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October 5, 2021

Federal Election Commission
Office of Complaint Examination
& Legal Administration
Attn: Lisa J. Stevenson
1050 First Street NE
Washington, DC 20463

VIA EMAIL: jdgiovanni@fec.gov

Re: MUR 7465 Response for Freedom Vote to General Counsel's Brief

Five years ago today, Freedom Vote, which has been dissolved since May 2019, made a contribution to a Super PAC. Since then, it has not spent money on anything that could be considered even in the broadest sense "political." For this reason alone, this matter should be dismissed. Yet, undeterred, the Commission's Office of General Counsel ("OGC") has continued to target activity that occurred past the Commission's well-established five-year statute of limitations, seeking to punish Freedom Vote for engaging in constitutionally protected political speech that occurred many years ago. This approach is plainly impermissible and should not stand. We respectfully ask the Commission to immediately dismiss this matter because the statute of limitations has run and/or as a matter of prosecutorial discretion due to the proximity of the statues of limitations. In addition, OGC's analysis contains a number of erroneous applications of the law that are inconsistent with the Commission's prior rulings in similar matters.

Substantively, Freedom Vote maintains its long-held position that the organization's total spending on political activity never crossed the 50 percent political spending threshold that would trigger registration and reporting with the Commission.[1] The financial information

[1] OGC has applied the "major purpose test" in a variety of ways, which provides inconsistent guidance to organizations that wish to participate in political activity. For example, from our review of previous applications of the "major purpose test," OGC has determined that an organization was a "political committee," based on one calendar year of political spending, two years of political spending (or spending conducted during a single election cycle), and the political spending over an organization's lifespan. This inconsistent approach in applying the "major purpose test" has been criticized by current and former Commissioners. Statement of Reasons by Vice Chairman Dickerson and Commissioner Trainor at 3, MUR 7181 (Independent Women's Voice)("[]the simplest, cleanest, and fairest standard for determining whether an organization has the major purpose of nominating and electing federal candidates is to analyze its total spending on federal campaigns."); Statement of Reasons by Vice Chair Hunter and Commissioner Goodman at 21 N. 96, MUR 6872 (New Models) ("We have consistently rejected OGC's myopic focus on one year of spending, no matter how OGC rhetorically describes one year of spending. The fundamental flaw in OGC's one-year approach - which is a recent creation by OGC - is that it ignores an organization's history

Freedom Vote provided to the Commission, based on its official Form 990s submitted to the Internal Revenue Service ("IRS"), has consistently shown that Freedom Vote's spending on political activity throughout its lifetime constituted 24.8% of its overall spending, well below the 50% threshold such that its "major purpose" could be considered influencing federal elections.[2] However, in the General Counsel's Brief, OGC asserts that Freedom Vote's "major purpose" became the nomination or election of a federal candidate starting in 2014 and that "$3.4 million dollars" spent from 2014 until 2016 constituted federal campaign activity. This conclusion is disingenuous, as it is not only artificially inflated by manipulative and incorrect calculations of Freedom Vote's spending on "federal campaign activity," but also because the vast majority of spending included in the calculations occurred outside the Commission's statute of limitations.

Given the vague rationale for OGC's conclusion that Freedom Vote spent $3.4 million dollars on "federal campaign activity," we cannot directly respond to their chart.[3] There are, however, certain expenses that OGC considered to be "federal campaign activity" that have never been considered "federal campaign activity" by the Commission. For example, OGC includes in its analysis of Freedom Vote's "federal campaign activity" expenses for "poll ride calls," "support fees"[4] and spending that "mentioned the 8th Congressional District in Ohio" as "federal campaign activity."[5] None of those expenses ever expressly advocated for or against, *or even mentioned*, a clearly identifiable candidate for office, as OGC explicitly acknowledges.[6] OGC appears to be conflating the definition of "federal *election* activity"[7] with that of "federal *campaign* activity" here. OGC also incorrectly includes as "federal campaign activity" Freedom Vote's issue advertisement about the number of jobs lost in Ohio during Ted Strickland's tenure as Ohio governor, despite the fact that it contained no express advocacy and was consistent with similar and numerous past examples of advertisements for which the Commission determined there was no reason to believe.[8] Considering the above expenses as "federal campaign activity" goes beyond any interpretation of the "major purpose test." Even the most expansive interpretation of the 'major purpose' analysis, recently promulgated through *Citizens for Responsibility and Ethics in Washington (CREW) v. FEC*, No. 16-cv-155 (D.D.C. 2018), did not widen the reach of the "major purpose test" to cover these types of generic expenses.[9] While the application of the "major purpose test" has always depended on the specific facts and

