



10 G Street NE, Suite 600 | Washington, DC 20002

December 6, 2021

Office of the General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: MURs 7291 and 7449

Dear Ms. Stevenson:

Hillary for America and Elizabeth Jones in her official capacity as treasurer (“HFA”) and the DNC Services Corporation/Democratic National Committee and Virginia McGregor in her official capacity as treasurer (the “DNC”) (collectively, “Respondents” or the “Committees”) hereby submit this brief in response to the General Counsel’s Briefs in the above matters, dated November 19, 2021. Because the General Counsel’s Briefs present no factual or legal basis to find probable cause that Respondents violated the Federal Election Campaign Act of 1971, as amended (the “Act”), the Federal Election Commission (the “Commission” or “FEC”) should immediately dismiss these matters and close the file.

I. Statement of the Case

These matters, which concern events that largely took place over five years ago, turn on a single, narrow question: whether the Committees used an acceptable “purpose” description when reporting their disbursements to Perkins Coie LLP (“Perkins Coie” or the “Firm”) that also covered work the Firm subcontracted to a third-party vendor, Fusion GPS. The Committees timely reported all of the relevant disbursements and the Office of General Counsel (“OGC”) rightly makes no argument that the Committees were required to further identify the subcontractor in some way. The only issue is the wording of the purpose description.

As OGC must acknowledge in its brief, the Commission has previously provided guidance that, “a description of purpose such as ‘Consultant-Legal’ is sufficient for a disbursement to a consultant” and that “‘Legal/Legal Fees/Legal Services’ [are also] a sufficient description of purpose.”¹ This should end the analysis. The Committees generally described the relevant payments to the Firm as “Legal Services” or “Legal and Compliance Consulting,” clearly in line with the Commission’s approved descriptions.² These phrases also exactly and accurately describe what the payments were for and what work was being done.

¹ General Counsel’s Brief (DNC) at 8 (Nov. 19, 2021); General Counsel’s Brief (HFA) at 7 (Nov. 19, 2021).

² General Counsel’s Brief (DNC) at 1; General Counsel’s Brief (HFA) at 1.

The essential and actually uncontested fact is that the work that Fusion GPS performed for Perkins Coie did make up part of the “legal services” that Perkins Coie provided to the Committees. Perkins Coie retained Fusion GPS. Fusion GPS performed work at Perkins Coie’s direction, engaged in communications protected by the attorney client privilege, and delivered work product to Perkins Coie that is covered by the attorney work product doctrine. Perkins Coie used the work product to assist it in providing privileged legal advice to the Committees, including evaluating potential litigation risks relating to information distributed in connection with the 2016 election.³ While OGC raises the question, based solely on unreliable press reports and citations to its own previous characterizations, that Fusion GPS may have been doing “opposition research,” this is not some term of art, a phrase that has some meaning under the Act or Commission regulations, or indeed, even an approved “purpose” description.⁴ Fusion GPS was performing research, but research *for* Perkins Coie to inform the Firm’s legal advice and legal consulting. This matter was first brought to the Commission over four years ago, OGC began a formal investigation over two years ago, and it has issued numerous subpoenas and requests for information. This long and thorough process has not yielded any evidence of any kind to suggest that the work was anything other than research to support Perkins Coie’s legal advice. The Committees used an approved purpose description, and the description matched the work.

The Committees’ reporting practices in these matters was also routine. It is exceedingly common for lawyers to use third parties as part of their legal services, including expert witnesses, accountants, investigators, researchers, and translators. Lawyers also provide a wide array of legal services to political committees, including litigation, compliance advice, policy drafting, vetting, analysis of legal documents, and legal strategy. However, the Commission has always stated that a simple purpose description like “Legal” or “Legal Consulting” is correct for the broad variety of legal work done by lawyers and their supporting subcontractors. The Commission has never suggested that some further, or different, description was required. Indeed, requiring some additional description regarding subcontractors is contrary to the clearly established FEC precedent that there is no obligation for political committees to disclose payments by their vendors to bona fide subcontractors. Purpose descriptions on FEC reports are by their nature short and general. The Commission, for example, lists such broad descriptions as “wages,” “fundraising (to a vendor),” and “campaign consulting,” all as adequate purposes.⁵ The purpose descriptions used by the Committees here complied with current Commission requirements.

Given the basic nature of the purpose description requirement, the Commission has adopted a formal policy that pursuing any enforcement action based on a disputed description is a “rare circumstance.”⁶ There is no legal or factual justification for this matter to be such a “rare” case

³ See DNC’s Objections and Responses to Order to Submit Written Answers and Subpoena to Produce Documents at 4 (Apr. 13, 2021) (hereinafter “DNC Response”); HFA’s Objections and Responses to Order to Submit Written Answers and Subpoena to Produce Documents at 4 (Apr. 13, 2021) (hereinafter “HFA Response”).

