BEFORE THE FEDERAL ELECTION COMMISSION

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) **MUR 7265/7266**
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RESPONSE OF DONALD J. TRUMP FOR PRESIDENT, INC. AND BRADLEY T. CRATE, AS TREASURER, TO THE COMPLAINTS

By and through undersigned counsel, Donald J. Trump for President, Inc., and Bradley T. Crate, as Treasurer, ("Respondents" or the "Campaign") respond to the Complaints in the above-captioned MURs.[1] We respectfully request that the Commission find no reason to believe a violation has occurred, dismiss the Complaints, and close the files.

Introduction

These Complaints state that federal campaign finance laws prohibit a person from "solicit[ing]" "a contribution or donation of money or other thing of value" from "a foreign national" "in connection with a Federal, State, or local election." 52 U.S.C. § 30121. That much is true. Yet the email record Complainants attach to their Complaint makes clear that the meeting at issue was not solicited by Donald Trump, Jr. but by Ms. Veselnitskaya or her associates, with the false promise that information damaging to Hillary Clinton would be provided from a Russian prosecutor. And neither the Complaints nor the many news reports about the meeting have provided any evidence of any actual solicitation or receipt of any actual thing of value, whether "paid research" or other form of contribution.

In any event, even assuming for the sake of argument that Donald Trump, Jr. (or any agent of the campaign) somehow "solicited" information --- an assumption for which there is no evidence --- such information would not amount to "a contribution or donation of money or other

[1] Since MUR 7266 appears to supplement the same allegations and repeat the same circumstances as MUR 7265 Respondents submit this response to address the allegations in all Complaints.

thing of value". Furthermore, any conversation in which such information is revealed would be political speech, and such political speech is both encouraged by the law and takes place frequently in all campaigns as individuals, institutions and campaigns exchange ideas and information. This is not, and cannot be, a contribution under the Federal Election Campaign Act ("Act") or the Commission's regulations.

The Commission should dismiss these Complaints for four reasons:

I. The Complaints are legally deficient under the Commission's precedents because they fail to recite any facts that constitute a violation of the Act or Commission Regulations by the Campaign.

II. A conversation regarding a candidate's fitness for office is pure political speech protected by the First Amendment.

III. The information at issue does not meet the definition of a "contribution" under Commission Regulations, precedent or basic principles of statutory interpretation.

IV. Because the alleged information at issue does not meet the definition of a "contribution", it also could not have been "solicited" within the meaning of the Act.

At its core, a meeting between campaign representatives and those who seek to provide it with information or ideas cannot be a "contribution" or a "solicitation". As a practical matter, in every election cycle, advocates, experts, think tanks and interest groups, some of them representing foreign countries, meet with campaigns. Often campaign representatives meet with and solicit ideas on policies and politics from interest groups, university professors or representatives of foreign governments. These experts are typically informed by research funded by incorporated non-profit organizations, corporations or unions. Yet these meetings and white

papers have never been considered a "thing of value" required to be reported as contributions or prohibited as impermissible foreign contributions.

Neither the Act nor any other law requires a campaign to reject these ideas, meetings or information provided by representatives of these entities because the sources of the research are non-federal dollars. It has never been and it is not now a "contribution" if a scholar leaves behind a white paper developed with the research funds of an incorporated educational institution or a lobbyist leaves behind a white paper on an issue of importance to his union or her trade association in hopes those ideas make their way into a candidate's platform, speeches or web site.

As a matter of law, it does not matter if these advocates or experts are foreign nationals. The political attachés of many foreign governments meet with campaigns. As Clinton campaign chairman John Podesta acknowledged on MSNBC, meetings with foreign representatives by campaigns are common. Podesta said, "I think it's a sort of a little bit of a cottage industry for foreign representatives in the country to try to figure out what's happening, what's the likely result … so that they can report back to their foreign offices overseas…Jake Sullivan, our Senior Policy Adviser, Laura Rosenberger who ran Foreign Policy for the campaign never met with the Russians but we met with others. But I think those were you know, what's going on in the campaign, what are you predicting, you know, how is it going kind of meetings." Transcript of Interview of John Podesta on All In with Chris Hayes, MSNBC, July 10, 2017. Whether these meetings are lawful does not hinge on the identity or citizenship of the meeting participants, nor on the topic of the conversation. In fact, Tony Blair, François Hollande, and Adele endorsed Hillary Clinton. David Cameron criticized Donald Trump's proposed restrictions on travel to the United States. Nigel Farage appeared at Trump rallies, where he attacked Hillary Clinton. Yet

no one has suggested that these forms of speech constitute "contributions" of "things of value" or resulted from improper "solicitations".

