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VIA ELECTRONIC MAIL: CELA@FEC.GOV

Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First Street, N.E.
Washington, D.C. 20463

Re: MUR 7284

Dear Ms. Stevenson:

On behalf of our clients, AB PAC and Rodell Mollineau in his official capacity as treasurer, and Correct the Record and Elizabeth Cohen in her official capacity as treasurer ("Respondents"), we respond to the General Counsel's Briefs in MUR 7284, which recommended that the Federal Election Commission ("the Commission" or "FEC") find probable cause to believe that Respondents violated the reporting requirements of the Federal Election Campaign Act of 1971, as amended, 52 U.S.C. § 30101 et seq. (2021) ("the Act" or "FECA"). We request that the General Counsel withdraw the recommendation pursuant to 11 C.F.R. § 111.16(d) (2019), or, alternatively, that the Commission find no probable cause to believe Respondents committed the alleged violations pursuant to 11 C.F.R. § 111.17(b).

INTRODUCTION

From a more than 200-page complaint filed by an ideological adversary, which the Commission largely rejected, Respondents now face three technical reporting issues, none of which is a normal subject of Commission enforcement:

1. Whether AB PAC had to disclose goods and services that a related nonprofit organization paid it to provide under a common paymaster agreement as "debts and obligations owed by" AB PAC under 52 U.S.C. § 30104(b)(8).

2. Whether AB PAC had to disclose its use of an email list through that same nonprofit organization, when information identified after the reason-to-believe finding indicated that the nonprofit organization paid a third party to send emails to the list, under an agreement by which the third party kept ownership and control of that same list, and by which no one else, including Respondents, would have physical or remote access to the list.

3. Whether AB PAC and Correct the Record ("CTR") breached the Act's reporting requirements when they disclosed receiving and making, respectively, a $400,000 contribution on December 31, 2015,[1] when some of that amount was for list use, and neither Respondent's description of the transaction on its report provided that additional detail.

On the issue of debt reporting, the AB PAC brief admits: "Neither the Act nor Commission regulations expressly addresses how a political committee should report receipts, disbursements or debt obligations relating to a common paymaster agreement …"[2] On the issue of the list, the briefs do not discuss information Respondents voluntarily produced after the reason-to-believe finding, which undercuts the allegation of non-reporting. Finally, neither Respondent had an incentive to misreport: AB PAC was a super PAC, and CTR a "hybrid PAC," which meant that both could receive unlimited amounts.

While the briefs repeatedly say that Respondents "do not dispute" the allegations now before the Commission,[3] Respondents have consistently taken issue with the *legal conclusions* drawn. The Office of General Counsel ("OGC") served Respondents with sweeping requests for information on First Amendment-protected activities. To avoid the burden and uncertainties of litigation, Respondents repeatedly searched tens of thousands of documents and produced some responsive information. When Respondents would not agree to the last of OGC's repeated requests to waive their legal rights by tolling the statute of limitations, OGC sent probable cause briefs on the afternoon before Christmas Eve, with responses due the Thursday after New Year's Day, with no opportunity for extension unless Respondents waived their rights and tolled.

Because there is no clear legal support to apply the debt reporting requirement to these particular facts, because the facts fail clearly to support the reporting allegations regarding the list, and because there are no circumstances to support a finding of probable cause and the threat of civil litigation over the sort of reporting issue that might well have gone to the Alternative Dispute Resolution Office under different circumstances, the General Counsel should withdraw the probable cause recommendation, and if not, the Commission should reject it.

[1] *See* Correct the Record, 2015 Year-End Report at 41, https://docquery.fec.gov/pdf/110/201601319004983110/201601319004983110.pdf (Jan. 17, 2016); American Bridge 21st Century, Second Amended 2015 Year-End Report at 17, https://docquery.fec.gov/pdf/237/201608319023763237/201608319023763237.pdf (Aug. 31, 2020).
[2] AB PAC General Counsel's Brief ("AB PAC Brief") at 9 (Dec. 23, 2020).
[3] *Id.* at 1; *see id.*at 8; *see also* Correct the Record General Counsel's Brief ("CTR Brief") at 2, 4 (Dec. 23, 2020).

