



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Matthew T. Sanderson
Caplin & Drysdale, Chartered
One Thomas Circle, NW, Suite 1100
Washington, DC 20005.

JUN - 1 2017

RE: MUR 7101
Robert Ziff

Dear Mr. Sanderson:

On July 14, 2016, the Federal Election Commission notified your client, Robert Ziff, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 25, 2017, the Commission found that there is no reason to believe that your client violated 52 U.S.C. § 30116(a)(1)(C). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016), effective September 1, 2016. The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Claudio J. Pavia, the attorney assigned to this matter at (202) 694-1597.

Sincerely,

A handwritten signature in black ink, appearing to read "Jin Lee".

Jin Lee
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

Respondents:

MUR 7101

Respondent Committees

House Majority PAC and Alixandria Lapp in her
official capacity as treasurer
American Alliance and Chris Marston in his
official capacity as treasurer
Congressional Leadership Fund and Caleb Crosby
in his official capacity as treasurer
Bold Agenda PAC and Candace Hermsmeyer in her
official capacity as treasurer
Defending Main Street SuperPAC Inc. and Sarah
Chamberlain in her official capacity as
treasurer
ESAFund and Nancy H. Watkins in her official
capacity as treasurer
Freedom Partners Action Fund, Inc. and Thomas F.
Maxwell III in his official capacity treasurer
New York Wins PAC and Keith A. Davis in his
official capacity as treasurer
Senate Majority PAC and Rebecca Lambe in her
official capacity as treasurer
Senate Leadership Fund and Caleb Crosby in his
official capacity as treasurer

Respondent Contributors

Access Industries, Inc.
Americans for Shared Prosperity
Bernard H. Schwartz
Bernard Marcus
Charles G. Koch
Charles G. Koch 1997 Trust
Chevron Corporation
Diane Hendricks
S. Donald Sussman
Fred Eychaner
George M. Marcus
James H. Simons
John Jordan
Kenneth Griffin
LIUNA Building America
Marlene Ricketts
Mountaire Corporation
Paul Singer

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1 Petrodome Energy
2 Richard B. Gilliam
3 Robert C. McNair
4 Robert L. Mercer
5 Robert Ziff
6 Sean Parker
7 Sheldon Adelson
8 Vitreo-Retinal Consultants of the Palm Beaches
9 Warren Stephens

10
11 **I. INTRODUCTION**

12 This matter was generated by a complaint filed with the Federal Election Commission
13 alleging that respondent independent-expenditure-only political committees (“IEOPCs” or “super
14 PACs”) have violated the Federal Election Campaign Act of 1971, as amended (the “Act”) by
15 knowingly accepting contributions in excess of the \$5,000 annual limit applicable to political
16 committees that are not authorized committees or political party committees.¹ The Complaint
17 enumerates dozens of allegedly excessive contributions and, by implication, alleges that the
18 Respondent Contributors violated the Act by making those contributions.² Further, the
19 Complaint alleges that, without prospective relief, the Respondent Committees will continue to
20 knowingly accept contributions in excess of the \$5,000 limit.³

21 Following *SpeechNow.org v. FEC*,⁴ in which the Court of Appeals for the District of
22 Columbia held that contribution limits are unconstitutional as applied to IEOPCs, the
23 Commission concluded that IEOPCs are permitted to accept unlimited contributions in Advisory

¹ Compl. ¶¶ 1-3, 84-95 (July 7, 2016); see 52 U.S.C. § 30116(a)(1)(C), (f).

² Compl. ¶¶ 44-83.

³ *Id.* ¶ 96.

⁴ 599 F.3d 686, 689 (D.C. Cir. 2010) (*en banc*) (“*SpeechNow*”).

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1 Op. 2010-11 (Commonsense Ten) (“AO 2010-11”). However, the Complaint asks the
2 Commission to “reconsider, in light of later experience, its previous decision to acquiesce to
3 *SpeechNow*,” find that Respondent Committees violated the Act, and “seek . . . declaratory
4 and/or injunctive relief against future acceptance of excessive contributions.”⁵ The Complaint
5 asserts that “the D.C. Circuit’s pronouncement that contributions to independent expenditure
6 groups ‘cannot corrupt or create the appearance of corruption’ has proven empirically wrong.”⁶
7 In support, it states that super PAC contributions: (1) provide an opportunity for *quid pro quo*
8 transactions to arise because super PACs effectively spend money on behalf of candidates and
9 political parties; and (2) create an appearance of such corruption that is confirmed by public
10 opinion polls.⁷

