

BEFORE THE FEDERAL ELECTION COMMISSION

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) MUR 7340
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RESPONSE OF AMERICA FIRST ACTION AND JON PROCH, AS TREASURER

By and through undersigned counsel, America First Action and Treasurer Jon Proch (collectively, “A1A”) respond to the Complaint in the above-captioned Matter Under Review. The Complaint, a serial regurgitation of media stories in search of a legal theory, comes nowhere near establishing “reason to believe” a violation of law has occurred. The Complaint’s conclusory allegations against A1A are completely hollow, and the Commission should dismiss this spurious matter and close the file.

FACTUAL BACKGROUND

A1A is an FEC-registered independent expenditure-only political committee organized as a Virginia nonstock corporation and tax exempt under § 527 of the Internal Revenue Code of 1986. *See* Declaration of Brian Walsh [hereinafter Walsh Decl.] ¶ 1. Its purpose, as stated in its Articles of Incorporation, “is to conduct and carry on as a political organization in a manner consistent with the meaning of section 527.” *See id.* ¶ 4. The organization was founded in April 2017 at the leadership and direction of Brian Walsh, and it was originally incorporated under the laws of the District of Columbia on April 13, 2017. *See id.* ¶ 3. Its Board of Directors subsequently voted to re-domesticate in Virginia in May 2017. *See id.*

A1A is governed under written bylaws. *Id.* ¶ 4. The bylaws provide that “[t]he business, property, affairs, and funds of [A1A] shall be managed, supervised, and controlled by its Board of Directors, which shall exercise all of the powers of the Corporation.” *See id.* ¶ 5. A1A’s

Board of Directors consists of three directors: Roy Bailey, Thomas Hicks, Jr., and Mr. Walsh.¹

See id. ¶ 7. The Board of Directors has exclusive authority to hire, appoint, demote, or otherwise control the officers of A1A under the corporate bylaws. *See id.* ¶ 8.

Under A1A’s bylaws, there must be at least two Board-appointed officers responsible for A1A’s daily governance, a President and a Treasurer. *See id.* ¶ 9. Mr. Walsh, as President, is “responsible for the management of the Corporation,” and as “principal executive officer . . . shall supervise and control all of the business and affairs of [A1A].” *See id.* ¶¶ 10, 12. Jon Proch is A1A’s Treasurer and thus is “responsible for [the organization’s] financial affairs” under the bylaws. *See id.* ¶¶ 11, 12.

A1A is a different entity than America First Policies, Inc., another Virginia nonstock corporation organized under § 501(c)(4) of the Internal Revenue Code. America First Policies was founded in January 2017, though it had no Board of Directors and was largely inactive until April 2017, and has its own bylaws and board of directors. Mr. Walsh also serves as President of America First Policies, and Mr. Proch is its Treasurer.

ARGUMENT

The Complaint, without any evidence, makes two – entirely erroneous – claims against A1A. First, it asserts that A1A is “established, financed, maintained, or controlled” by President Trump or Donald J. Trump for President, Inc. (“the Trump Campaign”). *See Compl.* ¶¶ 2.i, 84–100. Second, it contends that certain A1A consultants violated the Bipartisan Campaign Reform Act’s (“BCRA”) prohibition against agents of federal candidates or national party committees raising non-federal funds. *See id.* ¶¶ 2.ii–2.iv, 101–24. Neither allegation has any basis in law or

¹ At its founding in April 2017, A1A’s original directors were Mr. Walsh, James Nicholas Ayers, and Jon Proch. Mr. Ayers subsequently resigned in July 2017 to join the administration; Mr. Proch later resigned and serves only as Treasurer. *See Walsh Decl.* ¶ 6.

fact, and for the reasons below, A1A respectfully requests that the Commission dismiss the Complaint.²

I. A1A IS AN INDEPENDENT ORGANIZATION, NEITHER ACTING ON BEHALF OF NOR ESTABLISHED, FINANCED, MAINTAINED, OR CONTROLLED BY PRESIDENT TRUMP OR THE TRUMP CAMPAIGN.