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and other activities."); *see also* Freedom Vote's Supplemental Response on the Commission's Investigation of Freedom Vote, Inc. at 3-4.

2 *Id*.

3 While OGC states that "the analysis provided in this Report is based solely on Freedom Vote's own ledgers of expenditures produced in the course of the investigation[,]" the spending chart provided by Freedom Vote is derived from the financial information reported on its annual tax returns, which was signed under penalty of perjury. Such a significant discrepancy in the numbers raises questions in how OGC calculated its totals. A detailed and coherent explanation by OGC is necessary, especially when Freedom Vote is facing the potential of civil penalties over such calculations.

4 General Counsel's Brief at 8, n. 37 (describing monthly "support fees" to GeoConnect as 'federal campaign activity.').

5 General Counsel's Brief at 7-10;

6 *Id*. at 8 ("The remaining invoices do not explicitly refer to an election, but given that one references 'poll ride calls,' and three others describe a support fee for a political canvassing tool, the weight of the evidence suggests that [sic] these invoices also supported Freedom Vote's electoral activities in the 8th Congressional District…") (citations omitted).

7 11 CFR § 100.24(b).

8 *See* MUR 6612 (Crossroads GPS), MUR 5854 (Lantern Project), MUR 6311 (Americans for Prosperity), MUR 5842 (Economic Freedom Fund), and MUR 6122 (National Association of Home Builders).

9 The Court in *CREW* expanded the 'major purpose' analysis to include not only express advocacy communications (communications that expressly call for the election or defeat of a clearly identifiable candidate) but also electioneering communications (communications that references a clearly identifiable candidate thirty days before the primary election and sixty days before the general election). Here, OGC, without any support, goes far beyond even that.

circumstances,[10] lumping expenses that have never been considered to be "federal campaign activity" as such activity defies the long-time precedent of both the Commission and federal courts of applying the "major purpose test" narrowly.[11] It is clear that OGC, by including any expense that *could* even theoretically be considered "political" as "federal campaign activity," is attempting to perpetuate their own narrative of what occurred and find that Freedom Vote's "major purpose" was intervening in federal elections. The standard that OGC has constructed is so broad and all-encompassing that, if adopted, every organization that wishes to engage in any policy or political activity—even outside the electioneering communication window and without express advocacy—will be chilled by the fear that the Commission will force them to register and report its activity.[12] We urge the Commission to consider these detrimental ramifications when reviewing OGC's expansive application of the "major purpose test" to Freedom Vote's activities.

What makes OGC's conclusions especially concerning is that Freedom Vote has been the target of an investigation and is now being subjected to potential civil penalties for activities that occurred well-beyond the Commission's statute of limitations. The Commission has an unambiguous five-year statute of limitations,[13] which has consistently been followed by current and former Commissioners even when the statute of limitations has not technically run but is "imminent."[14] Here, OGC is blatantly defying the Commission's clear statute of limitations by basing their legal analysis that Freedom Vote violated FECA on activity that occurred between 2014 and early 2016. Independent of whether Freedom Vote violated FECA and/or Commission regulations, the Commission is barred from acting, as the statute of limitations has expired.

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[10] We have previously expressed our general concern with the Commission's application of the "major purpose test." Freedom Vote's Supplemental Response on the Commission's Investigation of Freedom Vote, Inc. at 3-4; *see also* Note 1.