STATEMENT OF FACTS

A. The Complaint and Reason to Believe Finding

This matter began on October 9, 2017, when "an educational and media organization" called The Citizens Audit LLC filed a complaint against Respondents, which made a series of speculative and unsupported allegations concerning their relationship.[4] Formerly known as American Bridge 21st Century, Respondent AB PAC is an independent expenditure-only PAC, or "super PAC," that registered with the Commission in 2010.[5] AB PAC is party to a "common paymaster" arrangement with American Bridge Foundation ("AB Foundation"), a related tax-exempt organization.[6] Under the common paymaster agreement—a cost-sharing arrangement specifically permitted by the IRS—AB Foundation and AB PAC share staff and overhead, such as a rent and office supplies.[7] AB PAC pays for the expenses upfront, and AB Foundation reimburses AB PAC for its allocable share of the costs.[8] AB PAC reports the reimbursements to the Commission on Line 15, as offsets to operating expenditures.[9]

The other respondent in this case is Correct the Record, a "hybrid" or "Carey" PAC that registered with the Commission in 2015.[10] The issues in this matter solely involve CTR's non-contribution account, which may accept unlimited funds. While AB PAC remains active, CTR is defunct and awaits Commission termination, pending the resolution of outstanding complaints. Its 2020 Post-General Report shows $0 cash-on-hand.[11]

On April 23, 2019, nearly two years after the Complaint was filed, the Commission sided with Respondents on the Complaint's central allegation that AB PAC's use of a common paymaster arrangement with AB Foundation resulted in so-called "disguised" contributions.[12] However, while rejecting the Complaint's overarching, unsupported theory, the Commission chose to proceed to an investigation on three technical reporting issues:

First, the Commission found reason to believe that AB PAC did not report $610,800 in outstanding debt to AB Foundation at the end of 2015, in connection with the common

[4] *See* Complaint ("Compl.") (Oct. 9, 2017).
[5] American Bridge 21st Century, FEC Form 1 (Statement of Organization), https://docquery.fec.gov/pdf/705/11030534705/11030534705.pdf (Nov. 23, 2010).
[6] Response at 1 (Nov. 28, 2017).
[7] *See id.* at 1-3.
[8] *Id.* at 1-2.
[9] *See, e.g.*, American Bridge 21st Century, Second Amended 2015 Year-End Report, Schedule 15, https://docquery.fec.gov/pdf/237/201608319023763237/201608319023763237.pdf (Aug. 31, 2016).
[10] Correct the Record, FEC Form 1 (Statement of Organization), https://docquery.fec.gov/pdf/085/15031431085/15031431085.pdf (June 5, 2015).
[11] Correct the Record, 2020 Post-General Report, https://docquery.fec.gov/pdf/250/202012039337587250/202012039337587250.pdf (Dec. 3, 2020).
[12] *See* American Bridge 21st Century Factual & Legal Analysis ("AB PAC F&LA") at 10-13 (Apr. 25, 2019).

paymaster arrangement.[13] In the Factual and Legal Analysis, the Commission held that using a common paymaster arrangement, like AB PAC did, "is generally permissible and does not, in itself, give rise to unspecified reporting violations," while saying that inaccurate reporting "would be a violation."[14] The adverse finding sprang from language on page 3 of Schedule D of AB Foundation's 2015 IRS Form 990, cited in paragraph 12 of the Complaint, which listed $610,800 in assets "due from American Bridge PAC."[15]