⁴ See FEC, Purposes of Disbursement (last updated Aug. 21, 2018), <https://www.fec.gov/help-candidates-and-committees/purposes-disbursements/> (hereinafter “Purposes of Disbursement”) *cf.* Statement of Policy: “Purpose of Disbursement” Entries for Filings With the Commission, 72 Fed. Reg. 887, 888 (indicating that additional guidance will be posted at the above URL) (hereinafter “Purpose Statement of Policy”).

⁵ See Purposes of Disbursement.

⁶ Purpose Statement of Policy at 888.

or for any further use of Commission resources. For example, there is no evidence to suggest that there was some systemic failure or widespread practice of missing or expressly prohibited purpose descriptions on the Committees' reports, as was the case in the handful of matters cited by OGC where the Commission has previously pursued purpose description issues. If the Commission believes that there should be further differentiation in the purpose descriptions used for legal services, it can easily update its list of inadequate and adequate purpose descriptions on its website. It can provide clear guidance to the regulated community. However, there is no basis for taking any further action against the Committees under the current rules, and the Commission should not create new requirements, applied retroactively through enforcement actions. Just as in other 2016 matters that the Commission has recently closed, the only appropriate course of action in line with the Commission's policies and practices is to find no probable cause to believe that a violation occurred or to take no further action and close MURs 7291 and 7449 immediately.

Respondents also request a probable cause hearing pursuant to the Commission's Procedural Rules for Probable Cause Hearings in order to have "an opportunity to present the respondent's arguments in person to the Commissioners *before* the Commission makes a determination as to whether there is 'probable cause to believe' that the respondent violated the Act or Commission regulations."⁷ Respondents would expect to explain that the research conducted by Fusion GPS was part of the legal services provided by Perkins Coie to the Respondents, that as a matter of law, the purpose descriptions they used were appropriate, and the other arguments raised in this brief.

II. Factual Background

The Committees retained Perkins Coie to provide a wide range of legal and compliance consulting services throughout the 2016 election cycle. As Respondents explained in their responses to the Commission's requests for information, dated April 13, 2021, the substance of the specific work performed by Perkins Coie, including the aspects of its work that were subcontracted to Fusion GPS, is protected under the attorney-client privilege and work product doctrine.⁸ Without waiving that privilege, Respondents disclosed that Perkins Coie retained Fusion GPS to perform research and consulting services in support of Perkins Coie's provision of legal advice to the Committees, including evaluating potential litigation risks relating to information distributed in connection with the 2016 election cycle.⁹ Fusion GPS's services in support of the Firm's provision of legal advice to the Committees included research, such as requesting, pulling, and analyzing publicly available records, and compiling and assessing information gathered by its subcontractors.¹⁰ Fusion GPS performed research at the overall direction of Perkins Coie into matters that would assist the Firm's provision of legal services to the DNC and HFA.¹¹ Other than counsel, DNC and HFA personnel did not engage with Fusion

⁷ Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64,919 (Nov. 19, 2007); *see also* Amendment of Agency Procedures for Probable Cause Hearings, 74 Fed. Reg. 55,443 (Oct. 28, 2009).

⁸ *See* HFA Response at 3; DNC Response at 3.

⁹ HFA Response at 7; DNC Response at 8.

¹⁰ *Id.*

¹¹ *Id.*

GPS.¹² These subcontractor costs were part of the overall scope of Perkins Coie's legal and compliance consulting services that it rendered to the DNC and HFA.

Neither HFA nor the DNC contracted with Fusion GPS nor made any direct payments to Fusion GPS.¹³ As with any typical subcontractor relationship, Fusion GPS billed Perkins Coie for its work, and Perkins Coie included those costs, plus its own fees for managing that work, in the amounts billed to the Committees.¹⁴ On its invoices to the Committees, Perkins Coie separately listed its disbursements for expenses incurred in support of its legal work, as distinct from its charges for its own attorneys' time. In every instance, the Committees timely disclosed payments made to Perkins Coie which included the Fusion GPS work on their FEC reports, generally reporting the purpose of those disbursements as "Legal and Compliance Consulting" (in the case of the DNC) or "Legal Services" (in the case of HFA).¹⁵ While the DNC and HFA used different purpose descriptions because they were independent entities, each with their own separate compliance staff that worked on FEC reports, both Committees' descriptions match the FEC's multiple approved purpose descriptions for legal work.

These are the relevant facts before the Commission. These are essentially the same facts provided by the Committees in their initial responses to the complaints at issue here, and despite spending years conducting an investigation that included multiple subpoenas and requests for information, OGC has not presented any material facts to the contrary. There are no facts or evidence before the Commission to show that the substance of the work performed by Fusion GPS was anything other than work for Perkins Coie to inform their legal services provided to the Committees. Fusion GPS's work did include "research," but research that was used by Perkins Coie to provide legal services.