In the course of such meetings, it has never been a violation to seek a non-U.S. citizen's views on an issue impacting his or her country or to ask what he or she knows of a political opponent. If a representative of Great Britain offers a white paper on how the U.S. and its leaders might approach Brexit, it cannot be a violation to accept that product. Even if a representative of a foreign government or a non-U.S. citizen presents negative information about a political opponent, it is not a violation of the Act for the campaign to receive such information.

Significantly, the Complaint here does not allege that the Clinton campaign, the Democratic Party or its operatives violated the law for accepting and pedaling the infamous "Steele Dossier" prepared by Fusion GPS concerning Donald Trump. As *The Independent* reported earlier this year, "Fusion GPS, which is based in Washington DC and was established by former *Wall Street Journal* reporters Glenn Simpson and Peter Fritsch, found itself in the spotlight earlier this year after it was discovered to have been behind an 'oppo research' dossier containing unproven and often salacious allegations about Mr. Trump. The company had originally been hired by Republican rivals of Mr. Trump during the primary campaign. After he secured the party's nomination, the company was instead paid by Democratic financial supporters of Ms Clinton. In the summer of 2016, GPS hired former British intelligence agent, Christopher Steele, to help their work." Andrew Buncombe, "Russian lawyer who met with Donald Trump Jr. linked to investigation group behind salacious Steele Dossier," *The Independent*, July 10, 2017.

The Complaint alleges, without a shred of evidence, that "opposition research" was exchanged and should be a "thing of value". Yet in MUR 6958 (Senator Claire McCaskill et al.)

the Commission dismissed a similar complaint which involved a conversation in which polling information was exchanged. As Senator McCaskill's attorney, Marc Elias (who also represented Hillary Clinton's Presidential campaign) successfully argued: "[I]t would be antithetical to that [American political] tradition to suggest that the Federal Election Commission should step in to regulate [conversations] as 'contributions.'" Response of McCaskill for Missouri in MUR 6958 at 1.

I. The Complaints Are Legally Deficient and Must Be Dismissed Because They Fail to Clearly and Concisely Recite Any Facts That Constitute a Violation of the Act or Commission Regulations by the Campaign.

Under the Act and Commission regulations, a complaint must satisfy specific requirements in order to be deemed legally sufficient. Specifically, a complaint must contain a "clear and concise recitation of the facts which describe a violation of statute or regulation over which the Commission has jurisdiction." 11 C.F.R. § 111.4(d)(3). Indeed, absent such a "clear and concise recitation of the facts," a complaint is legally deficient and must be dismissed. *See* MUR 6554 (Friends of Weiner), Factual and Legal Analysis at 5 ("The Complaint and other available information in the record do not provide information sufficient to establish [a violation]."). The instant Complaints hardly provide a "clear and concise recitation of the facts that describe a violation of a statute or regulation over which the Commission has jurisdiction" as required by 11 C.F.R. §111.4(d)(3). For this reason alone, the Complaints must be dismissed.

Consistent with these regulatory requirements, the Commission has already made clear that simple speculation by a complainant is insufficient and does not establish that there is reason to believe a violation occurred. MUR 5467 (Michael Moore), First General Counsel's Report at 5 ("Purely speculative charges, especially when accompanied by a direct refutation, do not form the adequate basis to find reason to believe that a violation of [the Act] has occurred" (quoting

MUR 4960 Statement of Reasons at 3)). Due process and fundamental fairness dictate that the burden must not shift to a respondent merely because a complaint is filed with the Commission. *See* MUR 4850 (Deloitte & Touche, LLP), Statement of Reasons of Chairman Darryl R. Wold and Commissioners David M. Mason and Scott E. Thomas at 2 (rejecting the Office of General Counsel's recommendation to find reason to believe because the respondent did not specifically deny conclusory allegations, and holding that "[a] mere conclusory allegation without any supporting evidence does not shift the burden of proof to the respondents."). This is especially the case where the complaint does not contain sufficient information to establish an alleged violation or provide the respondent with sufficient information to meaningfully respond to the allegations. *See* MUR 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 2 ("Unwarranted legal conclusions from asserted facts . . . will not be accepted as true.").

