

**BEFORE THE FEDERAL ELECTION COMMISSION**

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 ) **MUR 7340**  
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**RESPONSE OF AMERICA FIRST POLICIES, INC.**

By and through undersigned counsel, America First Policies, Inc. ("A1P") responds to the Complaint in the above-captioned Matter Under Review. The Complaint's allegations against A1P have no basis in law or fact and should be dismissed. Accordingly, A1P respectfully requests that the Commission find there is no reason to believe a violation has occurred and close the file without any further enforcement action in this specious matter.

**FACTUAL BACKGROUND**

A1P is a Virginia nonstock corporation tax exempt under § 501(c)(4) of the Internal Revenue Code of 1986. *See* Attachment, Declaration of Brian Walsh [hereinafter Walsh Decl.]

¶ 1. Its purpose, as stated in its Articles of Incorporation, "is to promote social welfare within the meaning of section 501(c)(4) of the [I.R.C.], . . . including but not limited to . . . the advancement of social welfare by promoting ideas, policies and/or legislation to address major problems burdening the United States, stifling economic growth and job creation, and/or compromising national security." *See id.* ¶ 4. The organization was originally incorporated under the laws of the District of Columbia on January 27, 2017, but had no Board of Directors and was largely inactive until April 2017, at which time a Board of Directors was elected and voted to re-domesticate the corporation in Virginia and appoint Brian Walsh as the President. *See id.* ¶ 3.

A1P is governed under written bylaws. *See id.* ¶ 4. The bylaws provide that "[t]he business, property, affairs, and funds of [A1P] shall be managed, supervised, and controlled by

its Board of Directors, which shall exercise all of the powers of the Corporation.” *See id.* ¶ 5.

A1P’s Board consists of three outside directors: Roy Bailey, Harold Hamm, and Thomas Hicks, Jr.<sup>1</sup> *See id.* ¶¶ 6–7. The Board of Directors has exclusive authority to hire, appoint, demote, or otherwise control the officers of A1P under the corporate bylaws. *See id.* ¶ 8.

Under A1P’s bylaws, there must be at least two Board-appointed officers responsible for A1P’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 [A1P].” *See id.* ¶¶ 10, 12. Jon Proch is A1P’s Treasurer and thus “responsible for [the organization’s] financial affairs” under the corporate bylaws. *See id.* ¶¶ 11, 12.

A1P is a different entity than America First Action, Inc., another Virginia nonstock corporation that is registered with the FEC as an independent expenditure-only political committee. America First Action was founded in April 2017 and has its own bylaws and board of directors. Mr. Walsh also serves as President of America First Action, and Mr. Proch is its Treasurer.

## ARGUMENT

The Complaint makes three primary claims against A1P, each one as fallacious as the next. First, it asserts that A1P is “established, financed, maintained, or controlled” by President Trump or Donald J. Trump for President, Inc. (“the Trump Campaign”). Second, it contends that certain A1P consultants violated the Bipartisan Campaign Reform Act’s (“BCRA”) prohibition against agents of federal candidates or national party committees raising non-federal funds.

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<sup>1</sup> Nicholas Ayers and Douglas Ammerman previously served as Directors of A1P. Mr. Ayers resigned in July 2017 when he joined the administration, and subsequently was replaced by Mr. Bailey. Mr. Ammerman resigned in November 2017, and was replaced by Mr. Hamm. *See* Walsh Decl. ¶ 6.

Lastly, it accuses AIP of making coordinated expenditures on behalf of President Trump or the Trump Campaign through monthly polling and surveys AIP has done.

None of these allegations has merit. The Complaint, moreover, proves to be nothing more than a catalogue of legal conclusions, conclusory assertions, and speculation drawn from a running recitation of news articles. It thus is blatantly insufficient to establish reason to believe and should be dismissed. *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)); *see also* Statement of Reasons of Comm'rs Petersen, Goodman & Hunter, MUR 6661 (Robert E. Murray), at 8 ("[U]nsworn news reports, anonymous sources, and an author's summary conclusions and paraphrases provide questionable legal basis to substantiate a reason to believe finding.").

**I. AIP 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 erroneous claim is that AIP is an entity acting on behalf of or "directly or indirectly established, financed, maintained or controlled by" President Trump or the Trump Campaign and thus prohibited from raising non-federal funds. *See* Compl. ¶¶ 2.i, 84–100; *see also* 11 C.F.R. §§ 300.60, 300.61. This is false, and the Complaint presents no credible evidence of any such outside control or influence over AIP. Accordingly, the claim should be dismissed.

To determine whether an entity is "established, financed, maintained or controlled by" a person, the Commission considers ten non-exhaustive factors "in the context of the overall relationship" between the person and the entity. *See* First General Counsel's Report, MUR 7070

(Congressional Leadership Fund), at 4. The Complaint, however, fails to discuss, let alone provide any factual support for, almost all of those factors. For example, the Complaint offers no evidence that:

- President Trump, the Trump Campaign, or an agent acting on President Trump's behalf caused or arranged for any financing – let alone “in a significant amount” – to A1P. *(They have not.)*
- President Trump, the Trump Campaign, or an agent acting on President Trump's behalf has a voting interest or other formal governance control over A1P. *(They do not.)*
- President Trump, the Trump Campaign, or an agent acting on President Trump's behalf can hire, appoint, demote, or otherwise control A1P's officers or other decisionmaking employees. *(They cannot.)*
- There are any common or overlapping officers or employees between the Trump Campaign and A1P. *(There are not.)*

See Walsh Decl. ¶¶ 2, 5, 8, 10, 11, 13–14; see also 11 C.F.R. § 300.2(c).