III. Legal Analysis

a. The Law and FEC Policy Are Clear on How to Describe the Purpose of Disbursements for a Wide Range of Legal Services

The law on this matter is simple and straightforward. The Act and its accompanying regulations require political committees to report the purpose of each expenditure in excess of \$200 that they itemize on their periodic FEC reports.¹⁶ The "purpose" of an expenditure means "a brief statement or description of why the disbursement was made."¹⁷ As a "rule of thumb" the

¹² *Id.*

¹³ HFA Response at 4; DNC Response at 4.

¹⁴ *Id.*

¹⁵ In one instance where the DNC made a payment to Perkins Coie for work that Fusion GPS completed for the Firm, it reported the purpose of the expenditure as "Research Consulting." *See* Federal Election Commission, Hillary for America, 2015-2016 Reports, <https://www.fec.gov/data/committee/C00575795/?tab=filings&cycle=2016#reports>; Federal Election Commission, DNC Services Corp./Dem. Nat'l Committee, 2015-2016 Reports, <https://www.fec.gov/data/committee/C00010603/?tab=filings&cycle=2016#reports>. In other certain instances, where the DNC paid Perkins Coie for specific other expenses, it described those using purpose description such as "Postage & Shipping," "Travel," "Data Services Subscription" or the like. These purpose descriptions are not at issue in this matter.

¹⁶ 52 U.S.C. § 30104(b)(5)(A); 11 C.F.R. § 104.3(b).

¹⁷ 11 C.F.R. § 104.3(b)(3)(i)(A).

Commission has said that filers should consider the question: “Could a person not associated with the committee easily discern why the disbursement was made when reading the name of the recipient and the purpose?”¹⁸ Additionally, to provide certainty to the regulated community, the Commission has provided a list of clearly “acceptable” and “not acceptable” purpose descriptions that filers can use to ensure they are complying with their reporting obligations.¹⁹ The Commission has explicitly stated that “legal,” “legal fees,” “legal services,” “legal consulting,” “compliance consulting,” and “Consultant-legal” are all appropriate descriptions of purpose under Commission guidelines.²⁰ These are the terms that the Committees used in this case.

Moreover, the Commission has never indicated in any way that the diverse range of legal services performed by lawyers for political parties and campaigns need to be differentiated in the purpose descriptions political committees use on their campaign finance reports. As detailed in the Committees’ earlier responses to the Commission in these matters, it is common for lawyers to provide a wide variety of different types of legal services and to retain third parties to support their representation of clients. For instance, law firms regularly contract with expert witnesses, researchers, document review specialists, e-discovery services, private transcription services, translators, interpreters, and investigators, among other third parties.²¹ The academic literature and current industry practices show that these relationships are “common” and recognized as a standard practice by the American Bar Association.²² Law firms have a particularized need for subcontractors that can assist in the development of detailed factual records.²³ For example, attorneys in the political space often rely on research findings from subcontractors when performing legal review of public communications. Attorneys use subcontractors when they need to confirm that there is adequate factual basis for a client’s claims or allegations and that the client does not make any statements that could trigger a defamation suit. This kind of work was especially significant in the 2016 election cycle, given an increased risk of such actions—even frivolous ones. As is well known, candidate Donald Trump had a history of such suits and repeatedly threatened costly and time-consuming litigation as a political tactic.²⁴ Attorneys also

¹⁸ Purpose Statement of Policy at 888; Purposes of Disbursement.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See generally Donna Lee Elm, Sean Broderick, Third-Party Case Services and Confidentiality, *Crim. Just.*, Spring 2014, at 15, 17-18.

²² *Id.*; see also Sumedha Ahuja, *A Balanced Approach to Patent Process Outsourcing: Its Challenges and Rewards*, 40 *AIPLA Q.J.* 483, 500-01 (2012); Lisa Stansky, *Staking Out A Detective*, *ABA J.*, Sept. 2001, at 68 (“investigators often are more successful than lawyers at gathering information from people”); Jonny J. Frank & Bart M. Schwartz, *Private Eyes: Using Investigators in Criminal Defense Matters*, *Crim. Just.*, Fall 1996, at 21 (an “effective investigative firm can assist counsel” in various respects); see also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451 (2008).

²³ See *ABA J.*, Sept. 2001, at 68; Jonny J. Frank & Bart M. Schwartz, *Private Eyes: Using Investigators in Criminal Defense Matters*, *Crim. Just.*, Fall 1996, at 21 (an “effective investigative firm can assist counsel” in various respects).