11 The Respondents argue that the Complaint has alleged no violation of law. They contend
12 that *SpeechNow* was correctly decided under the principles enunciated by the Supreme Court in
13 *Citizens United v. FEC*,⁸ and that the Commission must acquiesce to the D.C. Circuit, especially
14 given the number of circuit courts that have ruled in accordance. They also state that, in light of
15 AO 2010-11, the contributions at issue fall within the Act’s protection for persons entitled to rely
16 on an advisory opinion. Further, the Respondents assert that, even if the Commission has a legal
17 basis to declare its nonacquiescence to *SpeechNow*, it would be inappropriate for that to occur in

⁵ Compl. ¶¶ 7-8; see also *id.* ¶ 7 (“In light of [AO 2010-11 and the Act’s protection for persons entitled to rely on an advisory opinion] . . . complainants do not ask the FEC to seek civil penalties or other sanctions for past conduct . . .”).

⁶ *Id.* ¶ 37.

⁷ *Id.* ¶¶ 6, 40-43.

⁸ 558 U.S. 310 (2010).

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1 the context of an enforcement action, and the Complaint's request for a change in Commission
2 policy should be treated as a petition for rulemaking or advisory opinion request.

3 As explained below, under AO 2010-11, the Complaint fails to show that the
4 Respondents violated the Act. Therefore, the Commission finds no reason to believe that the
5 Respondent Committees violated 52 U.S.C. § 30116(f) by knowingly accepting excessive
6 contributions and finds no reason to believe that the Respondent Contributors violated 52 U.S.C.,
7 § 30116(a)(1)(C) by making excessive contributions.

8 **II. FACTUAL BACKGROUND**

9 **A. The Respondents**

10 The Respondent Committees are registered with the Commission as independent-
11 expenditure-only political committees.⁹ The Complaint cites to statistics showing that the
12 Respondent Committees have spent or publicly stated their intent to spend large amounts to
13 influence federal elections. For example, by May 2016, House Majority PAC (formed to help
14 Democrats win seats in the House) had reserved nearly \$19 million of advertising time for the
15 2016 election cycle.¹⁰ Senate Leadership Fund (formed to help Republicans win seats in the

⁹ See Compl. ¶¶ 24-33; House Majority PAC Statement of Organization ("SOO") (Apr. 8, 2011), Cover Letter; American Alliance SOO at 5 (Aug. 13, 2014) (Misc. Text Form); Congressional Leadership Fund SOO (Oct. 24, 2011), Cover Letter; Bold Agenda PAC SOO, Cover Letter (Oct. 10, 2014); Defending Main Street SuperPAC Inc. SOO (Dec. 26, 2012), Cover Letter; ESAFund (then Ending Spending Fund) SOO (Oct. 5, 2010), Cover Letter; Freedom Partners Action Fund, Inc. SOO (Jun. 13, 2014), Cover Letter; New York Wins PAC SOO at 5 (Jan. 12, 2016) (Misc. Text Form); Senate Majority PAC (then Commonsense Ten) Misc. Report to FEC (July 27, 2010); Senate Leadership Fund SOO (Jan. 20, 2015), Cover Letter. The cited cover letters, miscellaneous text forms, and miscellaneous reports are based on the template that the Commission attached to AO 2010-11. See AO 2010-11 at 3 n.4 (providing that "the 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"); see *id.*, Attach. A (template). Respondent Bold Agenda PAC terminated months before the Complaint was filed. Bold Agenda PAC Termination Approval (Jan. 28, 2016).

¹⁰ Compl. ¶ 24.

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1 Senate) had reserved \$38.6 million in advertising time by June 2016.¹¹ The Complaint also
2 describes how, during the 2014 election cycle, Senate Majority PAC (formed to help Democrats
3 win seats in the Senate) apparently funded one out of every 20 television ads in senate races
4 across the country.¹²

5 The Complaint states that the Respondent Committees are among over 2,400 super PACs
6 registered with the Commission, and that, as of July 2016, such groups as a whole reported \$755
7 million in total receipts and \$405 million in total independent expenditures during the 2016
8 election cycle.¹³ After the 2016 election cycle ended, super PACs reported \$1.8 billion in total
9 receipts and \$1.1 billion in total independent expenditures.¹⁴ The Complaint asserts that “the
10 number of super PACs has exploded, as has the size of contributions to them and their influence
11 in federal races.”¹⁵ Further, the Complaint contends that a large portion of their receipts are
12 attributed to a small number of wealthy individuals.¹⁶

¹¹ *Id.* ¶ 27.