Second, the Commission found reason to believe that AB PAC did not correctly report receiving an email list from AB Foundation in 2015.[16] The adverse finding sprang from paragraphs 14 and 15 of the Complaint: they quoted an email, illegally obtained by Russian military intelligence and provided to Wikileaks, which indicated that CTR had access to an email list associated with a political committee called Ready PAC, but claimed that there was no payment to acquire the list on its FEC reports.[17] Respondents averred that AB PAC had leased the list from AB Foundation, which had acquired the use of the list from Ready PAC; that AB PAC accounted for its payment of the fair market value of the list through its ongoing reconciliation with AB Foundation; and that CTR obtained the list from AB PAC.[18]

Third, the Commission found reason to believe that AB PAC and CTR failed correctly to report CTR's acquisition of the Ready PAC list.[19] In their response to the Complaint, Respondents averred that CTR reimbursed AB PAC for the use of the list as part of a $400,000 disbursement made on December 31, 2015, which CTR reported as a contribution made, and AB PAC as a contribution received.[20]

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[13] *See* AB PAC Brief at 1-2, 7-8.
[14] AB PAC F&LA at 10.
[15] *See* Compl. ¶ 12, Exh. A. In other contexts, the Commission has acknowledged that IRS requirements and definitions are different than the FEC's and do not control questions arising under FECA. *See, e.g.*, Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed, Reg. 68,056, 68,064-65 (2004) (declining to link "political organization" status under the Internal Revenue Code to the Commission's definition of "political committee").
[16] *See* AB PAC Brief at 12.
[17] *See* Compl. ¶¶ 14-15. Previous Commissioners have declined to rely on information illegally obtained by Russian intelligence, deeming its consideration "inappropriate" and excluding the material from their deliberations. *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, MURs 6940, 7097, 7146, 7160 and 7193 at 2 n.4 (Aug. 21, 2019).
[18] *See* AB PAC Brief at 13-15.
[19] *See* AB PAC Brief at 8-9, 13; CTR Brief at 5-6.
[20] *See* AB PAC Brief at 8; CTR Brief at 3-4; Correct the Record, 2015 Year-End Report at 41, https://docquery.fec.gov/pdf/110/201601319004983110/201601319004983110.pdf (Jan. 17, 2016); American Bridge 21st Century, Second Amended 2015 Year-End Report at 17, https://docquery.fec.gov/pdf/237/201608319023763237/201608319023763237.pdf (Aug. 31, 2020).

B. OGC's Investigation and Respondents' Responses

Over these asserted reporting violations, which were peripheral at best to the otherwise rejected Complaint, the Commission issued voluntary requests for documents and written answers in April 2019.[21] It requested information and communications about "all instances since 2014 where [AB PAC] obtained resources [from AB Foundation] that were not in connection with" staff time or overhead costs.[22] The Commission also asked how AB PAC reported every one of those transactions and for broad information on CTR's reporting of transactions with AB PAC.[23] Thus, the Commission asked Respondents to review years' worth of records, in order to find any other transaction that it might later characterize as a reporting error. This was a search for the proverbial needle in a haystack, made more difficult by the years that had passed between the transactions and the Complaint, and the turnover among Respondents' personnel and consultants.

While the Commission's requests took the case far beyond "the heart of the matter" set forth in the Factual and Legal Analyses,[24] and veered into a broad review of core First Amendment activities, based solely on an "inference" drawn from the actual findings,[25] Respondents still worked to comply, at significant burden. AB PAC and American Bridge Foundation conducted a keyword search of their communications to isolate potentially responsive materials. This initial search produced approximately 4,000 documents, of which only one item was potentially responsive. In a further effort to identify responsive documents, AB PAC and AB Foundation conducted a second keyword search of their communications, this time casting a wider net and identifying about 35,700 potentially responsive documents. Counsel ran additional searches and examined the resulting materials but did not identify any communications responsive to the Commission's requests. On June 14, 2019, Respondents provided the Commission with the responsive document from the original search and a written response.[26] On June 21, 2019, OGC sent Respondents a letter saying that the response was insufficient and renewing the original request for documents and written answers.[27] AB PAC and AB Foundation then undertook a third search, and a third batch of approximately 31,000 documents were generated for review.

