FEDERAL ELECTION COMMISSION

FIRST GENERAL COUNSEL'S REPORT

MUR 7722
DATE COMPLAINT FILED: March 24, 2020
DATE OF NOTIFICATIONS: March 26, 2020
DATE OF LAST RESPONSE: June 9, 2020
DATE ACTIVATED: July 31, 2020

EXPIRATION OF SOL: March 13, 2025 (earliest)
June 1, 2025 (latest)
ELECTION CYCLE: 2020

COMPLAINANT: Great America PAC and Elizabeth Curtis in her official capacity as treasurer

RESPONDENTS: Michael R. Bloomberg
Mike Bloomberg 2020, Inc., and Hayden Horowitz in his official capacity as treasurer
DNC Services Corporation/Democratic National Committee and Virginia McGregor in her official capacity as treasurer
Unknown State Party Committees

MUR 7723
DATE COMPLAINT FILED: March 25, 2020
DATE OF NOTIFICATIONS: March 26, 2020
DATE OF LAST RESPONSE: June 9, 2020
DATE ACTIVATED: July 31, 2020
EPS: 70
EXPIRATION OF SOL: March 13, 2025
ELECTION CYCLE: 2020

COMPLAINANT: Americans for Public Trust

RESPONDENTS: Michael R. Bloomberg
Mike Bloomberg 2020, Inc., and Hayden Horowitz in his official capacity as treasurer
DNC Services Corporation/Democratic National Committee and Virginia McGregor in his official capacity as treasurer

RELEVANT STATUTES AND REGULATIONS:	52 U.S.C. § 30114 52 U.S.C. § 30116 52 U.S.C. § 30122 11 C.F.R. § 100.33 11 C.F.R. § 110.1(c) 11 C.F.R. § 110.6 11 C.F.R. § 110.10 11 C.F.R. § 113.2(c)
INTERNAL REPORTS CHECKED:	Disclosure Reports
AGENCIES CHECKED:	None

I. INTRODUCTION

On March 13, 2020, two weeks after the Democratic Party's "Super Tuesday" primary elections, Mike Bloomberg 2020, Inc., and Hayden Horowitz in his official capacity as treasurer (the "Committee"), the principal campaign committee of Presidential candidate Michael R. Bloomberg (collectively, the "Bloomberg Respondents"), transferred $18 million to the DNC Services Corporation/Democratic National Committee and Virginia McGregor in her official capacity as treasurer (the "DNC"). The Committee subsequently reported making in-kind transfers to various unknown Democratic State Party Committees (the "Unknown State Party Committees") in excess of $10,000 for expenses reported as rent, office space, and equipment.

The Complaints in these matters allege that those transactions violated the Federal Election Campaign Act of 1971, as amended (the "Act"), in the following ways. First, because Bloomberg self-funded his campaign, they allege Bloomberg made, and the DNC accepted, an excessive contribution in violation of the Act's limits on contributions to a national political party committee. Second, they allege that Bloomberg made, and that the Unknown State Party Committees accepted, excessive contributions in violation of the Act's limits on contributions to state political party committees. Third, Complaints allege that the $18 million provided to the DNC constituted a prohibited contribution in the name of another.

The MUR 7722 Complaint also makes several alternative allegations should the Commission conclude that the $18 million given to the DNC cannot be attributed to Bloomberg. It alternatively alleges that the Committee made, and the DNC accepted, an excessive contribution in violation of the Act's limits on contributions to political committees of a national political party. It also alleges that Bloomberg exceeded the Act's limits on contributions to candidates by contributing millions of dollars to the Committee. Finally, it alleges that the Committee exceeded the Act's contribution limits to candidates by earmarking the $18 million given to the DNC for the benefit of the Democratic nominee for President.

The Bloomberg Respondents and the DNC contend that Bloomberg was permitted to make unlimited contributions to the Committee. They further argue that the $18 million was attributable to the Committee and that its transfer to the DNC was permitted by 52 U.S.C. § 30114(a)(4), which provides that "[a] contribution accepted by a candidate . . . may be used by the candidate . . . for transfers, without limitation, to a national, State, or local committee of a political party," and 11 C.F.R. § 113.2(c), which provides for the unlimited transfer of "funds in a campaign account" to a national, State, or local committee of a political party.[1] The Bloomberg Respondents rely on those same provisions to argue that the in-kind transfers to Unknown State Party Committees were permissible for the same reasons. Finally, Respondents argue that no contribution in the name of another occurred.