The Complaint's first claim against A1A, that it is an entity acting on behalf of or "directly or indirectly established, financed, maintained or controlled by" President Trump or the Trump Campaign and prohibited from raising non-federal funds, fails on its face. Indeed, the Complaint makes no attempt whatsoever to apply – much less supply factual support for – the ten affiliation factors the Commission examines "in the context of the overall relationship" to assess such allegations. *See* 11 C.F.R. § 300.2(c)(2). Rather, essentially everything cited in the Complaint concerns a different organization (America First Policies) and events that allegedly occurred months before A1A was even founded. *See* Compl. ¶¶ 87–94. Nothing indicates that President Trump or the Trump Campaign controls A1A,³ and there is no basis for any further enforcement action on this claim. *See, e.g.*, First General Counsel's Report, MUR 7070 (Congressional Leadership Fund), at 6 (finding "additional enforcement proceedings . . . [un]warranted" in light of the Complaint's lack of information regarding a majority of the affiliation factors, the ambiguity of the complaint's allegations asserted, and direct denials of

² The Complaint alleges that America First Policies made coordinated expenditures with the Trump Campaign, *see Compl.* ¶¶ 2.v, 137–45, but makes no allegations that A1A has made any coordinated expenditure. Nevertheless, to avoid any doubt, A1A expressly states that it has not made any coordinate expenditure – whether for a communication or otherwise – with any federal candidate, campaign committee, or political party committee.

³ The only factual allegation the Complaint points to related to A1A concerns its retention of *former* campaign employee Corey Lewandowski as a consultant in 2017. *See Compl.* ¶ 92. It never explains how Mr. Lewandowski's work as an independent contractor – not a director, not an officer, not an employee – could plausibly establish either President Trump's or the Trump Campaign's *control* over A1A. A1A, moreover, terminated Mr. Lewandowski's agreement in March 2018.

candidate “control over [the outside group]”); Factual & Legal Analysis, MUR 5943 (Take Initiative America LLC), at 8–9.

Nonetheless, the facts plainly show that neither President Trump nor the Trump Campaign established, financed, maintained, or controlled A1A. *See, e.g.*, Factual & Legal Analysis, MUR 5943 (Giuliani), at 10. A1A was created under the leadership and direction of Mr. Walsh, who never had any role in the Trump Campaign. 11 C.F.R. § 300.2(c)(2)(ix). A1A has not received any funding from President Trump or the Trump Campaign, and only Mr. Trump’s son, Donald J. Trump, Jr., has made any contribution to A1A, in the amount of only \$5,000 (the federal PAC limit) – hardly a “significant amount” – on October 24, 2017, many months after A1A was created. *Id.* § 300.2(c)(2)(viii). A1A’s bylaws also do not grant “authority or ability” in either President Trump or his Campaign “to direct or participate in the governance of the entity” or to “hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of the entity.” *Id.* § 300.2(c)(2)(ii)–(iii). A1A’s Board of Directors, moreover, exercises “all [such] powers of the Corporation,” and manages, supervises, and controls its “business, property, affairs, and funds,” including the appointment of officers like Mr. Walsh. Finally, A1A and the Trump Campaign do not have any overlapping officers or employees, nor is there any indication that they have similar patterns of receipts and disbursements. *Id.* § 300.2(c)(2)(v), (x). Accordingly, A1A is not established, financed, maintained, or controlled by President Trump or the Trump Campaign, and the Commission should dismiss this conclusory claim. *See, e.g.*, First General Counsel’s Report, MUR 5467 (Michael Moore), 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 [law] has occurred.”” (citation omitted)).

II. A1A'S CONSULTANTS HAVE NOT SOLICITED FUNDS FOR A1A ON BEHALF OF ANY FEDERAL OFFICEHOLDER OR CANDIDATE OR NATIONAL PARTY COMMITTEE.

The Complaint's second claim against A1A identifies two A1A independent contractors – Marty Obst and Brad Parscale – whom the Complaint alleges, through their work for A1A, violated BCRA's "soft-money" prohibition on "agent[s] acting on behalf of a Federal candidate or individual holding Federal office" or national party committees. Compl. ¶¶ 101–24; *see also* 11 C.F.R. §§ 300.10, 300.61.⁴ Mr. Obst, through MO Strategies, Inc., provides traditional fundraising consulting services to A1A. *See* Walsh Decl. ¶ 15. Mr. Parscale, who is no longer under contract with A1A after being announced as Campaign Manager for the Trump Campaign,⁵ provided digital consulting services to the organization through his company, Parscale Strategy LLC, and did not directly solicit any donors. *See id.* ¶ 16. The Complaint concludes that Messrs. Parscale and Obst must have been violating BCRA when acting for A1A just because they may also have been performing similar services for either committees controlled by President Trump or Vice President Pence or the Republican National Committee.

The Commission has established that while BCRA "restricts the ability of Federal officeholders, candidates, and national party committees to raise non-Federal funds," it "does not prohibit individuals who are agents of the foregoing from also raising non-Federal funds for . . . outside groups."⁶ Advisory Op. 2015-09 (Senate Majority PAC), at 7 (quoting *Definition of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures*, 71 Fed. Reg. 4,975, 4,979 (Jan. 31, 2006) ("[M]erely acting in a

⁴ An "agent" of a federal candidate or officeholder is defined as "any person who has actual authority, either express or implied . . . [t]o solicit, receive, direct, transfer, or spend funds in connection with any election." 11 C.F.R. § 300.2(b)(3).

