BEFORE THE FEDERAL ELECTION COMMISSION

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) **MUR 7516**
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RESPONSE OF HERITAGE ACTION FOR AMERICA TO THE COMPLAINT

Heritage Action for America ("Heritage Action"), by and through undersigned counsel, responds to the Complaint in the above-captioned Matter Under Review. The Complaint alleges that Heritage Action – a tax-exempt 501(c)(4) social welfare organization whose mission is to advance conservative principles and policies – had to disclose donors on the quarterly independent expenditure report that it filed with the Federal Election Commission ("FEC" or "the Commission") on October 12, 2018. The Complaint offers no evidence to support its speculative claims, and the allegations are based on supposition and a misreading of the law and regulations. Heritage Action thus respectfully requests that the Commission dismiss the Complaint and close the file.

Section 30104(c) of the Federal Election Campaign Act ("the Act") governs reporting, including donor disclosure, by "persons other than political committees" (hereinafter referred to as "not-political committees") when they make independent expenditures aggregating in excess of $250 with respect to a given election in a calendar year. 52 U.S.C. § 30104(c). In October 2018, the Commission released new guidance concerning its enforcement of § 30104(c), after *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018), vacated the FEC's former regulation at 11 C.F.R. § 109.10(e)(1)(vi). *See* Press Release, FEC, *FEC provides guidance following U.S. District Court decision in CREW v. FEC, 316 F. Supp. 3d 349 (D.D.C. 2018)* (Oct. 4, 2018). The guidance provides that not-political committees need only disclose on their independent expenditure reports those donors who gave more than $200 in any one calendar year specifically "*earmarked* for

political purposes." *Id.* at 3 (emphasis added) (internal quotation marks omitted) (quoting *CREW*, 316 F. Supp. 3d at 389; *Buckley v. Valeo*, 424 U.S. 1, 80 (1976)).[1]

Under the Act and FEC regulations, the term "earmarked" includes a "designation, instruction, or encumbrance" by a donor for a specified use. 11 C.F.R. § 110.6(b)(1). The Commission repeatedly "has determined that funds are considered 'earmarked' only when there is clear documented evidence of acts by donors that resulted in their funds being used by the recipient committee" as specifically designated, and "has routinely rejected allegations of earmarking where . . . there is no clear designation or instruction given by the donor." Factual & Legal Analysis, MUR 5732 (Matt Brown for U.S. Senate), at 6, 6 n.4; *see also* First General Counsel's Report, MUR 6221 (Transfund), at 11. For example, the Commission has found that no "earmarking" occurs based on solicitations that discuss support for a specific candidate,[2] or where donations coincide with the timing of support provided to a candidate. *See* Factual & Legal Analysis, MUR 5732, at 6 (citing MUR 4831/5274 (Nixon)); *see also, e.g.*, First General Counsel's Report, MUR 5520 (Billy Tauzin Congressional Committee), at 7–8 (concluding that a newspaper article asserting that a state party committee acknowledged having a "wink and a nod" arrangement with donors, with no actual designation or instruction by any donor, was insufficient to find reason to believe earmarking had occurred).

The Complaint here presents no evidence of any donor earmarking funds for political purposes. It points only to a press release issued by Heritage Action and a related media report,

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[1] A not-political committee must additionally identify the subset of such contributors of earmarked funds who gave specifically to further an independent expenditure by the not-political committee. *See* Press Release, FEC, *FEC provides guidance following U.S. District Court decision in CREW v. FEC, 316 F. Supp. 3d 349*, at 3–4 (D.D.C. 2018) (Oct. 4, 2018).

[2] The D.C. Circuit also vacated as unconstitutional and beyond the Commission's statutory authority under the Act – and the Commission subsequently removed – a former regulation (11 C.F.R. § 100.57) that treated as "contributions earmarked for political purposes" any donation made in response to solicitations that indicated that any portion of the funds received would be used to support or oppose the election of a clearly identified federal candidate. *Emily's List v. FEC*, 581 F.3d 1, 18 (Sept. 2009).

both from August 8, 2018, in which Heritage Action described its general plans and strategies for spending in relation to certain 2018 midterm races – including an acknowledgement of the obvious fact that the more donations Heritage Action could raise to fund its overall operations, the more it could "effectively" dedicate toward such political spending. *See* Compl. ¶¶ 6–7. Heritage Action's press statements are not designations or instructions by a donor, and thus do not indicate that any donated funds were "earmarked" for political purposes triggering donor disclosure. *See, e.g.*, First General Counsel's Report, MUR 5125 (Paul Perry for Congress), 8–9 (finding no earmarking where complaint contained only bare allegations of earmarking but showed no designation, instruction, or encumbrance).

Simply put, Heritage Action had no obligation to disclose donors to the FEC under 52 U.S.C. § 30104(c), and the Complaint provides no evidence indicating otherwise.[3] The Commission must continue to reject such speculative, unsubstantiated allegations and dismiss the Complaint immediately. *See, e.g.*, Statement of Reasons of Comm'rs Wold, Mason & Thomas, MUR 4850 (Deloitte & Touche, LLP), at 2 ("A mere conclusory allegation without any supporting evidence does not shift the burden of proof to the respondents.").

Respectfully submitted,

Benjamin L. Ginsberg
Megan S. Newton
E. Stewart Crosland
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Tel. (202) 879-3939
Counsel for Heritage Action for America

[3] For these reasons, this matter must also be dismissed if the decision in *CREW v. FEC* is overturned on appeal and 11 C.F.R. § 109.10(e)(1)(vi) is reinstated.