As discussed in more detail below, the First Amendment right of a candidate to make unlimited expenditures of their own personal funds to advance the candidate's own speech does not also permit a candidate to make unlimited contributions to advance the speech of others in contravention of the Act's base contribution limits. Because of the uncontested fact that over

[1] 52 U.S.C. § 30114(a)(4); 11 C.F.R. § 113.2(c); *see also infra* Section II.D (summarizing the Responses).

99.9% of Committee funds were comprised of funds provided by Bloomberg from his personal funds, it appears that, under the Act, these funds do not constitute contributions "accepted by a candidate" within the meaning of 52 U.S.C. § 30114(a)(4).[2] The Bloomberg Respondents remained subject to the base contribution limits applicable to contributions from individuals to national and state party committees set forth in 52 U.S.C. § 30116(a)(1)(B), (D), limits greatly exceeded by the $18 million purported transfer.

Accordingly, we recommend that the Commission find reason to believe that the Bloomberg Respondents made, and the DNC accepted, an excessive contribution in violation of 52 U.S.C. § 30116(a)(1)(B) and 30116(f), respectively. Because the Committee's in-kind transfers to state party committees exceeded $10,000, we likewise recommend that the Commission find reason to believe that the Bloomberg Respondents violated 52 U.S.C. § 30116(a)(1)(D). Should the Commission approve this recommendation regarding the state party committees, we intend to notify the Unknown State Party Committees, whose identities are now known through the filing of disclosure reports.[3] We recommend that the Commission authorize a limited investigation to determine the level of involvement Bloomberg had with

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[2] 52 U.S.C. § 30114(a).

[3] The MUR 7722 Complaint included allegations against Unknown Democratic State Party Committees. Since the filing of the Complaint, disclosure reports have revealed that the entities in question are as follows: the North Carolina Democratic Party and Anna Tilghman in her official capacity as treasurer, the Arizona Democratic Party and Rick McGuire in his official capacity as treasurer, the Michigan Democratic State Central Committee and Traci Kornak in her official capacity as treasurer, the Democratic Party of Wisconsin and Randy A. Udell in his official capacity as treasurer, the Minnesota Democratic-Farmer-Labor Party and Leah Midgarden Manney in her official capacity as treasurer, the Democratic Party of Virginia and Abbi Easter in her official capacity as treasurer, the Maine Democratic Party and Betty Johnson in her official capacity as treasurer, the New Hampshire Democratic Party and Caitlin Rollo in her official capacity as treasurer, and the Tennessee Democratic Party and Carol V. Abney in her official capacity as treasurer. *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?committee_id=C00728154&two_year_transaction_period=2020&cycle=2020&line_number=F3P-29&data_type=processed (last visited May 1, 2023) ("Committee Line 29 Disbursements") (reflecting 133 Line 29 disbursements by Mike Bloomberg 2020, Inc., in 2019-2020). These Democratic State Party Committees have not been notified and are not currently respondents in MUR 7722.

respect to the decision to make the transfer and recommend that the Commission authorize compulsory process.

As for the remaining allegations, we recommend that the Commission find no reason to believe that Bloomberg violated 52 U.S.C. § 30116(a)(1)(A) by making excessive contributions to the Committee. We further recommend that the Commission find no reason to believe that the Bloomberg Respondents or the DNC violated 52 U.S.C. § 30122 by making, permitting their name to be used for, or knowingly accepting a contribution made in the name of another person. Finally, we recommend that the Commission find no reason to believe that the Committee made an excessive earmarked contribution to the 2020 Democratic nominee for President in violation of 52 U.S.C. § 30116(a)(1)(A), (a)(8).