Through efforts that continued into the COVID-19 pandemic, on May 15, 2020, Respondents identified and produced additional information about the email list transactions discussed in the

[21] American Bridge PAC F&LA at 19; CTR F&LA at 7.
[22] American Bridge PAC F&LA at 19.
[23] *Id.*; CTR F&LA at 7.
[24] *Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 4 (D.D.C. 2002) (stating that the government's interest in seeking disclosure of information protected by the First Amendment is weak unless the information "goes to the heart of the mater, that is, unless it is crucial to the party's case" (internal quotation marks omitted)).
[25] AB PAC F&LA at 16; *see also FEC v. LaRouche Campaign*, 817 F.2d 233, 234 (2d. Cir. 1987) (stating that Commission investigations "tread in an area rife with first amendment associational concerns"); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.D.C. 1981) ("[M]ere 'official curiosity' will not suffice as the basis for FEC investigations.").
[26] Letter, Marc E. Elias and Ezra W. Reese, Perkins Coie LLP, to Kimberly D. Hart, FEC (June 14, 2019).
[27] Letter, Mark D. Shonkwiler, FEC, to Marc. E. Elias, Perkins Coie LLP (June 21, 2019).

Factual and Legal Analyses.[28] (The General Counsel's Briefs neither reference this production nor discuss its contents.) Specifically, Respondents found a copy of the signed list rental agreement between AB Foundation and Ready PAC, dated May 4, 2015, by which AB Foundation was to pay Ready PAC $150,000 for use of the email list until December 31, 2016.[29]

Significantly, the agreement provided that "[AB Foundation] will not be provided physical or remote access to the Ready PAC email list. All emails approved by Ready PAC will be transmitted by Ready PAC's vendor on behalf of [AB Foundation]."[30] Rather, the agreement allowed AB Foundation to send one email per week to the list and to "submit emails on behalf of itself or on behalf of any other organization for which David Brock is serving as Chair of the Board."[31] For each batch of emails, Rising Tide Interactive, a list broker, was to be paid $500 "for the administrative costs associated with formatting and sending" emails to the Ready PAC list.[32]

The arrangement the agreement described is consistent with Respondents' reporting at the time. AB PAC reported no disbursements to Rising Tide Interactive in 2015 or 2016,[33] and indeed the Complaint did not allege that AB PAC ever emailed the Ready PAC list.[34] However, the Complaint did allege that CTR used the Ready PAC email list,[35] and CTR indeed itemized four $500 expenditures to Rising Tide between December 2015 and November 2016 for "list acquisition."[36] The agreement indicated that neither AB Foundation nor AB PAC nor CTR ever obtained actual possession of the Ready PAC email list. Rather, the agreement and corresponding reports indicate that Ready PAC kept the list; that Rising Tide Interactive managed the list on its behalf; that AB Foundation paid Ready PAC to send emails to the list; and that each organization seeking to have emails sent on its behalf paid Rising Tide Interactive the required $500 administration fee.

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[28] *See* Letter, Brian G. Svoboda and Shanna Reulbach, Perkins Coie LLP, to Mark Shonkwiler, FEC (May 15, 2020).
[29] *See id.*, Exh. 1.
[30] *See id.* § 1(e).
[31] *Id.* § 1(a).
[32] *Id.* § 3.
[33] *Filter 2015-2016 Disbursements: AB PAC*, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00492140&recipient_name=rising+tide&recipient_name=rising+tide+interactive&two_year_transaction_period=2016 (last visited Jan. 6, 2021) (searching for "Rising Tide" and "Rising Tide Interactive").
[34] *See* Compl. ¶¶ 14-15.
[35] *Id.* ¶ 14.
[36] *Filter 2015-2016 Disbursements: Correct the Record*, FEC, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00578997&recipient_name=rising+tide&recipient_name=rising+tide+interactive&two_year_transaction_period=2016 (last visited Jan. 6, 2021) (searching for "Rising Tide" and "Rising Tide Interactive"). CTR made seven other $500 payments to Rising Tide Interactive during 2015 and 2016, which may also have been related to the Ready PAC email list. *See id.*

Throughout the investigation, OGC continued to seek information, and Respondents continued to work toward further response. While Respondents disagreed with the Commission's reason-to-believe findings and admitted no violation—despite the repeated assertions to the contrary in the General Counsel's briefs—they hoped that the matter could be resolved at the pre-probable cause stage, to avoid continued, protracted dispute and, in AB PAC's case, to conserve its resources for the political and issue activity in which it was formed to engage.