¹² *Id.* ¶ 26.

¹³ *Id.* ¶ 38.

¹⁴ *Super PACs | OpenSecrets*, <https://www.opensecrets.org/pacs/superpacs.php> (last visited Mar. 10, 2017); see Compl. ¶ 38.

¹⁵ Compl. ¶ 38.

¹⁶ *Id.* ¶¶ 38-39 (citing Matea Gold & Anu Narayanswamy, *The New Gilded Age: Close to Half of All Super-PAC Money Comes from 50 Donors*, WASH. POST, Apr. 15, 2016).

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1 The Respondent Contributors are a group of individuals and corporations that made
2 allegedly excessive contributions to the Respondent Committees.¹⁷ The Complaint explains that
3 it “recites only select very large contributions.”¹⁸

4 **B. Other Factual Allegations in the Complaint**

5 According to the Complaint, factual developments since the D.C. Circuit’s ruling in
6 *SpeechNow* have proven the court’s rationale wrong and demonstrated that contributions to super
7 PACs can give rise to corruption or the appearance thereof.¹⁹ First, the Complaint asserts that
8 Attorney General Eric Holder’s prediction that *SpeechNow* would “affect only a small subset of
9 federally regulated contributions” was wrong given that the number of super PACs have
10 exploded and that these committees have raised and spent over a billion dollars, collectively.²⁰
11 The Complaint argues that the unlimited nature of super PAC contributions enables wealthy
12 individuals to evade contribution limits applicable to candidate committees and political party
13 committees by contributing funds to super PACs that “spend . . . money on behalf of candidates
14 and parties.”²¹

15 Second, the Complaint, relying on the results of several public opinion surveys, asserts
16 that super PAC contributions create the appearance of *quid pro quo* corruption. The Complaint
17 cites to surveys that “reveal widespread perceptions of corruption in the federal government.”²²

¹⁷ *Id.* ¶¶ 45-83.

¹⁸ *Id.* ¶ 44.

¹⁹ *See id.* ¶¶ 37-38, 43.

²⁰ *Id.* ¶¶ 6, 38.

²¹ *Id.* ¶ 6.

²² *Id.* ¶ 40.

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1 For instance, “61% of likely voters agreed that most members of Congress were ‘willing to sell
2 their vote for either cash or a campaign contribution,’ with the same percentage believing it
3 likely that their own representative had done the same,” according to a 2016 Rasmussen Reports
4 survey.²³

5 Additionally, the Complaint cites to surveys that “demonstrate[] an appearance of
6 corruption specifically attributable to large super PAC contributions.”²⁴ For example, “59% of
7 voters in 54 competitive congressional districts agreed that ‘[w]hen someone gives 1 million
8 dollars to a super PAC, they want something big in return from the candidates they are trying to
9 elect,’” according to a 2012 Democracy Corps/Public Campaign Action Fund survey.²⁵ In
10 addition, “68% of respondents (71% of Democrats, 71% of Republicans) agreed that ‘a company
11 that spent \$100,000 to help elect a member of Congress could successfully pressure him or her to
12 change a vote on a proposed law,’” according to a 2012 Brennan Center for Justice survey that
13 focused on the role of super PACs in federal elections.²⁶

14 Third, the Complaint relies upon an in-depth study on the effects of independent spending
15 on congressional campaigns to allege that even absent coordination, a *quid pro quo* arrangement

²³ *Id.* (citing Rasmussen Reports, *Congressional Performance: Voters Still Say Congress is For Sale* (Feb. 22, 2016), http://web.archive.org/web/20160624111643/http://www.rasmussenreports.com/public_content/politics/mood_of_america/congressional_performance (archived version)).

²⁴ *Id.* ¶ 41.

²⁵ *Id.* (citing Stan Greenberg et al., *In Congressional Battleground, Voters Intensely Concerned About Money in Politics* at 4, Democracy Corps (Oct. 1, 2012), <http://www.democracycorps.com/attachments/article/910/dcor.pcaf.memo.093012.v4.pdf>).

