncements, and the clear statutory protections parties have when relying on them. The Commission must reject this misuse of the enforcement process.

I. The FEC Must Respect Binding Judicial Precedent.

The complainants advance two theories for why the Commission should disregard binding D.C. Circuit precedent and find that some or all of the respondents are violating the Act. The first argument – i.e., that at least one respondent is located in a jurisdiction that has not ruled on the issued presented by *SpeechNow.org* – does not apply to CLF. As discussed at the outset, CLF is located in Washington, D.C., where the *SpeechNow.org* decision remains in full force. Moreover, even if CLF's state of incorporation – i.e., Delaware – were relevant, there is precedent in the federal appellate circuit that covers Delaware acknowledging and accepting the holding of *SpeechNow.org*. *See Lodge No. 5 of*

Fraternal Order of Police ex rel. McNesby v. City of Philadelphia, 763 F.3d 358, 379 n.20 (3d Cir. 2014).

The complaint's second argument – that the FEC may not be bound by *SpeechNow.org* at all – fares no better. The FEC was a defendant in that case, and a federal judge concluded it by permanently enjoining the FEC from enforcing the statutory contribution limits. *See* Order Granting Pls.' Mot. for Entry of Judgment, *SpeechNow.Org v. FEC*, Civ. Case. No. 1:08-cv-00248 (D.D.C. May 27, 2010). To say that the FEC is not bound by this decision would eviscerate the authority of the federal courts. Moreover, the FEC later went on to incorporate the principal holdings of *SpeechNow.org* in a *Federal Register* announcement and in the Commission's book of regulations. *See Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations*, 79 Fed. Reg. at 62,800, 62,819.

The only support the complaint offers for its position is academic. A 1990 Yale Law Journal article proposed that an agency can disregard a binding, federal appellate decision if the agency is "embarked on a rational litigation program designed to secure a . . . national resolution of the question in dispute" – i.e., what is known as "intracircuit nonacquiescence." Samuel Estreicher and Richard Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence*, 99 Yale L.J. 831, 832 (1990). But not only has this particular academic work never been cited by a federal court (so far as our research has shown), but government agencies "that have followed a policy of intracircuit nonacquiescence have been roundly 'condemned' by every circuit that has addressed the issue." *Grant Med. Ctr. v. Burwell*, No. CV 15-480, 2016 WL 4574648, at *7 (D.D.C. Sept. 1, 2016) (collecting authority).

In fact, it is a "basic doctrine that, until reversed, the dictates of a Court of Appeals must be adhered to by those subject to the appellate court's jurisdiction." *Beverly Enters. v. NLRB*, 727 F.2d 591, 593 (6th Cir. 1984). "Administrative agencies are no more free to ignore this doctrine than are district courts," *id.*, and the "fact that [an agency] has nationwide jurisdiction does not free it from the confines of [circuit] precedent," *Reich v. Contractors Welding of W. N.Y., Inc.*, 996 F.2d 1409, 1413 (2d Cir. 1993). Furthermore, not only are such decisions binding "on federal administrative agencies when they deal with matters within the jurisdiction of" a particular circuit, *Jones & Laughlin Steel Corp. v. Marshall*, 636 F.2d 32, 33 (3d Cir. 1980), but an agency "also owes deference to the other courts

of appeals which have ruled on the issue." *Mary Thompson Hosp., Inc. v. N.L.R.B.*, 621 F.2d 858, 864 (7th Cir. 1980).

In short, an administrative agency is not "free to apply its own view of [a] statute in contravention of [circuit] precedent." *Jones*, 636 F.2d at 33. To the contrary, it "raises serious statutory and constitutional questions," *Johnson v. U.S. R.R. Retirement Bd.*, 969 F.2d 1082, 1091 (D.C. Cir. 1992), when a federal agency tries to "disagree, respectfully or otherwise, with the decisions of [the D.C. Circuit]," *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366, 382 (D.C. Cir. 1983) (quoting *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 968, 970 (3d Cir. 1979)).

II. The FEC Is Bound to Follow Its Own Advisory Opinion Precedents.

When enacting the FECA, Congress explicitly provided that interested parties could ask the Commission for guidance on the application of the Act to a specific transaction. *See* 52 U.S.C. § 30108(a). As the courts and Congress have explained, this "process is central to the Commission's responsibility to clarify the Act," *FEC v. NRA*, 254 F.3d 173, 185 (D.C. Cir. 2001) (quoting H.R. Rep. No. 96–422, at 20 (1979)), and is intended to "remove any doubt there may be as to the meaning of the law," *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003), *overruled in part by Citizens United v. FEC*, 558 U.S. 310 (2010).

When an advisory opinion is rendered pursuant to the FECA, it has "binding legal effect," *NRA*, 254 F.3d at 186, creates a "'safe harbor' for parties who rely on [it]," *id.* at 185, and vests persons with a "legal right" to rely upon the opinion's conclusions, *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010).[4] It does not matter whether the opinion was issued to the specific party requesting it, as that is "a distinction without a significant difference." *NRA*, 254 F.3d at 186. All that matters is that the transaction be "indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered."

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[4] *See also U.S. Def. Comm. v. FEC*, 861 F.2d 765, 771 (2d Cir. 1988) (advisory opinions are "binding . . . in the sense that they may be relied on affirmatively by any person . . . in any materially indistinguishable transaction or activity"); *Martin Tractor Co. v. FEC*, 627 F.2d 375, 385 (D.C. Cir. 1980) (explaining that advisory opinions "are binding in the sense that reliance on an AO was and is a defense to criminal prosecution or civil suit").

52 U.S.C. § 30108(c)(1)(B). If that is the case, then there can be no liability under the Act. *See id.* § 30108(c)(2); 11 C.F.R. § 112.5(b).

The complaint never disputes that CLF, nor any of the other respondents, have acted consistently with the Club for Growth and the Commonsense Ten advisory opinions. And they could not, because that is precisely what CLF did. The complaint even appears to concede the point. *See* Compl. at 3 (citing the Commonsense Ten advisory opinion and also the statutory provision exempting persons who rely on such opinions from sanction under the law).

Instead, complainants' apparent goal here is to use the FEC's enforcement process as a vehicle to overturn the judicial precedent with which they disagree and that forms the underlying basis of the two advisory opinions. There may be other means by which to pursue such aims;[5] the FEC's enforcement process is not one of them. *Cf. Buckley v. Valeo*, 424 U.S. 1, 110-13 (1976) (distinguishing between the Commission's advisory opinion and enforcement powers); 52 U.S.C. § 30107 (enumerating the FEC's separate and various functions).[6]

CONCLUSION

Regardless of one's views about *Citizens United* and *SpeechNow.org*, those decisions are the law of the land and of this circuit. Moreover, the Commission has conclusively and authoritatively applied those decisions in its advisory opinions and other regulatory pronouncements to permit independent expenditure-only political committees, like CLF, to accept and spend unlimited sums without regard to 52 U.S.C. § 30116's annual $5,000 contribution limit. Accordingly, the FEC

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[5] For example, and without commenting on the substantive or procedural merits, the FEC's regulations provide a mechanism for the Commission to reconsider an existing advisory opinion. *See* 11 C.F.R. § 112.6.

[6] Even if the *SpeechNow.org* decision is eventually overturned and the legal underpinnings of the Club for Growth and Commonsense Ten advisory opinions become invalid, due process would preclude the Commission from proceeding against CLF during the time those legal authorities are in place.

should find no reason to believe a violation has occurred and dismiss this complaint.

Sincerely,

Jan Witold Baran
Caleb P. Burns
Andrew G. Woodson