II. FACTUAL BACKGROUND

A. Bloomberg's Candidacy

Michael Bloomberg is a former mayor of New York City, as well as the founder of Bloomberg LP, a privately held financial, software, data, and media company.[4] On November 21, 2019, Bloomberg filed his Statement of Candidacy for President in the 2020 election, designating the Committee as his principal campaign committee.[5] The DNC is a national party committee of the Democratic Party.[6]

On November 24, 2019, Bloomberg formally announced his candidacy and launched his campaign to qualify for placement on the Democratic presidential primary ballot in 52 U.S.

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[4] *See About*, MIKE BLOOMBERG, https://www.mikebloomberg.com/about/ (last visited May 1, 2023).

[5] Michael R. Bloomberg, Statement of Candidacy (Nov. 21, 2019), https://docquery.fec.gov/pdf/442/201911219166072442/201911219166072442.pdf; Mike Bloomberg 2020, Inc. ("Committee"), Statement of Organization (Nov. 21, 2019), https://docquery.fec.gov/pdf/029/201911219166073029/201911219166073029.pdf.

[6] *See* DNC Services Corp/Democratic National Committee, Amended Statement of Organization (Nov. 1, 2022), https://docquery.fec.gov/pdf/110/202211019546697110/202211019546697110.pdf.

states and territories.[7] To that end, Bloomberg and the Committee collected signatures, hired more than 2,500 staff, opened over 250 campaign offices, attended and hosted numerous campaign events, released policy platforms, gave campaign speeches, and participated in nationally televised debates.[8]

Bloomberg self-funded almost his entire campaign by making periodic contributions to the Committee and by personally paying for campaign expenses and reporting those payments as in-kind contributions to the Committee, resulting in candidate contributions to the Committee of over $1 billion.[9]

[7] Michael R. Bloomberg & Committee, Resp. at 2 (June 9, 2020) ("Bloomberg Resp."). Shortly before his announcement, Bloomberg appears to have contributed $106,500 to each of the DNC's separate segregated accounts described in 52 U.S.C. § 30116(a)(9)(1)-(3) and $35,500 to the DNC's general account. Committee, Amended 2019 December Monthly Report at 9495, 9502-04 (Mar. 24, 2020), https://docquery.fec.gov/pdf/078/202003249215883078/202003249215883078.pdf.

[8] Bloomberg Resp. at 2; *see also* DNC Resp. at 2 (June 9, 2020).

[9] *See Committee: FEC Financial Summary*, FEC.GOV, https://www.fec.gov/data/committee/C00728154/?tab=summary&cycle=2020 (last visited May 1, 2023) (showing candidate contributions from Bloomberg to the Committee of $1,089,255,532.11). Although the Bloomberg Respondents state that Bloomberg was the Committee's "sole funder," the Committee's reports disclosed hundreds of thousands of individual contributions. *Compare* Bloomberg Resp. at 3, Hayden Horowitz Aff. ¶3 (June 8, 2020), *with supra* Figure 1.

A financial summary of Bloomberg's campaign for the 2020 election cycle, taken from its financial figures reported to the Commission, is shown in Figure 1 below.[10]

Figure 1

Reporting Period	Individual Contributions	Bloomberg Contributions	Bloomberg's Share of Total	Disbursements
Oct. 2019 – Dec. 2019	$245,569.38	$200,114,049.18	99.88%	$188,385,951.94
Jan. 2020	$130,919.14	$263,651,376.11	99.95%	$220,620,861.64
Feb. 2020	$474,915.67	$471,871,073.67	99.90%	$466,862,439.75
Mar. 2020	$61,187.83	$112,262,428.25	99.95%	$175,374,861.39
Apr. 2020	$0.00	$26,602,855.91	100%	$42,607,549.09
May 2020	$288.32	$7,048,221.47	100%	$14,624,109.68
June 2020	$1,245.06	$2,617,565.95	99.95%	$3,360,667.99
July 2020	$143.91	$2,451,795.44	99.99%	$4,363,183.48
Aug. 2020	$217.75	$1,004,588.34	99.98%	$1,565,280.46
Sept. 2020	$0.00	$1,601,577.79	100%	$1,533,422.86
Oct. 2020	$0.00	$0.00	-	$136,020.17
Nov. 2020	$0.00	$0.00	-	$1,553,412.77
TOTAL	**$914,487.06**	**$1,089,225,531.67**	**99.92%**	**$1,120,987,761.22**