The most the Complaint can muster are allegations, primarily from unsourced and ambiguous media reports, suggesting that some former Campaign officials may have either encouraged or been involved in the founding of A1P, or served as outside consultants to A1P. See Compl. ¶¶ 88–90.<sup>2</sup> Yet the Commission has made clear that such attenuated connections, standing alone, are not enough. In MUR 5338 (Leadership Forum), for example, the Commission concluded that an outside group was not “established, financed, maintained, or controlled” by either the NRCC or House Republican leadership. It reached that conclusion notwithstanding that the group's president, vice-president, secretary-treasurer, and incorporator had been previously employed by the NRCC or members of the House Republican leadership and press accounts in the complaint reflected statements from the NRCC indicating support for

<sup>2</sup> The Complaint also points to a meeting held at the White House with President Trump in December 2017 where the attendees allegedly discussed the 2017 special elections and thoughts on the 2018 mid-term elections. The Complaint does not allege that any of A1P's officers or directors attended the meeting, or that A1P was even discuss. This ambiguous account of a meeting hardly establishes anyone's control over A1P. See Walsh Decl. ¶ 21.

the organization's creation. *See* First General Counsel's Report, MUR 5338 (Leadership Forum), at 6–7. Such information alone did not establish the NRCC's or House Leadership's actual control over the entity. *Id.* at 18; *accord* First General Counsel's Report, MUR 5343 (Democratic Senate Majority Fund), at 12; Factual & Legal Analysis, MUR 5943 (Giuliani), at 10.

The Complaint in this matter equally fails to support its conclusory allegations that President Trump or his Campaign controls A1P, and the facts show plainly that the allegations are untrue. *See, e.g.*, Factual & Legal Analysis, MUR 5943 (Take Initiative America LLC), at 8–9 (dismissing “establish, finance, maintain, or control” allegation when the complaint's cited facts made only “tenuous connections” to a violation and the respondent's sworn affidavit suggested other components of the test were inapplicable); First General Counsel's Report, MUR 5943 (Rudy Giuliani), at 13–14. As explained above, A1P's corporate bylaws impart no power to President Trump or any employee of the Trump Campaign. All decisionmaking power rests exclusively with the independent Board of Directors and Mr. Walsh – who never had any position in the Trump Campaign. This allegation must be dismissed.

## **II. A1P'S CONSULTANTS HAVE NOT SOLICITED FUNDS FOR A1P ON BEHALF OF ANY FEDERAL OFFICEHOLDER OR CANDIDATE OR NATIONAL PARTY COMMITTEE.**

The Complaint also identifies two A1P independent contractors, Marty Obst and Brad Parscale, whom it alleges, through their work for A1P, 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. ¶¶ 2.ii–2.iv, 101–24; *see also* 11 C.F.R.



§§ 300.10, 300.61.<sup>3</sup> Mr. Obst, through MO Strategies, Inc., provides traditional fundraising consulting services to AIP. *See* Walsh Decl. ¶ 15. Mr. Parscale, who is no longer under contract with AIP after being announced as Campaign Manager for the Trump Campaign,<sup>4</sup> provided digital consulting services, not fundraising, to the organization through his company, Parscale Strategy LLC. *See id.* ¶ 16.

According to the Complaint, Messrs. Parscale and Obst must have been violating BCRA when acting for AIP simply 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 made clear 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.” 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 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

<sup>3</sup> 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).

<sup>4</sup> AIP terminated its consulting agreement with Mr. Parscale on February 28, 2018. *See* Walsh Decl. ¶ 16.

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 or party] when soliciting non-federal funds [for another entity]." *Id.* at 4–5.

The Complaint offers no such evidence. A1P's decision to hire Messrs. Parscale and Obst was made solely at the discretion of Mr. Walsh and A1P'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, under his agreement, merely provided digital services and did not 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.

### **III. A1P HAS NOT MADE ANY EXPENDITURES COORDINATED WITH PRESIDENT TRUMP OR THE TRUMP CAMPAIGN.**

Finally, the Complaint falsely claims that A1P's payments for polling and research must have been coordinated expenditures on behalf of President Trump or the Trump Campaign under the Commission's general coordinated expenditure regulation, 11 C.F.R. § 109.20(b). Compl. ¶¶ 2.v, 137–45. A1P's polling is an initiative begun by and done solely at the direction of Mr. Walsh, not in coordination with the President or the Trump Campaign. *See* Walsh Decl. ¶ 19–20. A1P's polling, moreover, primarily focuses on policy and legislative matters and is done to educate A1P's own activities, and the results are posted publicly on A1P's website. *See id.* ¶ 19. Furthermore, the Complaint's assertion that polling during the 2018 cycle has been done to influence a 2020 presidential election, and thus constitutes an in-kind contribution to a campaign not on the ballot for years, makes no sense and is inconsistent with the FEC's regulations, which expressly recognize that timing matters. *Cf.* 11 C.F.R. § 109.21(c)(4)(ii); Explanation & Justification, *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,197–99 (June 8, 2006)



(recognizing that time frames are important to establish bright-lines and avoid “unnecessarily capturing a substantial amount of speech that is unrelated to elections”).