[11] *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238,248,262 (1986) (MCFL); *New Mexico Youth Organized v. Herrera*, 611 F.3d at 678, (applying a narrow interpretation of the "major purpose" test when determining that it can be applied by either (1) an examination of the organization's central organizational purpose; or (2) a comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates.

[12] *See Buckley v. Valeo*, 424 U.S. 1, 79. OGC's novel standard for defining a political committee could also raise the exact vagueness concerns expressed by the Supreme Court in narrowing the definition of what constituted a political committee.

[13] 52 USC § 30145 ("No person shall be prosecuted, tried, or punished for any violation of subchapter I of this chapter, unless the indictment is found or the information is instituted ***within five (5) years after the date of the violation***.") (emphasis added); 2 U.S.C. § 2462 ("Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained ***unless commenced within five years from the date when the claim first accrued*** if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.") (emphasis added); *see also* Guidebook for Complaints and Respondents on the FEC Enforcement Process at 6 (May 2012)("…the Commission's ability to seek civil penalties in federal district court within the five-year statutes of limitations period (measured from the time of the violation) provided by 28 U.S.C. § 2462 (civil) and 2 U.S.C. § 455 (criminal).")

[14] Statement of Reasons of Chair Shana Broussard and Commissioner Ellen Weintraub, MUR 7395 ("Under these circumstances, and in light of the imminent statute of limitations and other priorities on the Commission's docket, we voted to dismiss the allegations as a matter of prosecutorial discretion.") (emphasis added); Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean Cooksey and James E. "Trey" Trainor III, MUR 7265 (Donald J. Trump for President, Inc.) ("In this position, however, our agency's limited enforcement resources are better directed toward other investigations with better odds of success. Commission staff time and funds are especially precious in light of the significant backlog of enforcement cases that the Commission accrued while lacking a quorum.") (citing Statement of Commissioner Ellen L. Weintraub On the Senate's Votes to Restore the Federal Election Commission to Full Strength (Dec. 9, 2020))).

The statute of limitations is five years for good reason. As explained by some of the current Commissioners:

> Statutes of limitations exist to protect defendants against just this kind of case, where stagnant or unduly delayed claims undermine fair adjudication. When investigations or lawsuits are based on long-forgotten conduct, the passage of time hampers defendants' ability to raise an adequate defense: evidence has been lost, memories have faded, and witnesses have disappeared. Statutes of limitations are especially important for campaign-finance law. Political campaigns and committees are, by their nature, often temporary enterprises without permanent structures or personnel, and reconstituting their activities from far in the past often poses significant investigatory obstacles.[15]

These concerns are exemplified upon review of Mr. Nathanson's deposition. Throughout his deposition, Mr. Nathanson repeatedly explained to OGC attorneys that he could not recall specific activities conducted by Freedom Vote because the activity occurred *over seven years ago*. For example, while Mr. Nathanson, under oath, repeatedly expressed to OGC attorneys that Freedom Vote was focused on a variety of economic policies that impacted Ohioans during its existence as an organization and acted with that purpose when engaging in activity in the State, Mr. Nathanson quite understandably could not recollect the *specific* issue-based activities that were conducted by Freedom Vote (because Freedom Vote's activities occurred over five years ago). What is truly damning for OGC's approach here is that OGC attempts to use that lack of historic recollection in their Brief to insinuate that Freedom Vote did not engage in any issue-based activities and amplify their argument that Freedom Vote was a political committee, while completely discrediting the repeated sworn statements made by Mr. Nathanson that Freedom Vote's primary goal was promoting economic issues prevalent in Ohio. The Commission has consistently emphasized the importance of sworn statements from first-hand witnesses in determining the outcome of an enforcement matter.[16] Yet, to support their desired outcome, OGC is ignoring this longstanding precedent and dismissing sworn statements for the sake of finding the potential of a campaign finance violation. This sort of disregard of the law and longstanding Commission precedent in order to conjure up campaign finance violations is wrong and is the sort of abuse that statutes of limitation are designed to protect against.

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[15] Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor III at 3 (March 18, 2021), MUR 7181 (Independent Women's Voice) (citations omitted).