[10] Committee, Amended 2019 Year-End Report at 3-4 (Mar. 27, 2020), https://docquery.fec.gov/pdf/265/202003279216018265/202003279216018265.pdf; Committee, Amended 2020 February Monthly Report at 3-4 (Mar. 27, 2020), https://docquery.fec.gov/pdf/447/202003279216020447/202003279216020447.pdf; Committee, Amended 2020 March Monthly Report at 3-4 (May 20, 2020) ("Committee Amended 2020 March Monthly Report"), https://docquery.fec.gov/pdf/921/202005209239116921/202005209239116921.pdf; Committee, Amended 2020 April Monthly Report at 3-4 (June 19, 2020) ("Committee Amended 2020 April Monthly Report"), https://docquery.fec.gov/pdf/972/202006199240065972/202006199240065972.pdf; Committee, Amended 2020 May Monthly Report at 3-4 (June 19, 2020), ("Committee Amended 2020 May Monthly Report"), https://docquery.fec.gov/pdf/515/202006199240063515/202006199240063515.pdf; Committee, 2020 June Monthly Report at 3-4 (June 19, 2020) ("Committee 2020 June Monthly Report"), https://docquery.fec.gov/pdf/260/202006199240062260/202006199240062260.pdf; Committee, 2020 July Monthly Report at 3-4 (July 20, 2020) ("Committee 2020 July Monthly Report"), https://docquery.fec.gov/pdf/409/202007209255230409/202007209255230409.pdf; Committee, 2020 August Monthly Report at 3-4 (Aug. 20, 2020) ("Committee 2020 August Monthly Report"), https://docquery.fec.gov/pdf/721/202008209266853721/202008209266853721.pdf; Committee, 2020 September Monthly Report at 3-4 (Sept. 18, 2020) ("Committee 2020 September Monthly Report"), https://docquery.fec.gov/pdf/860/202009189275257860/202009189275257860.pdf; Committee, 2020 October Monthly Report at 3-4 (Oct. 20, 2020), https://docquery.fec.gov/pdf/254/202010209298273254/202010209298273254.pdf; Committee, 2020 November Monthly Report at 3-4 (Nov. 20, 2020), https://docquery.fec.gov/pdf/088/202011209337060088/202011209337060088.pdf; Committee, Amended 2020 December Monthly Report at 3-5 (Mar. 20, 2021), https://docquery.fec.gov/pdf/790/202103209441676790/202103209441676790.pdf.

B. The Committee's Transfer of Funds to the DNC

The Democratic Party's Super Tuesday primaries were held on March 3, 2020, but Bloomberg gained only 49 delegates.[11] The next day, Bloomberg suspended his campaign and endorsed Joe Biden.[12] Bloomberg pledged to use his resources and those at his campaign's disposal to defeat President Trump and Republicans but did not indicate what form those efforts would take.[13] On March 13, 2020, the Committee reported an $18 million transfer to the DNC.[14] In connection with that transfer, the Committee explained, in a March 20, 2020 memorandum to DNC Chair Tom Perez, that the transfer of $18 million in its campaign account to the DNC was "to help Democrats win up and down the ballot this fall."[15] The memorandum articulated Bloomberg's personal motivation for the transfer as follows:

> As Mike said throughout the campaign, he would support whomever the eventual Democratic nominee is, as well as Democrats in key races that we must elect to help undo the damage President Trump has done in office. While our campaign has ended, Mike's number one objective this year remains defeating Trump and helping Democrats win in November.[16]

The DNC accepted these funds, which comprised more than 50% of the DNC's approximate $32 million in receipts for March 2020.[17]

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[11] Bloomberg Resp. at 3 (citing Amy B Wang & Michael Scherer, *Mike Bloomberg Is Suspending His Presidential Campaign, Says He's Endorsing Biden*, WASH. POST (Mar. 4, 2020, 12:14 PM), https://www.washingtonpost.com/politics/mike-bloomberg-drops-out-of-presidential-race/2020/03/04/62eaa54a-5743-11ea-9000-f3cffee23036_story.html); DNC Resp. at 3 (same).