²⁴ See, e.g., Complaint (June 30, 2015), *Miss Universe L.P., LLLP and Donald J. Trump v. Univision Networks & Studios, Inc. et al.*, S.D.N.Y., Case No. 1:15-cv-05377-JGK, (Donald Trump’s company sued Univision for defamation, among other claims, because Univision announced it would not show the Miss USA pageant on its network after Trump made disparaging remarks about Mexican immigrants); Complaint (Oct. 14, 2015), *Trump Ruffin Commercial, LLC v. Local Joint Exec. Bd. Las Vegas*, D. Nev., Case No. 2:15-cv-01984-GMN-GWF, (Donald Trump’s company sued the Culinary Workers Union and Bartenders Union for saying Trump spent the night at a unionized hotel instead of Trump’s own hotel); see also FiveThirtyEight, “The ~20 Times Trump Has

routinely help clients with tasks such as analyzing legal documents and obtaining public records. Attorneys are uniquely positioned to provide these services to their political clients, with the assistance of subcontractors that support all aspects of the process from collecting records to analyzing the results.

That lawyers perform varied legal services and use myriad different types of subcontractors and consultants to support their work is well established and known to the Commission, and yet, in the past, the Commission has only suggested using a general purpose description like “legal services” or “legal consulting” on political committees’ FEC reports. These have been the purpose descriptions used by political committees for decades, and have long been listed on the Commission’s formal list of approved terms.²⁵ In other circumstances, such as general “consulting” or “fundraising,” the Commission has made a determination that more differentiation in purpose descriptions is necessary and given clear guidance on the need to describe the work with specificity.²⁶ This has never been the case with “legal services;” a simple, general descriptor has always been acceptable. Notably, in its briefs in this matter, OGC never tries to define the meaning of “legal services” or “legal consulting” or attempts to explain how the work here could be outside the scope of that definition. Absent some pre-existing specialized definition, the common understanding of these terms is broad, and they are the only purpose descriptions that the Commission has ever provided.

Moreover, as the Commission has repeatedly made clear over decades of decisions, political committees are not required to disclose payments by vendors to their vendor’s bona fide

Threatened To Sue Someone During This Campaign” (Oct. 24, 2016), <https://fivethirtyeight.com/features/the-22-times-trump-has-threatened-to-sue-someone-during-this-campaign/> (documenting 20 instances in which candidate Trump threatened to sue others for a range of issues, many related to negative ads about Trump, during the 2016 election cycle); The Hill, “Trump Threatens to Sue Club for Growth Over Attack Ads” (Sept. 22, 2015), <https://thehill.com/blogs/ballot-box/presidential-races/254539-trump-threatens-to-sue-attack-ad-group> (“Donald Trump has threatened a ‘multimillion dollar lawsuit’ against the conservative Club for Growth for its advertising campaign attacking the Republican front-runner for his liberal economic policy positions.”); McClatchy, “Trump to Kasich: Watch What You Say or I’ll Sue” (Nov. 20, 2015), <https://www.mcclatchydc.com/news/politics-government/election/article45598329.html> (quoting a tweet by Donald Trump: “‘Watch Kasich squirm – if he is not truthful in his negative ads I will sue him just for fun!’”); Politico, “Cruz on Trump Lawsuit Threat: Bring It On” (Feb. 17, 2016), <https://www.politico.com/blogs/south-carolina-primary-2016-live-updates-and-results/2016/02/ted-cruz-donald-trump-lawsuit-219379>; Washington Post Live, “Interview with Donald Trump” (Transcript) at 21 (May 18, 2016), <https://www.washingtonpost.com/wp-stat/graphics/politics/trump-archive/docs/donald-trump-interview-with-shawn-boburg-robert-oharrow-drew-harwell-amy-goldstein-jerry-markon-may-18-2016.pdf> (Donald Trump: “And I will be bringing more libel suits as people -- maybe against you folks. I don’t want to threaten, but I find that the press is unbelievably dishonest.”); USA Today, “Trump, Bill Maher and Miss Pennsylvania: The ‘I’ll sue you’ effect” (July 11, 2016), <https://www.usatoday.com/story/news/politics/elections/2016/2016/07/11/trump-bill-maher-and-miss-pennsylvania-ll-sue-you-effect/85877342/> (“The threats can be effective. Even the possibility of a lawsuit by a rich, powerful opponent raises the specter of years of expensive and time-consuming litigation. ‘Plainly, the guy uses lawsuits as a tool of intimidation and doesn’t care how much he clogs the courts with nonsense,’ Maher said in an interview.”); The New York Times, “Donald Trump Threatens to Sue The Times Over Article on Unwanted Advances” (Oct. 13, 2016), <https://www.nytimes.com/2016/10/14/us/politics/donald-trump-lawsuit-threat.html> (Trump’s lawyer wrote to the New York Times: “‘Your article is reckless, defamatory and constitutes libel per se,’” and that a failure to retract the story “‘will leave my client with no option but to pursue all available actions and remedies.’”).