Furthermore, "the RTB standard does not permit a complainant to present mere allegations that the Act has been violated and request that the Commission undertake an investigation to determine whether there are facts to support the charges [...] . The Commission must have more than anonymous suppositions, unsworn statements and unanswered questions before it can vote to find RTB and thereby commence an investigation." *See* MUR 6056 (Protect Colorado Jobs, Inc.), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 2.

These Complaints' wishful legal theories do not satisfy the Commission's regulatory requirements to support a reason to believe finding. *Machinists Non-partisan Political Action*

Comm. v. FEC, 655 F.2d 380, 388 (D.C. Cir. 1981) ("[M]ere 'official curiosity' will not suffice as the basis for FEC investigations").

II. A Conversation Regarding a Candidate's Fitness for Office Is Pure Political Speech Protected by The First Amendment.

A conversation in which information regarding a candidate's fitness for office is revealed is pure political speech protected by the First Amendment, which prohibits any reading that treats speech as a "thing of value" regulated by the campaign finance laws. The cornerstone of the Supreme Court's modern campaign finance jurisprudence is the distinction between engaging in "pure [political] expression" and making a political contribution. *Buckley v. Valeo*, 424 U.S. 1, 17 (1976). Congress, of course, lacks the power to regulate political expression, but the Supreme Court has held that it *may* regulate monetary and in-kind contributions, since such regulation "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20. And the reason the contribution restrictions have only "marginal" effect is precisely because those restrictions leave people free to engage in "robust and effective discussion of candidates and campaign issues." *Id.* at 29. Treating pure speech about a political candidate as a "thing of value" would make a mockery of that assurance. It would mean that a politician makes a contribution when he endorses a colleague (the endorsement, after all, has some value to the colleague). It would mean that a newspaper makes a contribution when it publishes an editorial criticizing a candidate's voting record (the criticism, after all, has some value to the candidate's adversary). And it would mean that a voter makes a contribution when he provides a candidate important information about a policy issue (the information, after all, has some value to the candidate). The First Amendment plainly does not allow Congress to regulate the endorsement or the editorial or the voter's input simply because the speech has "value" to the campaign.

These observations apply with full force to speech about a political candidate's flaws. The First Amendment protects the rights of speakers to engage in "criticism of [a political candidate's] character and her fitness for the office of the Presidency," and the rights of listeners to hear such criticisms. *Citizens United v. FEC*, 558 U.S. 310, 325 (2010). Speakers thus have the right to present, and campaigns have the right to request, information about political candidates. And Congress has no constitutional authority to criminalize such an exchange of information by labeling it a "contribution" of a "thing of value."

This equally is true when the source of the information is a foreign national. It is "inherent in the nature of the political process" that candidates and voters "must be free to obtain information from diverse sources" in order to determine how to campaign and to cast their votes. *Id.* at 341. And while *foreign nationals* may not have a First Amendment right to make monetary or in-kind contributions in American elections (*see Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (2011)), *American citizens* unquestionably have a First Amendment right to "receive information and ideas" from foreign nationals (*Kleindeinst v. Mandel*, 408 U.S. 753, 762 (1972)). It follows that the First Amendment protects the right of American citizens to talk to *anyone*, foreign nationals included, about the fitness of a political candidate for office. The importance of this protection is illustrated by the most recent presidential campaign, in which the relationships of both candidates to the Russian and other foreign governments were raised as campaign issues. The First Amendment does not permit Congress to prohibit campaigns from seeking relevant information from foreign sources.

Moreover, even if viewed exclusively from the perspective of the foreign national's right to speak, *Bluman* itself made clear that such people have a right to "speak out" about political issues. *Bluman*, 800 F.Supp.2d at 290; *see Bridges v. Wixon*, 326 U.S. 135, 148 (1945). Indeed,

as John Podesta's comments earlier this year acknowledged, foreign nationals, often but not always embassy attachés, regularly talk to campaign staff (since foreign governments want to keep track of the campaigns) and sometimes help campaigns, *see* p. 3, *supra*. Presumably in these meetings, U.S. campaign staff can seek information about developments in the foreign country from the foreign embassy attachés or foreign nationals and that information can be used by the campaign without triggering a contribution.

A contrary understanding of the First Amendment would lead to bizarre results. Under such a reading, for example, if a politician violates the law by hiring an illegal alien to work as a nanny, Congress could prohibit the nanny from revealing this to the opposing campaign. If a politician hires a foreign prostitute, Congress could prohibit a campaign staffer from asking for information about the scandal. These outcomes, of course, cannot be squared with the bedrock principle that "debate on the fitness of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14.