It goes without saying that for there to be a finding of a coordinated expenditure under § 109.20(b), there must be some evidence indicating that an “expenditure” was “coordinated” – that is, “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate or candidate’s authorized committee, or a political party committee.” 11 C.F.R. § 109.20(a). Yet the Complaint can point to none. Instead, it appears to base its wishful theory on press accounts of two meetings allegedly held months *after* A1P had already begun its polling activity. *See* Compl. ¶¶ 27, 139; *see also id.* ¶ 45 (noting that A1P began polling in summer 2017). This is hollow conjecture. The Complaint can point to no evidence suggesting these meetings had anything to do with A1P’s polling activity, or that any A1P spending was ever discussed. Furthermore, neither Mr. Walsh nor any other officer or director of A1P was even at the December meeting.<sup>5</sup> *See* Walsh Decl. ¶ 21. The Complaint’s coordination allegations thus rest on nothing but “unwarranted legal conclusions from asserted facts, or mere speculation” that can “not be accepted as true” and must be dismissed. *See* Factual & Legal Analysis, MUR 5943 (Giuliani), at 11–12 (dismissing coordination allegations for lack of evidence of coordination).

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For the foregoing reasons, A1P respectfully requests that the Commission dismiss the Complaint and close the file as the Complaint fails to demonstrate any reason to believe A1P has violated the law.

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<sup>5</sup> Two then-independent contractors to A1P – Brad Parscale and Corey Lewandowski – allegedly attended. Yet their attendance was not at the direction of Mr. Walsh or A1P. *See* Walsh Decl. ¶ 21. Furthermore, neither Mr. Parscale nor Mr. Lewandowski had decision-making authority with respect to A1P’s polling efforts, have been done at the Mr. Walsh’s sole discretion. *See id.* ¶ 19.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "E. Stewart Crosland", is positioned above a horizontal line.

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# **Attachment**

**BEFORE THE FEDERAL ELECTION COMMISSION**

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**MUR 7340 (America First Policies, Inc.)**

**DECLARATION OF BRIAN O. WALSH**

I, Brian O. Walsh, declare as follows:

1. My name is Brian O. Walsh. I am the President of America First Policies, Inc., a Virginia nonstock corporation that is tax exempt under § 501(c)(4) 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 Policies was originally incorporated in Washington, D.C., on January 27, 2017. The corporation was re-domesticated in Virginia on April 25, 2017, upon a vote of the Board of Directors.

4. America First Policies 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 promote social welfare within the meaning of section 501(c)(4) of the Code, such purpose including but not limited to: (1) the advancement of social welfare by promoting ideas, policies and/or legislation to address major problems burdening the United States, stifling economic growth and job creation, and/or compromising national security, and (2) engaging in any lawful activity incidental to the foregoing purposes and not otherwise prohibited by the Act, Section 501(c)(4) of the 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. America First Policies’ first directors were not elected to the Board until April 13, 2017. The initial Board of Directors consisted of the following independent directors: Nicholas Ayres, Thomas Hicks, Jr., and Douglas Ammerman. Mr. Ayers subsequently resigned from the Board in July 2017 when he joined the administration and was replaced by Roy Bailey. Mr. Ammerman resigned in November 2017 and was replaced by Harold Hamm.

7. Messrs. Hicks, Bailey, and Hamm comprise America First Policies’ current Board of Directors. Each is an independent director.

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

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 Policies on April 13, 2017. The Board appointed Jon Proch Treasurer of America First Policies on the same day.

13. Neither President Trump nor the Trump Campaign, nor anyone acting on their behalf, has caused or arranged for any financing to America First Policies.

14. No employee or officer of America First Policies 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 Policies. MO Strategies, Inc. provides America First Policies 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 Policies. Parscale Strategy LLC provided America First Policies with digital and online strategy consulting services, under the terms of an independent contractor agreement. America First Policies does not engage in digital fundraising activity, and the agreement did not contemplate Mr. Parscale directly soliciting donors or prospective donors on behalf of America First Policies. America First Policies 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 Policies, 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 Federal Election Commission regulations.

18. America First Policies' 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.


19. Since June 2017, America First Policies has engaged in monthly polling activity in furtherance of its organizational purpose and activities. This polling work began at my discretion, and continues be done solely at my direction and under my supervision. America First Policies, at my direction, posts the results of its surveys publicly on its website.

20. I have never coordinated any of America First Policies' polling activity with President Trump or the Trump Campaign, or anyone acting on their behalf.

21. I did not attend any meetings with President Trump at the White House in December 2017, nor did anyone else acting at my direction and authority on behalf of America First Policies.

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