²⁵ See Purposes of Disbursement; Purpose Statement of Policy at 888.

²⁶ *Id.*

subcontractors.²⁷ As OGC reiterated in 2013, “neither the Act nor the Commission’s regulations require authorized committees to report expenditures or disbursements to their vendors’ sub-vendors” and a committee “need not separately report its consultant’s payments to other persons – such as those payments for services or goods used in the performance of the consultant’s contract with the committee.”²⁸ While the Commission made the correct decision in this case and did not find any reason to believe that the Committees should have separately reported Perkins Coie’s payment to Fusion GPS, OGC is essentially trying to require the same thing under the auspices of a purpose description. This is clearly contrary to the Commission’s rulings on subcontractor reporting. The Commission has given clear guidance on subcontractor reporting and purpose descriptions. It is with this legal background in mind that the Committees correctly completed their FEC reports using pre-approved, “adequate” purpose descriptions to accurately describe their disbursements.

b. The Committees Paid the Firm for Legal Services, Including the Work That Fusion GPS Did for the Firm, and There Is No Evidence to the Contrary

The Committees’ purpose descriptions were correct because the work performed by Perkins Coie, including that work supported by Fusion GPS, was in fact “legal services” that utilized a routine lawyer/subcontractor relationship. Here, as detailed in the Committees’ responses to the Commission’s requests to provide written answers, Perkins Coie retained Fusion GPS in furtherance of its representation of the Committees. These subcontractor costs were part of the overall scope of the Firm’s “legal and compliance consulting” and “legal services.” Perkins Coie engaged Fusion GPS to assist it in its provision of advice regarding potential litigation risks relating to information distributed in connection with the 2016 election cycle.²⁹ Fusion GPS’s work included review and analysis of publicly available records and compiling and assessing information gathered by its subcontractors.³⁰ Fusion GPS performed research at the overall direction of Perkins Coie into matters that would assist Perkins Coie in providing legal services to the Committees.³¹ While the specific substance of the work done by Perkins Coie, including through its subcontractor Fusion GPS, is subject to the attorney-client privilege and work product doctrine, the Committees have made the overall nature of the relationship and the type of work performed clear in their submissions to the Commission. The Committees’ lawyers directed and managed the work, communicated with Fusion GPS, received the work product, and themselves used that work product in providing legal advice to the Committees. This plainly was “legal services” or “legal consulting” as those terms are commonly understood. While it should not be necessary to even ask the question given that the Committees used pre-approved “acceptable” purpose descriptions, the reporting at issue clearly complies with the Commission’s “rule of thumb.” An individual *could* easily discern why the disbursements to Perkins Coie were made when reading the name of the law firm and the purpose “legal services” or “legal and compliance consulting” because “legal services” or “legal consulting” is exactly what Perkins Coie was providing, using the research and work performed by Fusion GPS.

²⁷ See, e.g., FEC Adv. Op. 1983-25 (Mondale for President); First General Counsel’s Report at 16 (Mar. 8, 2013) MUR 6510 (Kirk); First General Counsel’s Report at 3 (Aug. 26, 2015) MUR 6894 (Steve Russell for Congress); *Reporting Ultimate Payees of Political Committee Disbursements*, 78 Fed. Reg. 40625 (Jul. 8, 2013).

²⁸ First General Counsel’s Report at 16 (Mar. 8, 2013), MUR 6510 (Kirk).

²⁹ See HFA Response at 7; DNC Response at 8.

³⁰ See *id.*

³¹ See *id.*

In its long investigation, OGC has not identified or presented any facts to suggest that the substance of the research and work performed by Fusion GPS was something other than part of Perkins Coie's legal services. The Committees have described to the Commission the nature of the relevant legal advice provided to them by Perkins Coie and the supporting work product performed by Fusion GPS to the greatest extent possible without waiving the attorney-client privilege or attorney work product protections. OGC has never questioned or challenged the Committees' privilege or work product assertions, and indeed, there would be no legitimate basis to do so. Accordingly, OGC has no basis to question the inherent substance or purpose of the work. There is no information in this case even suggesting that the work performed and the relationships between the Committees' vendors are not exactly as the Committees describe them. While there is no effort from OGC to define the scope of what is accurately described as "legal services" or "legal consulting" on one hand, or alternatively, what is meant by their invented term "opposition research" on the other, fundamentally, there is also simply no material evaluation of the work that Fusion GPS performed or substantive or factual basis to assert that the Committees' description of the work was anything but accurate.