²⁶ *Id.* (citing Brennan Center for Justice, *National Survey: Super PACs, Corruption, and Democracy* (Apr. 24, 2012), <https://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy>).

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1 can result between a candidate and a contributor to a super PAC.²⁷ In particular, the Complaint
2 describes one interview with a campaign operative who explained: “So the Member calls and
3 says ‘Hey, I know you’re maxed out — and I can’t take any more money from you — but there’s
4 this other group. I’m not allowed to coordinate with them, but can I have someone call you?’²⁸
5 The Complaint then posits that “[t]he same conversation could then proceed to discuss legislative
6 matters, including an agreement to take some official action in exchange for the donor’s
7 contributions to the ‘other group,’ i.e. the super PAC.”²⁹

8 III. ANALYSIS

9 A. Legal Background

10 The Act provides that no person shall make contributions to any political committee that
11 is not an authorized committee or a political party committee in any calendar year which, in the
12 aggregate, exceed \$5,000.³⁰ Further, the Act prohibits any political committee from knowingly
13 accepting contributions that exceed the limit.³¹

14 An “independent expenditure” is defined as an expenditure made by a person “that is not
15 made in concert or cooperation with or at the request or suggestion of such candidate, the
16 candidate’s authorized political committee, or their agents, or a political party committee or its

²⁷ *Id.* ¶ 42 (citing Daniel B. Tokaji & Renata E.B. Strause, *The New Soft Money* (2014), available at <http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf>).

²⁸ *Id.*

²⁹ *Id.*

³⁰ 52 U.S.C. § 30116(a)(1)(C).

³¹ *Id.* § 30116(f).

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1 agents.”³² If an expenditure is coordinated with a candidate or an authorized committee, such
2 expenditure is treated as an in-kind contribution and is subject to the applicable contribution limit
3 and source prohibitions.³³

4 In *Citizens United*, the Supreme Court held that “independent expenditures, including
5 those made by corporations, do not give rise to corruption or the appearance of corruption.”³⁴
6 Therefore, the Court determined that the government has no sufficient interest in prohibiting
7 certain entities from making independent expenditures because, “[t]he absence of
8 prearrangement and coordination . . . alleviates the danger that expenditures will be given as a
9 *quid pro quo* for improper commitments from the candidate.”³⁵

10 In *SpeechNow*, the D.C. Circuit extended the legal principles enunciated in *Citizens*
11 *United* and held that the Act’s contribution limits as applied to contributions made to an IEOPC
12 were unconstitutional.³⁶ The court reasoned that, “contributions to groups that make only
13 independent expenditures also cannot corrupt or create the appearance of corruption,” and
14 therefore “the government has no anti-corruption interest in limiting contributions to an

³² *Id.* § 30101(17).

³³ *See id.* § 30125(e)(1).

³⁴ 558 U.S. at 314. The Court invalidated as unconstitutional the Act’s ban on corporate independent expenditures. *Id.* at 372.

³⁵ *Id.* at 357 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

³⁶ *SpeechNow*, 599 F.3d at 689.

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1 independent group such as *SpeechNow*.³⁷ Further, like the D.C. Circuit, every circuit court that
2 has considered this issue has ruled that IEOPCs may accept unlimited contributions.³⁸

3 After the D.C. Circuit issued its opinion in *SpeechNow*, one of the Respondent
4 Committees, Senate Majority PAC (formerly known as Commonsense Ten), submitted an
5 advisory opinion request to solicit and accept unlimited contributions from individuals, political
6 committees, corporations, and labor organizations on the condition that it would make only
7 independent expenditures, and the Commission granted the request.³⁹ In concluding that an
8 independent expenditure-only political committee could accept unlimited contributions, the
9 Commission relied upon *Citizens United* and *SpeechNow*, stating:

10 Following *Citizens United* and *SpeechNow*, . . . corporations, labor organizations,
11 and political committees . . . may make unlimited contributions to organizations
12 such as the Committee that make only independent expenditures. Given the
13 holdings in *Citizens United* and *SpeechNow*, that “independent expenditures do
14 not lead to, or create the appearance of, *quid pro quo* corruption,” . . . the
15 Commission concludes that there is no basis to limit the amount of contributions
16 to the Committee⁴⁰

17
18 The Commission further provided guidance regarding how the Committee should register
19 as an IEOPC with the Commission by submitting a letter expressing its intent to accept

³⁷ *Id.* at 694-95.