⁵ A1A terminated its consulting agreement with Mr. Parscale on February 28, 2018.

manner that benefits another is not necessarily acting on behalf of that person” (citation omitted)); *see also* Restatement (Third) of Agency § 1.01 cmt. c (2006) (“Despite their agency relationship, a principal and an agent retain separate legal personalities. Agency does not merge a principal’s personality into that of the agent, nor is an agent, as an autonomous person or organization with distinct legal personality, merged into the principal.”). Instead, to “preserve an individual’s ability to raise funds for multiple organizations, the Commission’s . . . regulations specifically require an agent to be acting on behalf of a candidate or party committee to be subject to [BCRA’s] soft money prohibitions.” 71 Fed. Reg. at 4,979 n.9; *accord* Advisory Op. 2015-09, at 7.

Individuals who are agents of federal candidates or national party committees thus may solicit funds on behalf of an outside group so long as they act in their own capacities “exclusively on behalf of” that organization when fundraising for it, “not on the authority of” the candidates, and raise funds on behalf of candidates or parties and the organization “at different times.” Advisory Op. 2003-10 (Nevada State Democratic Party et al.), at 5. The Commission will not find that an individual has acted “on the authority of a candidate” or party committee merely because he provided fundraising services for, or has a significant relationship with, the candidate or party. *See, e.g., id.* at 3–5 (concluding that a candidate’s son who had raised funds for the candidate would not necessarily act on authority of the candidate). Rather, there must be a showing that the individual “ha[d] actual authority to act on behalf of [the candidate] when soliciting non-federal funds [for another entity or party].” *Id.* at 4–5.

The Complaint offers no such evidence. A1A’s decision to hire Messrs. Parscale and Obst was made solely at the discretion of Mr. Walsh and A1A’s Board, and written contracts executed at arm’s length governed their consulting arrangements. *See* Walsh Decl. ¶¶ 15–16.

Under their contracts, they both represented that they had adequate knowledge of the Federal Election Campaign Act (“the Act”) and FEC Regulations and would perform their services in compliance with the law. *See id.* ¶ 17. Furthermore, their contracts expressly provided:

- America First recognizes that Consultant may engage in fundraising activities on behalf of other political committees restricted by law to raising funds within the federal limits and source prohibitions of the Federal Election Campaign Act, as amended (“FECA”). Consultant understands that America First may solicit and receive donations of funds that are not subject to the contribution limits, source prohibitions, and reporting requirements of FECA. At all times while acting within the scope of this Agreement, Consultant agrees that it will have no authority to, and will not hold itself out or otherwise represent itself as soliciting funds as an agent of, or otherwise on behalf of any other entity, including any federal candidate campaign committee or national, state, or local political party committee.

See id. ¶ 18. The Complaint can point to nothing indicating that Mr. Obst, an experienced political fundraiser, ever violated the terms of his contract or held himself out as acting on behalf of Vice President Pence. *See, e.g.*, Advisory Op. 2015-09, at 7. Mr. Parscale merely provided digital-consulting services and did not directly solicit donors. The Complaint thus seeks simply to impose a strict rule proscribing consultants for federal campaigns or party committees from working on behalf of outside groups. That has never been the law, and the Commission should dismiss these groundless claims.

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For the foregoing reasons, A1A respectfully requests that the Commission dismiss the Complaint and close the file as the Complaint fails to demonstrate any reason to believe A1A has violated the law.

Respectfully submitted,

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*Counsel for America First Action and Jon
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Attachment

BEFORE THE FEDERAL ELECTION COMMISSION

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MUR 7340 (America First Action, Inc.)

DECLARATION OF BRIAN O. WALSH

I, Brian O. Walsh, declare as follows:

1. My name is Brian O. Walsh. I am a director and the President of America First Action, Inc., an independent expenditure-only committee registered with the Federal Election Commission (“FEC”) (C00637512) that is organized as a Virginia nonstock corporation and is tax exempt under § 527 of the Internal Revenue Code. My business address is 1400 Crystal Drive, Suite 850, Arlington, Va. 22202. I have personal knowledge of the facts described in this Declaration.

2. I have never been employed by nor had any role in Donald J. Trump for President, Inc. or the Trump administration.

3. America First Action was originally formed upon my discretion and at my direction and incorporated in Washington, D.C., on April 13, 2017. The corporation was re-domesticated in Virginia on May 25, 2017, upon a vote of the Board of Directors.