Instead, OGC relies on contorted *ipso facto* logic and misconstrues the invoices concerning the work. This thin record cannot support a finding of probable cause against the Committees. Fundamentally, OGC's recommendation that the Commission find probable cause relies on a logical sleight of hand that misconstrues the actual facts before it. OGC seizes on any indication that Fusion GPS performed "research" as part of its work for Perkins Coie, and then *ipso facto* concludes that "legal services" or "legal and compliance consulting" must have been an incorrect purpose description. This argument is nothing more than a willful disregard of the reality of the work performed in this case or that is typically performed by law firms. There is no dispute that part of Fusion GPS's work included "research,"³² but it was research for Perkins Coie that informed Perkins Coie's legal advice to its clients. It is both correct that Fusion GPS conducted research and that "legal services" or "legal consulting" accurately describes the end work product, the actual services that the Committees were receiving from Perkins Coie itself. The research performed for Perkins Coie was part of its legal services.

As to the invoices, OGC's analysis twists Perkins Coie's basic practice of separately listing fees for its own attorneys' time and fees based on disbursements to third parties on its bills.³³ This argument is of course nonsensical and misunderstands the anatomy of any common law firm invoice. The "services" section of an invoice is typically reserved for costs attributable to the time spent by the attorneys of the Firm (e.g., based on their hourly rate or pursuant to a retainer); while the "disbursements and other services" section covers all costs other than attorneys' time, including the costs of paying consultants or subcontractors for services that further the legal representation. The fact that an expense is described as "professional services – other" in a different section of the bill simply indicates that it is a fee in addition to the actual hourly work of a firm attorney. That a charge appears in the latter category certainly does not mean it is not part of the legal services rendered by the Firm. This is the exact same place on an invoice where

³² Indeed, in one instance where the DNC paid Perkins Coie exclusively for a disbursement made to Fusion GPS, it listed the purpose of the disbursement as "Research Consulting." This description was also correct. Fusion GPS was performing research, but it was research that was part of Perkins Coie's legal services and consulting.

³³ General Counsel's Brief (DNC) at 12; *see also* General Counsel's Brief (HFA) at 10.

a fee for an expert witness, expert consultant, filing fee, or any other external expense would be listed, and here, Fusion GPS's service was research to inform Perkins Coie's legal advice. All of these expenses are accurately described as part of "legal expenses" or "legal consulting" and the fact that they are separately itemized on an invoice is inapposite.

OGC similarly misconstrues information described on invoices produced by Fusion GPS. For example, OGC makes much of the fact that Fusion GPS described part of what they were doing as "Russia Research" or referred to "Russian language researcher."³⁴ There is simply nothing about these descriptions that are at odds with the work being part of Perkins Coie's legal services. No one contests, and indeed the Committees have made clear, that part of what Fusion GPS provided to Perkins Coie was "research" to inform Perkins Coie's legal advice. Given the key issues in the presidential campaign, evaluating litigation risks relating to information distributed in connection with the 2016 election cycle of course required an understanding of issues related to Russia or documents written in Russian, and the need for this work was especially pronounced given candidate Trump's predilection for defamation suits. Moreover, a majority of the details of what Fusion GPS was doing was appropriately redacted on the invoices that Fusion GPS provided to the Commission—exactly because those invoices consisted of information protected by the attorney-client privilege and work product doctrine. The substance of the work is protected by these doctrines because it was part of the legal services provided to the Committees by Perkins Coie, and OGC has never argued otherwise. The invoices sent by Fusion GPS to Perkins Coie to assist with its work are perfectly in line with the description of Perkins Coie's ultimate work as "legal services" or "legal and compliance consulting."

c. Any Further Enforcement Action at This Juncture Would Be Contrary to Commission Policy and Practice

It is important to consider the overall status of this case. A series of outlandish complaints were filed against the Committees and their lawyers based on wild accusations concerning everything from soliciting foreign donors to somehow "aiding and abetting" campaign finance violations. There was no reason to believe that any of these violations ever occurred, and the only basis on which the Commission authorized an investigation was on the technical matter of how the Committees reported their disbursements. As detailed above, OGC has investigated for years, but failed to identify any evidence that rebuts the accuracy of Committees' descriptions of the work or purpose descriptions. Just because the statute of limitations is now expiring, there is no basis to move forward to find probable cause that the Committees violated the Act on the only potential allegation still at issue. This is not a record that should support further action from the Commission. Moreover, OGC's recommendation is contrary to Commission policy and practice on pursuing purpose description enforcement actions and is directly at odds with the Commission's previous determinations to not create new rules through enforcement actions. It would amount to an inexplicable departure from how the Commission has recently resolved matters in a similar posture.