When OGC told Respondents on December 7, 2020, that they must waive their rights and toll the statute of limitations to avoid a recommendation of a probable cause finding, and would receive no extension to respond to the recommendation unless they tolled, Respondents declined to waive their rights.[37] On the afternoon of December 23, the day before Christmas Eve, OGC served Respondents with its briefs, with responses due the week after New Year's Day. When Respondents sought a two-week extension, OGC would not provide it, unless they tolled.[38]

ARGUMENT

A. The General Counsel Erroneously Treats AB PAC's Compensated Provision of Overhead and Staff Services as a Reportable Debt Owed to AB Foundation

With no clear precedent, the General Counsel asks the Commission to find probable cause over a committee's alleged failure to disclose as debt the value of the goods and services a related organization paid it to provide under a common paymaster agreement. In so doing, the General Counsel takes the debt reporting rules—which are vague and contradictory to begin with—and proposes their enforcement against a specific scenario that they were not written to address in the first place. Finally, the General Counsel asks the Commission to take the penultimate enforcement action in its book—short only of suing a respondent de novo in federal district court— even while the Commission routinely dismisses allegations of this sort. Either the General Counsel should withdraw the recommendation, or the Commission should reject it.

As a past Commissioner said in a Statement of Reasons that comprehensively analyzed the history and ambiguity of the debt disclosure requirement: "[T]he Commission has routinely dismissed debt disclosure allegations as a matter of prosecutorial discretion, with only a small number of exceptions."[39] Congress appears originally to have written the debt disclosure requirement to ensure that defunct campaigns paid their bills and avoided cheating their

[37] *See* Email, Brian G. Svoboda, Perkins Coie LLP, to Mark Shonkwiler, FEC (Dec. 8, 2020).
[38] *See* Email, Wanda D. Brown, FEC, to Brian G. Svoboda, Perkins Coie LLP (Dec. 29, 2020).
[39] Statement of Reasons of Commissioner Lee E. Goodman, MUR 6732 (North Carolina Democratic Party) at 9, https://www.fec.gov/files/legal/murs/6732/16044403885.pdf (Dec. 8, 2016).

creditors.[40] This, apparently, is why the Commission's initial regulations required disclosure only of debts and obligations which remained outstanding "after the election."[41]

Only later did the rules acquire their present purpose, which was to provide a "focused and limited" disclosure of those to whom a political committee owed money, and of those who owed it money.[42] Significantly, committees do *not* disclose obligations for rent, salary or other regularly reoccurring administrative expenses, until after the payment due date.[43] Instead, they disclose "the amount and nature of outstanding debts and obligations owed by or to such political committee …"[44] Such debts and obligations are to "be continuously reported until extinguished," which is incompatible with the compelled disclosure of the routine, ongoing administrative expenses committees frequently incur, which would otherwise cause their reports to be teeming with debts.[45]

The debt reporting rules are vague, contradictory, and ill-suited to enforcement and civil penalties. As then-Commissioner Goodman wrote, when the General Counsel tried and failed to pursue enforcement against a state party committee over its debt reporting: "The Act requires committees to disclose 'the amount and nature of outstanding debts and obligations.' … The Act does not define the key terms 'outstanding,' 'debt,' or 'obligation.'"[46]

In the case of a common paymaster agreement like the one here—where two entities share staff and overhead, where one makes the direct disbursements for these costs, and where the other reimburses the payor for its share—the General Counsel freely admits: **"Neither the Act nor Commission regulations expressly addresses how a political committee should report … debt obligations relating to a common paymaster agreement …"**[47] With no clear precedent, the General Counsel relies solely on the general debt-reporting requirement. The General Counsel's logic appears to be that, because AB Foundation pre-paid AB PAC for staff and overhead, and because AB PAC had yet to provide the full value of that staff and overhead, AB PAC was required to report debt to AB Foundation until the pre-payment was extinguished.