4. America First Action is governed by written bylaws, which provide, “The Corporation shall be operated exclusively for the purposes as set forth in its Articles of Incorporation.” The Articles of Incorporation state:

The purpose for which the Corporation is organized is to conduct and carry on as a political organization in a manner consistent with the meaning of section 527 of the [Internal Revenue Code], such purpose including but not limited to, engaging in any lawful activity incidental to the foregoing purposes and not otherwise prohibited by the [Code of Virginia], section 527 of the [Internal Revenue Code], the Corporation’s Bylaws or the[] Articles of Incorporation.

5. Under the corporate bylaws, "The business, property, affairs, and funds of the Corporation shall be managed, supervised, and controlled by its Board of Directors, which shall exercise all of the powers of the Corporation, subject to the limitations contained in the Articles, the[] Bylaws, and applicable law."

6. The first directors were elected to the Board on April 13, 2017. The initial Board of Directors consisted of Nicholas Ayers, Jon Proch, and me.

7. The current board consists of two independent directors, Roy Bailey and Thomas Hicks, Jr., in addition to me.

8. Under the corporate bylaws, the Board of Directors has exclusive power to appoint the officers of America First Action.

9. Under the corporate bylaws, "The Corporation must have a minimum of two (2) separate officers at all times, one responsible for the management of the Corporation (the 'President') and another responsible for the financial affairs of the Corporation (the 'Treasurer')."

10. Under the corporate bylaws,

The President shall be the principal executive officer of the Corporation and shall supervise and control all of the business and affairs of the Corporation. He or she shall have authority to sign any contracts, agreements, or other instruments on behalf of the Corporation except as may be specifically limited by the[] Bylaws or by the Board of Directors. The President shall preside at meetings of the Board of Directors. The President shall perform all duties incident to the office of President and such other duties as may be prescribed by the[] Bylaws or by the Board of Directors from time to time.

11. Under the corporate bylaws,

The Treasurer shall keep correct and complete records of account, showing accurately at all times the financial condition of the Corporation. He or she shall be the legal custodian of all monies, notes, securities, and other valuables which may from time to time come into the possession of the Corporation.

12. The Board of Directors appointed me President of America First Action on April 13, 2017. The Board appointed Jon Proch Treasurer of America First Action on the same day.

13. America First Action has not received any funding from President Trump or Donald J. Trump for President, Inc. Only Donald J. Trump, Jr. has contributed \$5,000 to America First Action on October 24, 2017, as disclosed on America First Action's relevant FEC report.

14. No employee or officer of America First Action works for the Trump Campaign.

15. In executing my authority under the corporate bylaws, I made the decision to retain Marty Obst, through his company MO Strategies, Inc., as an independent contractor to America First Action. MO Strategies, Inc. provides America First Action with professional fundraising consulting services under the terms of an independent contractor agreement.

16. In executing my authority under the corporate bylaws, I made the decision to retain Brad Parscale, through his company Parscale Strategy LLC, as an independent contractor to America First Action. Parscale Strategy LLC provided America First Action with digital and online strategy consulting services, including services related to America First Action's digital fundraising activities, under the terms of an independent contractor agreement. The agreement did not contemplate Mr. Parscale directly soliciting donors or prospective donors on behalf of America First Action. America First Action terminated its consulting agreement with Parscale Strategy LLC on February 28, 2018, upon learning that Mr. Parscale would serve as Campaign Manager of Donald J. Trump for President, Inc.

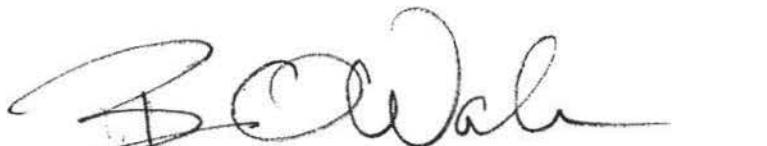
17. Under their independent contractor agreements with America First Action, MO Strategies, Inc. and Parscale Strategy LLC represented that they understood and would comply with all federal, state and local statutes, regulations, ordinances, and rules, including, the Federal Election Campaign Act of 1971, as amended, and FEC regulations.

18. America First Action's independent contractor agreements with MO Strategies, Inc. and Parscale Strategy LLC further provided,

America First recognizes that Consultant may engage in fundraising activities on behalf of other political committees restricted by law to raising funds within the federal limits and source prohibitions of the Federal Election Campaign Act, as amended ("FECA"). Consultant understands that America First may solicit and receive donations of funds that are not subject to the contribution limits, source prohibitions, and reporting requirements of FECA. At all times while acting within the scope of this Agreement, Consultant agrees that it will have no authority to, and will not hold itself out or otherwise represent itself as soliciting funds as an agent of, or otherwise on behalf of any other entity, including any federal candidate campaign committee or national, state, or local political party committee.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on April 30, 2018.



Brian O. Walsh