As a matter of formal Commission policy, pursuing enforcement actions over the specifics of a purpose description is a "rare circumstance."³⁵ Under this policy, where a committee uses

³⁴ General Counsel's Brief (DNC) at 5; General Counsel's Brief (HFA) at 4.

³⁵ Purpose Statement of Policy at 888.

Commission approved purpose descriptions, “[t]he Commission does not intend to request that a committee provide additional information.”³⁶ Even if a committee uses inadequate descriptions, the Commission has determined that it will “not automatically take any particular action.”³⁷ For example, in a matter against Charles Boustany Jr. MD for Congress and United Ballot PAC, the Commission affirmatively decided not to take any enforcement action against a campaign that described the purpose of a disbursement as “door-to-door get-out-the-vote (GOTV),” when the committee used the funds for door-to-door GOTV and then *also had its vendor transfer a portion of the funds to a third party for another type of GOTV activity*.³⁸ Commissioners determined that even with this additional activity, the purpose was related, and that even though the funds went to a third party for a “another kind of GOTV activity,” the “minor discrepancy did not render the description inadequate.”³⁹ Closing the Boustany enforcement action was the correct course of action under the Commission’s adopted policy and there is absolutely no basis to distinguish that case from the matters here. The Commission should not depart from its standard policy on purpose descriptions enforcement.

The rare and egregious enforcement cases that OGC references regarding wholly inadequate purpose descriptions are nothing like the present case. The violations in the cited cases—where the purpose descriptions were either severely misleading, missing altogether, or a symptom of systemic reporting failures—actually illustrate that enforcement would be inappropriate in this case. In one matter that OGC cites, the Commission found reason to believe the Dallas County Republican Party violated the Act by actually failing to include any purpose description or using wholly inadequate descriptions of fifty different disbursements.⁴⁰ The respondent reported multiple generic classifications from its software system, including descriptions like “professional fees” that have been explicitly classified as inadequate by the Commission.⁴¹ The respondent said that the reported “purposes were sometimes vague because the software the committee used did not allow enough space to provide detailed purposes.”⁴² In the only other Commission action cited by OGC, the Commission found, in just a random sampling, that Cranley for Congress failed to include any purpose description at all on multiple disbursements, and on many others included plainly inadequate purpose descriptions like “miscellaneous” or “other expenses.”⁴³ Finally, OGC cites to the case of *U.S. v. Benton*, where a committee reported the purpose of disbursement as “audio/visual expenses,” when in fact, no such services were provided in any way, and the payment was actually a bribe for a campaign endorsement.⁴⁴ These cases are nothing like the case currently before the Commission.

Here, there was no systemic failure by the Committees to complete even basic purpose descriptions. The Committees did not use descriptions that were explicitly identified as

³⁶ *Id.*

³⁷ *See id.*; *see also* Statement of Reasons of Commissioners Petersen, Hunter, and Goodman at 5 (Dec. 5, 2016), MUR 6698 (United Ballot PAC).

³⁸ Statement of Reasons of Commissioners Petersen, Hunter, and Goodman at 5 (Dec. 5, 2016), MUR 6698 (United Ballot PAC).

³⁹ *Id.*

⁴⁰ Factual & Legal Analysis at 2-3 (July 9, 2009), MUR 6204 (Dallas County Republican Party).

⁴¹ Report of the Audit Division at 13-14 (Dallas County Republican Party) (Nov. 19, 2008).

⁴² *Id.* at 14.

⁴³ *See* Report of the Audit Division at 12-13 (Cranley for Congress) (Apr. 23, 2008).

⁴⁴ *U.S. v. Benton*, 890 F.3d 697, 709 (8th Cir. May 11, 2018).

inadequate by the Commission. There was no obvious and intentional misstatement to hide an inherently inappropriate act. The Committees made disbursements to their law firm for legal services and used purpose descriptions from the Commission's list of appropriate descriptions for those services. The mere fact that Perkins Coie itself used a subcontractor in providing legal services does not create any similarity between this case and the very "rare" instances where the Commission has departed from its policy to pursue inadequate purpose descriptions.

It is also contrary to Commission practice to create new rules through enforcement actions. As stated above, there has never been any indication from the Commission that some additional or different purpose description should be used in the common occurrence of a law firm using subcontractors in its provision of legal services. Similarly, there has never been any indication from the Commission that the wide variety of legal services provided by lawyers should be described with more specificity or differently on political committee FEC reports. Setting aside that requiring such reporting would likely infringe on the attorney-client privilege, if the Commission believes that such additional detail or differentiation is required, it can easily amend the lists of adequate and inadequate purpose descriptions on its website and issue new public guidance. However, it would be inappropriate and a significant departure from Commission precedent and policy to create some new rule through an enforcement action against the Committees. The Commission must not seek to change the law through enforcement actions; such a practice "creates an acute risk of exposure to accusations of partisanship and selective prosecution."⁴⁵ Because the Committees reported their disbursements to Perkins Coie in accordance with standing Commission guidance, there are no grounds to find probable cause that Committees violated the Act or create a new retrospective rule.