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[40] *See id.* at 4 (citing LEGISLATIVE HISTORY OF THE FEDERAL ELECTION CAMPAIGN ACT of 1971 270 (1981)).
[41] *Id.* (quoting 11 C.F.R. § 104.8 (1977)).
[42] *See id.* at 3.
[43] *See* 11 C.F.R. § 104.11(b).
[44] 52 U.S.C. § 30104(b)(8); *see also* FEC, Instructions for FEC Form 3X and Related Schedules 20 (May 2016), https://www.fec.gov/resources/cms-content/documents/fecfrm3xi.pdf.
[45] 11 C.F.R. § 104.11(a); *see also id.* § 104.3(d) (providing for reporting of outstanding debts and obligations on Schedule C or D, as appropriate).
[46] *See* Statement of Reasons of Commissioner Lee E. Goodman, MUR 6732 at 3; *see also* Certification, MUR 6732 (Oct. 27, 2015) (failing to find reason to believe a violation occurred), https://www.fec.gov/files/legal/murs/6732/15044381763.pdf.
[47] AB PAC Brief at 9 (emphasis added).

Several different scenarios show how the Commission does not enforce the debt reporting rules in analogous cost-sharing scenarios:

- The Commission has long allowed federal political committees to allocate shared expenses with nonfederal organizations with which they are affiliated, permitting a political committee to pay an expense initially, and then be reimbursed by the affiliate for its share of that expense up to 60 days later.[48] The Commission has not required the federal political committees to report the receivables from the affiliates as debts on Schedule D.

- The Commission has long allowed separate segregated funds to pay solicitation and administration expenses that their connected organizations could bear, and then be reimbursed by the connected organizations within 30 days.[49] The Commission has not required the separate segregated funds to report the receivables as debts on Schedule D.

- The Commission has required political committees, when seeking to avail themselves of corporate and union facilities for fundraising activities, to pay the corporations and unions in advance for the fair market value of the staff, lists and catering which they propose to use, to avoid prohibited facilitation of the making of contributions.[50] When it wrote these rules, the Commission did not indicate that the political committee might have to disclose a debt owed by the corporation or union, to the extent that the facilities had not yet been fully used.[51]

In a footnote, the General Counsel cites the "variety of methods available to share and allocate costs" among different organizations.[52] None clearly supports the General Counsel's position on debt reporting. Advisory Opinion 1995-22, which involved the ongoing sharing of staff by two party committees, actually undercuts the General Counsel's argument. In that opinion, the DCCC, which could then raise nonfederal funds and allocate its administrative expenses, asked the Commission to approve how it was reporting payments for employees shared with the DSCC. The DCCC would report the gross salary payment on Schedule H4, be reimbursed by the DSCC for a portion of the employee's salary, and then report the reimbursement as a negative disbursement on Schedule H4. The Commission approved the reporting method and made no mention of debt reporting.[53]

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[48] *See* 11 C.F,R. §§ 106.6, 106.7.
[49] *See id.* § 114.5(b)(3).
[50] *See id.* § 114.2(f)(2)(i)(A), (C), (E).
[51] *See* Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates, 60 Fed. Reg. 64,260 (1995), https://www.fec.gov/resources/cms-content/documents/notice1995-23-121495.pdf.
[52] *See* AB PAC Brief at 10 & n.41.
[53] *See* FEC Advisory Op. 1995-22 (DSCC), https://www.fec.gov/files/legal/aos/1995-22/1995-22.pdf.