³⁸ See *Republican Party of N.M. v. King*, 741 F.3d 1089 (10th Cir. 2013); *N.Y. Progress and Protection PAC v. Walsh*, 733 F.3d 483 (2d Cir. 2013); *Texans for Free Enterprise v. Tex. Ethics Comm.*, 732 F.3d 535 (5th Cir. 2013); *Farris v. Seabrook*, 677 F.3d 858 (9th Cir. 2012); *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139 (7th Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011); *Long Beach Area Chamber of Com. v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); see also *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) (pre-*Citizens United*).

³⁹ AO 2010-11 at 2; see also Advisory Op. 2010-09 (Club for Growth) (concluding that a corporation may establish and administer a political committee that makes only independent expenditures and that such committee is not subject to contribution limits).

⁴⁰ AO 2010-11 at 3 (citing *Citizens United*, 558 U.S. at 360).

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1 unlimited contributions for the purpose of making only independent expenditures. Since
2 this advisory opinion, more than 2,400 have registered as IEOPCs.⁴¹

3 **B. There is No Reason to Believe That the Respondents Made or Accepted**
4 **Excessive Contributions**

5 The D.C. Circuit's decision in *SpeechNow* and the Commission's AO 2010-11 plainly
6 permit the contributions described in the Complaint, and the Complainants do not suggest
7 otherwise. Instead, the Complainants' primary contention is that the Commission should
8 reconsider AO 2010-11, engage in strategic nonacquiescence to the D.C. Circuit's binding
9 decision in *SpeechNow*, and resume enforcement of limits on contributions to super PACs.

10 As the Complainants acknowledge, the Commission adopted the holding in *SpeechNow*
11 by issuing AO 2010-11, and the Respondents are entitled to rely on it unless they acted contrary
12 to Commission guidance. Under the Act and Commission regulations, an advisory opinion may
13 be relied upon by the person "involved in the specific transaction or activity with respect to
14 which such advisory opinion is rendered," and by any person involved in any specific transaction
15 or activity "which is indistinguishable in all its material aspects from the transaction or activity
16 with respect to which such advisory opinion is rendered."⁴² Further, the Act and Commission
17 regulations prohibit the Commission from imposing any sanction under the Act on any person
18 who acts in good faith reliance on an advisory opinion.⁴³

19 Here, consistent with AO 2010-11, the Respondent Committees registered with the
20 Commission by submitting documentation, included with their Statements of Organization,

⁴¹ Compl. ¶ 38.

⁴² 52 U.S.C. § 30108(c)(1)(A), (B); see 11 C.F.R. § 112.5(a)(1), (2).

⁴³ 52 U.S.C. § 30108(c)(2); see 11 C.F.R. § 112.5(b).

1 stating their intent to accept unlimited contributions for the purpose of making only independent
2 expenditures. And none of the Respondent Committees have reported contributions to
3 authorized committees or political party committees, nor does the Complaint allege that any of
4 the committees coordinated their spending with candidates, authorized committees, or political
5 party committees. The contributions described in the Complaint, therefore, clearly fall within the
6 Act's protection for persons entitled to rely on an advisory opinion. Further, the protection also
7 would apply to any future contributions involving the Respondents, so long as the Commission
8 does not supersede AO 2010-11 through an advisory opinion, rulemaking, or other
9 administrative action. Indeed, the Complaint acknowledges that the Respondent Committees
10 complied with Commission guidance and "do not ask the FEC to seek civil penalties or other
11 sanctions for past conduct."⁴⁴ Rather, the Complaint requests that the Commission conduct an
12 investigation, determine the Respondents violated the law, and seek only "declaratory and/or
13 injunctive relief against future acceptance of excessive contributions."⁴⁵

⁴⁴ Compl. ¶ 7.