The proper course of action is for the Commission to close this matter, just as it recently did with several other aging cases that had similar enforcement profiles. For example, the Commission recently closed MUR 7502 because, like HFA, the respondent in that matter was a campaign whose candidate did not win her election, whose continued existence was principally due to the outstanding complaint against it, and who just sought to terminate.⁴⁶ Similarly, in MUR 7220, the Commission took no action against Donald Trump's former campaign regarding allegations that it falsely attributed millions of dollars in contributions as servicing non-existent debt in 2016, failed to timely re-designate or refund contributions, and failed to accurately report its outstanding debts, among other violations.⁴⁷ Significantly, in that case OGC recommended that the Commission dismiss several charges in the complaint given "the age of the allegations and their diminished relevance."⁴⁸ The deciding Commissioners then voted to dismiss the matter in its entirety given an insufficient investigation by OGC and because they were faced with "a case with no reasonable chance of successful enforcement because of the impending statute of

⁴⁵ See, e.g., Statement of Reasons of Vice Chairman McGahn and Commissioner Hunter at 6 (Sept. 18, 2013), MUR 6462 (Donald J. Trump, et al.); Statement of Reasons of Vice Chairman McGahn and Commissioner Hunter at 14 (July 25, 2013), MUR 6540 (Rick Santorum for President) (standing for the proposition that applying standards contrary to precedent in enforcement actions is improper selective prosecution).

⁴⁶ See Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor at 7 (Oct. 29, 2021), MUR 7502 (Friends of Mia Love).

⁴⁷ See Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor (Sept. 21, 2021), MUR 7220 (Make America Great Again PAC).

⁴⁸ *Id.* at 2.

limitations.”⁴⁹ The matters here involve far less serious charges, are of no real current relevance, rest on an investigation that has also failed to show any actual violations, and are already in the process of passing the statute of limitations. There is no basis to proceed in this matter after closing the recent Trump MUR.

In a final footnote in its brief, OGC suggests that the Commission might consider seeking “equitable relief such as the correction of inaccurate reporting” against the Committees even after the five-year statute of limitations precludes the Commission from seeking civil penalties.⁵⁰ Doing so here would be radically out of line with past Commission precedent, including the recently dismissed 2016 cases. Notably, there were obviously even more significant reporting issues presented in the Trump MUR, which concerned potentially millions of dollars in debt that was completely missing from multiple different reports filed with the Commission.⁵¹ Similarly, in another enforcement matter from the 2016 presidential election that was dismissed earlier this year, OGC recommended that the Commission not pursue equitable reporting remedies after the statute of limitations expired.⁵² In that case, a PAC failed to report testing the waters activities in support of Rand Paul’s presidential campaign.⁵³ OGC made this recommendation because, although the disbursements were not reported correctly, they were disclosed on the committee’s report in some way and the disbursements were made using funds collected in accordance with the source restrictions and amount limitations of the Act.⁵⁴ The same is also clearly true in the present case. There is no legitimate basis to distinguish this case from other 2016 matters that the Commission has just dismissed in order to pursue an unfounded enforcement action.

At bottom, the Committees’ reported purpose descriptions complied with the Act and Commission regulations. But moreover, given (1) the Commission’s formal policy of generally not pursuing enforcement actions concerning purpose descriptions; (2) the need to avoid creating new, retroactive policy through enforcement actions; (3) the dismissal of the Trump MUR, the Paul MUR, and other recent enforcement matters concerning aging cases running through the statute of limitations; and (4) the profound “exposure to accusations of partisanship and selective prosecution” should it proceed, the only appropriate course for these matters is for the Commission to close them. Any other course of action would be dramatically at odds with clear Commission policy and practice.

⁴⁹ *Id.* at 1.

⁵⁰ General Counsel’s Brief (DNC) at 11; General Counsel’s Brief (HFA) at 9.

⁵¹ See Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor (Sept. 21, 2021), MUR 7220 (Make America Great Again PAC).

⁵² Second General Counsel’s Report at 6-7 (Mar. 16, 2021), MUR 7191 (Rand Paul, et al.).

⁵³ *Id.*

⁵⁴ *Id.*

Conclusion

For these reasons, Respondents respectfully request that the Commission find that there is no probable cause to believe a violation has occurred, dismiss these matters, and close the file. If these matters are not dismissed on the briefs alone, Respondents also reiterate their request for an opportunity to address the Commission at a probable cause hearing.



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Dated: December 6, 2021