In Advisory Opinion 1980-38, a U.S. House campaign and a state legislative campaign proposed to share computer and data entry expenses, with the state campaign incurring at least some expenses in anticipation of payment by the federal campaign. The Commission did tell the U.S. House campaign that it must report the amount owed to the state campaign as debt on Schedule D, but that was a case where, unlike here, the federal campaign had a clear, unmet obligation to pay for the value of goods and services it had *already* received.[54]

The General Counsel's recommendation draws no more support from the two MURs it cites, neither of which resulted in any penalty. MUR 6509, which involved Friends of Herman Cain, foundered at the probable cause stage, with the Commission unable to agree on entering into pre-probable cause conciliation with the committee.[55] That case was not a simple debt reporting dispute, but involved evidence that a 501(c)(3) nonprofit corporation underwrote the presidential candidate's testing-the-waters expenses. The reason to believe finding on debt reporting was essentially a lesser included offense in "an investigation into whether [the charity] funded Cain Committee activities with corporate advances …"[56] MUR 4369, which involved Friends of Jim Inhofe, turned on payments that the candidate had made to vendors on behalf of the campaign, with no disclosure until the campaign reimbursed him.[57] Even though the Commission found probable cause to believe a violation occurred, it took no further action against the committee.[58] And the Inhofe MUR again involved goods and services the committee had already received and for which it had not paid.

To recommend a finding of probable cause, the General Counsel has taken debt-reporting rules that are seldom enforced, present a series of ambiguities and internal inconsistencies, and written initially for a purpose not at stake here, which was to ensure that defunct campaigns would not refuse to pay their vendors. The recommendation admits that the Commission has never applied these rules to a common paymaster arrangement like the one involved here, but recommends proceeding anyway. Its arguments are undercut by the Commission's past approaches to

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[54] *See* FEC Advisory Op. 1980-38 (Allen for Congress), https://www.fec.gov/files/legal/aos/1980-38/1980-38.pdf. Neither of the other two advisory opinions cited by the General Counsel involves the subject of reportable debt. In one of them, a federal candidate proposed to share a campaign headquarters with a nonfederal campaign, and the Commission approved the proposal under certain conditions, one being "that your expenditures for the campaign headquarters must be reported in accordance with 2 U.S.C. 434." FEC Advisory Op. 1978-67 (Anderson), https://www.fec.gov/files/legal/aos/1978-67/1978-67.pdf (superseded in part by FEC Advisory Op. 1980-38 on other grounds). The other involved a simple application of the Commission's joint fundraising rules at 11 C.F.R. § 102.17. *See* FEC Advisory Op. 1988-24 (Dellums), https://www.fec.gov/files/legal/aos/1988-24/1988-24.pdf.

[55] *See* Certification, MUR 6509 (Friends of Herman Cain, Inc.), https://www.fec.gov/files/legal/murs/6509/15044380583.pdf (Oct. 1, 2015).

[56] *See* F&LA, MUR 6509 at 8, https://www.fec.gov/files/legal/murs/6509/15044380539.pdf (May 24, 2012).

[57] *See* F&LA, MUR 4369 (Friends of Jim Inhofe) at 5, https://www.fec.gov/files/legal/murs/4369.pdf (Dec. 16, 1996).

[58] *See* Certification, MUR 4369, https://www.fec.gov/files/legal/murs/4369.pdf (Sept. 25, 1997).

analogous situations, and even by some of the advisory opinions and MURs the brief cites. The General Counsel should withdraw the recommendation, or the Commission should reject it.

B. The Evidence Surrounding the Use of the Email List Undercuts the General Counsel's Claim of Misreporting

The remaining issues in this matter involve a mailing list owned by a political committee called Ready PAC. The General Counsel charges that AB PAC failed to report receiving the list from AB Foundation, which acquired its use from Ready PAC. The briefs charge further that AB PAC and CTR failed correctly to report a payment from CTR to AB PAC that was, in part, for access to the list. Ironically, while the briefs repeatedly fault Respondents for having failed fully to meet the General Counsel's demands for information, they do not say that Respondents produced substantial information about the acquisition of the list use, which undercuts the claim of a reporting violation.