[16] *See, e.g.*, First General Counsel's Report at 8, MUR 7712 (Tom Steyer 2020, et. al. ("Given the lack of specific allegations against Steyer 2020 and Martinez, and in light of the specific, sworn statements provided by Steyer 2020 to rebut these allegations, the available record does not support a reasonable inference that Martinez and Steyer 2020 violated the Act in connection with her work for the committee."); Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor III, MURs 7370/7496 (New Republican PAC)("At the RTB stage, when speculation based on press reports and unattributed comments from "Republican officials" is pitched against a contradictory sworn statement from someone with personal knowledge of the matter at hand, we must credit the sworn statement."); Statement of Reasons of Comm'rs Hunter, McGahn, and Petersen at 5, MUR 6296 (Buck) ("'Purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find a reason to believe'") (quoting FGCR at 5, MUR 5467 (Michael Moore)); Statement of Reasons by Vice Chairman Matthew S. Petersen and Caroline C. Hunter, MUR 6928 at 9-10 (finding that the Respondent's specific denials, backed by affidavits from first-hand witnesses, undermined the credibility of the Complaint); *See also* Guidebook for Complainants and Respondents on the FEC Enforcement Process at 6 (May 2012) ("Providing sworn affidavits from persons with first-hand knowledge of the facts alleged is encouraged."); *Id.* at 10 ("While not required, providing documentation, including sworn affidavits from persons with first-hand knowledge of the facts, tends to be helpful.").

Freedom Vote is yet another victim in the ongoing attack by OGC on 501(c)(4) organizations and their engagement in protected speech. A legitimate 501(c)(4) organization, like Freedom Vote, should not have to fear that it will be deemed a political committee simply because it mentions Congressional districts in its invoices, uses "political software," or engages in issue advocacy.[17] This attempted expansion of the "major purpose test" directly defies not only legislative intent[18] but also the long-standing application by the Supreme Court, as well as other Circuit Courts, of the "major purpose" test.[19]

Given the significant concerns we have regarding the General Counsel's Brief—specifically OGC's direct defiance of FECA's statute of limitations to recommend that a violation of FECA occurred and OGC's misapplication of the "major purpose test" to Freedom Vote's spending on "federal campaign activity"—we respectfully request a hearing before the Commission. Given that the statute of limitations has expired on the majority of Freedom Vote's activities at issue, coupled with our availability and readiness to discuss this matter at any date or time that the Commission requests, there is no need to toll the statute of limitations.

Sincerely,

Charlie Spies
Counsel to Freedom Vote, Inc.

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17 *See* Comment of Public Citizen on Reg. 2003-07 (Political Committee Status) at 10 (Apr. 5, 2004). Public Citizen further noted that "[e]ntities that do not have as their major purpose the election or defeat of federal candidates, such as 501(c) advocacy groups, but which may well be substantially engaged in political activity, should remain subject to regulation for only the narrow class of activities – express advocacy and electioneering communications - explicitly established by current federal election law, as amended by [McCain-Feingold]." *Id*. at 2.

18 Comments of John McCain and Russell D. Feingold on Reg. 2003-07 (Political Committee Status) (Apr. 2, 2004), attached Statement of Senator John McCain, Senate Rules Committee, March 10,2004 at 2 (stating that "under existing tax laws, [s]ection 501(c) groups…cannot have a major purpose to influence federal elections, and therefore are not required to register as federal political committees, as long as they comply with their tax law requirements.")

19 *Buckley v Valeo*; 424 U.S. 1, 79 ("Although the phrase, "for the purpose of…influencing" an election or nomination, differs from the language use [to define "expenditure"], it shares the same potential for encompassing both issue discussion and advocacy of a political result. The general requirement that "political committees" and candidates disclose their expenditures could raise similar vagueness problems, for "political committee" is define only in terms of amount of annual "contributions" and "expenditures" and could be interpreted to reach groups engaged purely in issue discussion."); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238,252 n.6 (1986) (holding that a nonprofit corporation's major purpose is not the nomination or election of a federal candidate when its "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates.").