III. The Information at Issue Does Not Meet the Definition of A 'Contribution' Under the Act, Commission Regulations or Commission Precedent.

The Act defines "contribution" to mean "any gift, subscription, loan, advance or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A)(i); *see also* 11 C.F.R. §§ 100.51-100.56. Yet the campaign finance regulations have never been read to construe a mere conversation between an individual and a campaign as a "contribution." The phrase "contribution or donation of money or other thing of value" indicates the item must have *ascertainable monetary value* — for example, a plot of land or shares of stock in a company. Therefore, a contribution as defined under the Act does not and cannot encompass pure speech, even if it includes damaging information about a political candidate. This much is obvious from the words "contribution or donation." It is

perfectly natural to refer to items with an ascertainable monetary value as a "contribution or donation"; one might contribute non-monetary items to a political campaign such as office equipment and supplies, polling data, a donor list, or shares of stock. But no one would use the words "contribution" or "donation" to characterize a conversation between a third party and a campaign regarding the shortcomings of an opposing candidate.

This commonsense notion is confirmed by precedent. In recently decided MUR 6958, three Commissioners concluded that a pollster "discussing poll results 'in general'" with a campaign committee but not providing the recipient with "access to data, cross-tabulations, questions asked, and methodology" is not "something of value." MUR 6958 (Senator Claire McCaskill *et al.*), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Lee E. Goodman, and Matthew S. Peterson at 6-7. In voting against finding reason to believe that a violation of the Act occurred, the Commissioners "were not persuaded that the alleged conversation, even if it occurred, constituted a contribution." *Id.* at 1. This is true even though the purchase or receipt of polling data is specifically treated as a "contribution" or "expenditure" at 11 C.F.R. § 106.4. Importantly, opposition research does not have a corollary provision in the Regulations. Nevertheless, the purpose of 11 C.F.R. § 106.4 and the general concept of an in-kind contribution as enshrined in the regulations at 11 C.F.R. § 100.52(d)(1) is to prevent a political committee from receiving something of value for free that it would have otherwise purchased. Here, as in MUR 6958, it would be contrary to law and the American political tradition to characterize a conversation or a research tip regarding potentially damaging information about a candidate's opponent as a "contribution" under the Act.

Even so, Complainants attempt to twist several advisory opinions[2] and enforcement actions to support their position that information can qualify as a "thing of value." To be sure, the FEC has treated information as a "thing of value" when it comes in the form of a commercially distributed product that has an ascertainable value — for example, a voter contact list or a collection of poll results. *See, e.g.*, Advisory Opinion 1990-12 (treating poll results as a thing of value); Advisory Opinion 2007-22 (treating voter contact materials such as "flyers, advertisements, door hangers, tri-folds, signs, and other printed material" as a thing of value); Advisory Opinion 2014-06 (treating a political committee's mailing list as an asset that has value); First General Counsel's Report, MUR 5409 (Sep. 1, 2004) (treating a contact list as a thing of value); Factual and Legal Analysis, MUR 6414 (July 17, 2012) (concluding that investigative opposition research provided by a commercial vendor of such products on a "no charge" basis under the terms of a contract between the campaign and vendor was a thing of value, but dismissing the matter on the basis of prosecutorial discretion due to the relatively small amount at issue). But these opinions and enforcement actions are inapplicable to the matter at hand. In each case, the item deemed to be "something of value" possessed a market value and represented something that could be sold or rented in a market by a commercial vendor. Even assuming written informational materials were provided in the course of the meeting at issue, a fact that has never been established, this is not akin to the facts in MUR 6414, where a commercial research vendor provided opposition research to a political client at no charge or at a discount even though it had a contract to provide such services for a fee. Rather here the allegation, of which there is no evidence, is that individual(s) who are not commercial research

[2] As the Commission understands, advisory opinions are specific to the activity set forth in a request and may not be used as a sword against others.

vendors provided information with no ascertainable commercial value and without any contractual obligation to provide such information.

Taken to its logical conclusion, Complainants would have the Commission find that representatives of the Center for American Progress or the Heritage Foundation who provide a research paper in conjunction with a campaign meeting constitutes a thing of value which must be reported by a campaign as an in-kind contribution. Or that a campaign policy director talking with the AFL-CIO or U.S. Chamber of Commerce about an issue, and incorporating those thoughts into a candidate's position papers or speeches, would be something of value under campaign finance laws such that the campaign must assign a monetary value to the conversation and report it as an in-kind contribution. Indeed, under their theory, the Complainants' own organizations, incorporated entities all, have made illegal in-kind contributions every time they have discussed the virtues of campaign finance reform or ethics issues with a campaign or a campaign's representatives.