As discussed above, Respondents worked to develop information in response to the General Counsel's requests, even though the requests sought information about core First Amendment activities; the matter involved transactions that had occurred more than three years before; AB PAC and AB Foundation had experienced turnover in its personnel and compliance consultants; and CTR was defunct and seeking termination.

Nonetheless, Respondents identified and produced additional information about the email list.[59] They found a copy of the signed list rental agreement between AB Foundation and Ready PAC, dated May 4, 2015, by which AB Foundation was to pay Ready PAC $150,000 for use of the email list until December 31, 2016.[60]

Significantly, the agreement did not represent an outright sale of the list. Rather, it provided that that AB Foundation would not have physical or remote access to the list, that AB Foundation instead could send one email per week to the list, and could "submit emails on behalf of itself or on behalf of any other organization for which David Brock is serving as Chair of the Board."[61] The agreement required those seeking to use the list to pay $500 to a list broker, Rising Tide Interactive, "for the administrative costs associated with formatting and sending" emails to the Ready PAC list.[62] CTR's FEC reports indeed show four $500 expenditures to Rising Tide between December 2015 and November 2016.[63]

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[59] *See* Letter, Brian G. Svoboda and Shanna Reulbach, Perkins Coie LLP, to Mark Shonkwiler, FEC (May 15, 2020).
[60] *See id.*, Exh. 1.
[61] *Id.* § 1(a).
[62] *Id.* § 3.
[63] *Filter 2015-2016 Disbursements: Correct the Record*, FEC, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00578997&recipient_name=rising

This additional information — which Respondents produced voluntarily to the Commission, and which the General Counsel does not mention in the briefs — cuts against the claim of misreporting by AB PAC and CTR in connection with the list. If AB PAC and CTR never received actual possession of the list, but if Ready PAC kept it, and instead allowed AB Foundation-related entities to pay its vendor to send emails on their behalf, then no misreporting would have occurred. AB Foundation would have paid Ready PAC to induce it to make the list available, but neither AB PAC nor CTR would have received any contributions in connection with the list. Rather, Ready PAC, through its vendor, would have sent emails that did not qualify as "public communications," that were not subject to the Commission's coordinated communication regulations, and that did not result in contributions.[64] The additional information produced by Respondents regarding the Ready PAC list provides still more reason for the General Counsel's recommendation to be withdrawn or rejected.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the General Counsel withdraw the recommendation to find probable cause to believe Respondents committed violations. Alternatively, Respondents respectfully request the Commission to reject the recommendation, take no further action, and close the file.

Very truly yours,

Marc Erik Elias
Ezra W. Reese

Brian G. Svoboda
Shanna M. Reulbach

Counsel to Respondents

+tide&recipient_name=rising+tide+interactive&two_year_transaction_period=2016 (last visited Jan. 6, 2021) (searching for "Rising Tide" and "Rising Tide Interactive"). CTR made seven other $500 payments to Rising Tide Interactive during 2015 and 2016, which may also have been related to the Ready PAC email list. *See id.*

[64] *See* 11 C.F.R. §§ 100.26, 109.21(c); *see also* F&LA, MUR 6657 (Akin) at 4-7, https://www.fec.gov/files/legal/murs/6657/13044343294.pdf (Sept. 17, 2013) (finding no reason to believe that a candidate received an in-kind contribution when a political committee rented email lists and then sent emails to those lists soliciting contributions for the candidate).

cc: Shana M. Broussard, Chair
Allen Dickerson, Vice Chair
Commissioner Sean J. Cooksey
Commissioner James E. “Trey” Trainor III
Commissioner Steven T. Walther
Commissioner Ellen L. Weintraub
Laura E. Sinram, Acting Secretary