⁴⁵ *Id.* ¶ 96. Though we are aware of no directly applicable precedent construing the term "sanction" under 52 U.S.C. § 30108(c)(2), in other contexts, courts have construed the term "sanction" to include injunctive and declaratory relief. For example, courts have concluded that the term is expansive enough to cover nonmonetary limits on future activities. *See, e.g., Alabama v. North Carolina*, 560 U.S. 330, 340-41 (2010) (citation omitted) (noting, in the course of construing an interstate compact, that "the imposition of a nonmonetary obligation" can be "one kind of 'sanction'"); *United States v. Alabama*, 691 F.3d 1269, 1289 (11th Cir. 2012) ("A sanction is commonly understood to be 'a restrictive measure used to punish a specific action or to prevent some future activity.'" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2009 (1976)). Such a construction would also be consistent with the relatively broad definition found in the Administrative Procedure Act. *See* 5 U.S.C. § 551(10) (defining "sanction" to include an agency "prohibition, requirement, limitation, or other condition affecting the freedom of a person" and other "compulsory or restrictive action). Further, accepting the Complainants' argument that the Commission remains free to seek judicial remedies, notwithstanding a clear and on-point advisory opinion, would mean that persons who have relied in good faith on that opinion can nonetheless be subjected to Commission enforcement proceedings and potential litigation. Such a conclusion upends the purpose of the advisory opinion process which is intended to provide the regulated community with an assurance that they can carry out activity deemed permissible by the Commission without the possibility of some form of regulatory enforcement action.

1 The Act does not permit the Commission to investigate an allegation before making a
2 finding that there is reason to believe that a respondent has violated or is about to violate the
3 law.⁴⁶ The Complainants concede that *SpeechNow* and AO 2010-11 permit the conduct
4 described in the Complaint, which is inconsistent with a finding of reason to believe that
5 respondents violated the law.

6 Furthermore, the Commission chooses not to accept the Complainants' invitation not to
7 acquiesce to the binding *SpeechNow* decision. Generally, nonacquiescence refers to an agency's
8 conscious decision to disregard the law of one or more circuits to generate a circuit split that will
9 result in judicial finality through Supreme Court review.⁴⁷ The propriety of nonacquiescence,
10 therefore, "assume[s] that the law forming the basis for the obligation to acquiesce" remains "in
11 flux."⁴⁸

12 Here, seven federal courts of appeals have addressed the constitutionality of limiting
13 contributions to IEOPCs; each has ruled that such limits are unconstitutional.⁴⁹ One court went
14 so far as to conclude that "[f]ew contested legal questions are answered so consistently by so
15 many courts and judges."⁵⁰ With these decisions, there is simply no basis to conclude that the

⁴⁶ See 52 U.S.C. § 30109(a)(2) (providing that the Commission shall conduct an investigation if it finds reason to believe that a person has violated or is about to violate the Act).

⁴⁷ See generally Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L. J. 679 (1989) (seminal law review article on the subject still routinely cited by courts).

⁴⁸ *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1092 (D.C. Cir. 1992) (quoting Estreicher & Revesz, *supra* note 47) (internal quotations deleted). In *Johnson*, the D.C. Circuit suggested that once "three circuits have rejected" an agency's position, "and not one has accepted it, further resistance would show contempt for the rule of law." *Id.* at 1093; see also *Heartland Plymouth Corp. v. NLRB*, 838 F.3d 16, 24-25, 29 (D.C. Cir. 2016) (granting fees against agency for bad faith in continuing nonacquiescence to D.C. Circuit precedent).

⁴⁹ See *supra* note 38.

⁵⁰ *N.Y. Progress and Protection PAC*, 733 F.3d at 488.

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1 law remains unsettled in a way that would begin to justify Commission nonacquiescence, as the
2 Complainants contend, even if the Commission had not already adopted the holding of
3 *SpeechNow* in AO 2010-11.⁵¹

4 **D. Conclusion**

5 The Complaint raises a number of policy arguments as to why the Commission should
6 reconsider its regulation of super PACs. However, the Commission has adopted the holding of
7 *SpeechNow* in AO 2010-11, and cannot now pursue sanctions against the Respondents so long as
8 they act consistently with the Commission's guidance. The Complaint therefore fails to show
9 that a violation of the Act has occurred or is about to occur. Accordingly, the Commission finds
10 no reason to believe that the Respondents have violated or will violate the Act.

⁵¹ Attempting to enforce contribution limits against independent expenditure groups might expose the Commission to awards of legal fees under the Equal Access to Justice Act, because its position was not "substantially justified." 28 U.S.C. § 2412. One district court has already ordered the Commission to pay nearly \$125,000 in legal fees for arguing that it could restrict political committees that make direct contributions to candidates from also raising unlimited contributions for independent expenditures. *See Carey v. FEC*, 864 F. Supp. 2d 57 (D.D.C. 2012). That court criticized the FEC for "failing to appreciate binding precedent," including *Citizens United* and *SpeechNow*. *Id.* at 61.