In short, the citations provided by the Complainants offer no support for the notion that a conversation in which a speaker provides negative information about an opposing candidate amounts to a contribution.[3]

IV. Principles of Statutory Interpretation Support the View That Under the Act the Information at Issue Is Not a Contribution.

[3] That "information" must not be treated as a "contribution" or something of value is also recognized by the ethics and gift rules applicable to executive and legislative branch officials. *See e.g.*, Senate Code of Official Conduct, Rule XXXV (gift rules "shall not apply to the following ... Informational materials that are sent to the office of the Member, officer, or employee in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication"); House Ethics Manual at 54 citing House Rule 25, clause 5(a)(3)(I)) (noting that a Member, officer, or employee may accept "[i]nformational materials that are sent to [his or her] office . . . in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication"); 5 C.F.R. § 2635.204(m) (containing an exception specifically allowing executive branch employees to accept "informational materials" provided primarily for educational or instructive (and not for entertainment) purposes).

Under basic principles of statutory construction, the Act's provisions that tie the penalties for unlawful contributions to the monetary value of the contribution demonstrate that conversations and information cannot be a contribution. For example, the statute imposes a five-year prison term for unlawful contributions "aggregating $25,000 or more during a calendar year," but a one-year prison term for unlawful contributions "aggregating $2,000 or more (but less than $25,000) during a calendar year." 52 U.S.C. § 30109(d). Similarly, the statute authorizes the imposition of a civil penalty in "an amount equal to any contribution." *Id.* § 30109(a)(6)(B). These provisions necessarily presuppose that each prohibited contribution has a monetary value. *Cf. Adcock v. Freightliner LLC*, 550 F.3d 369, 375 (4th Cir. 2008) (concluding that "Congress clearly intended" a "thing of value" in another statute "to have at least some ascertainable value" because "the severity of the sentence [was] dictated by the monetary value of the thing" in question). Speech about a political candidate's fitness for office lacks such a value, so it falls outside the scope of 52 U.S.C. § 30121.

Another familiar principle of statutory interpretation "counsels that a word is given more precise content by the neighboring words with which it is associated." *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012). Since the word "value" neighbors the word "money," it plainly refers to *monetary* value—not some intangible value such as political value or sentimental value. Whether or not discussion of a political candidate's flaws has intangible political value, it certainly lacks an ascertainable monetary value, which is what counts here. Similarly, a related principle of statutory interpretation states that, "[w]hen general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001). Here, the general words "other thing of

value" follow the more specific word "money." So the general words "other thing of value" must be interpreted to encompass only things similar to money—again, things with ascertainable monetary value. Speech about a political candidate's flaws is not a thing with ascertainable monetary value.

Finally, even if the Commission were to conclude that the information provided had an ascertainable value, a point which we do not concede, these views cannot trump the First Amendment nor can they carry any weight in the interpretation of 52 U.S.C. § 30121. Section 30121 is a criminal law, and "[c]riminal laws are for the courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014); *see also United States v. Apel*, 134 S. Ct. 1144, 1151 ("we have never held that the Government's reading of a criminal statute is entitled to any deference").

V. Because the Information at Issue Does Not Meet the Definition of a 'Contribution,' It Also Cannot Have Been Solicited Within the Meaning of the Act.

Under the Act, "to solicit" means "to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value." 11 C.F.R. § 300.2(m). "A solicitation is an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value." *Id.* However, "[a] solicitation does not include mere statements of political support." *Id.* Here, as we have established, nothing of value was provided and therefore nothing could have been solicited as the term "to solicit" is defined in the Act and regulations. In fact, the regulation recognizes that general expressions of political support are not a contribution that can be solicited. For example, 11 C.F.R.

§ 300.2(m)(3)(iv) states that a comment such as, "Thank you for your continuing support," offered at a GOTV rally would not constitute a solicitation. Therefore, as a matter of law, the conduct at issue in the Complaints cannot satisfy the definition of "to solicit" and the Commission should dismiss these Complaints and close the files.

Conclusion

For the aforementioned reasons, Complainants have failed to demonstrate any reason to believe that the Campaign has violated the law, and we respectfully request that the Commission dismiss the Complaints and close the files.

Respectfully,

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