[12] Bloomberg Resp. at 3 (citing Wang & Scherer, *supra* note 11); DNC Resp. at 3 (same).

[13] DNC Resp. at 3; *see also* Washington Post, *Bloomberg Speaks After Ending Campaign*, YOUTUBE (Mar. 4, 2020), https://www.youtube.com/watch?v=CvpCxUOZxD8.

[14] Committee Amended 2020 April Monthly Report at 6458.

[15] Compl., Ex. 1 (Mar. 24, 2020), MUR 7722 ("MUR 7722 Compl.").

[16] *Id.*

[17] DNC, Amended 2020April Monthly Report at 3, 6418 (Jul. 22, 2020), https://docquery.fec.gov/pdf/630/202007229260734630/202007229260734630.pdf.

In its memorandum to the DNC, the Committee also announced an intention to donate its office facilities and equipment in key battleground states to various Democratic state committees.[18] The Committee subsequently reported making in-kind transfers to numerous Democratic state party committees in excess of $10,000 for rent, office space, and equipment, as reflected in Figure 2.[19]

Figure 2	
Recipient	**In-Kind Transfers from the Committee**[20]
North Carolina Democratic Party	$555,112.17
Arizona Democratic Party	$195,547.95
Michigan Democratic State Central Committee	$141,100.81
Democratic Party of Wisconsin	$68,842.44
Minnesota Democratic-Farmer-Labor Party	$85,504.81
Democratic Party of Virginia	$16,000.00
Maine Democratic Party	$41,654.84
New Hampshire Democratic Party	$29,100.00
Tennessee Democratic Party	$22,600.00
Total	**$1,155,463.02**

According to an affidavit submitted by the Committee's treasurer, at the time of the transfer to the DNC, the Committee had more than $29 million cash on hand.[21] Although the Committee does not indicate its debt level as of the date of the transfer, at the beginning of March 2020, the Committee reported $60,631,611.74 cash on hand and $30,774,885.28 in debts, but ended March with cash on hand of $11,179,585.13 and debts of $14,789,537.40.[22] This net

[18] MUR 7722 Compl., Ex. 1.

[19] *See* Committee Line 29 Disbursements, *supra* note 3.

[20] The "Total Amount" is the sum of in-kind transfers for rent, office space and equipment after Bloomberg announced the suspension of his campaign on March 3, 2020. Examples of descriptions of these transfers from the disclosure reports are "In-kind transfer given: Rent" and "In-kind transfer given: office space." *See* Committee, Line 29 Disbursements, *supra* note 3. The transfers occurred between March 20, 2020, and June 1, 2020. *Id.*

[21] Bloomberg Resp., Horowitz Aff. ¶ 6.

[22] *See* Committee Amended 2020 March Monthly Report at 2 (showing debts at the end of February); Committee Amended 2020 April Monthly Report at 2 (showing cash on hand at the beginning of March).

deficit of approximately $3.6 million at the end of March 2020 would not have occurred but for the transfer to the DNC, and the Committee continued to report debts that exceeded its cash on hand in every month except July through August 2020.[23]

Following the transfer to the DNC, Bloomberg continued to make contributions to the Committee so that the Committee could continue to make disbursements throughout the primary period. In some instances, the Committee made large recurring payments in excess of $1 million to vendors, such as for media, legal consulting, and software rental, but the Committee would have had insufficient funds to cover those disbursements without the additional contributions from Bloomberg.[24]

C. The Complaints

The Complaints argue that the Committee's funds were comprised entirely of Bloomberg's personal funds and that because Bloomberg maintained control over his Committee and its accounts, any transfers from the Committee must be attributed to him personally.[25] The MUR 7722 Complaint further argues that the Committee never "accepted" Bloomberg's contributions, within the meaning of 52 U.S.C. § 30114(a), because the funds came from and

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[23] *See* Committee Amended 2020 April Monthly Report at 2; Committee Amended 2020 May Monthly Report at 2 (disclosing cash on hand of $1,384,994.68 and debts of $7,218,513.35); Committee 2020 June Monthly Report at 2 (disclosing cash on hand of $452,426.93 and debts of $1,491,561.55); Committee 2020 July Monthly Report at 2 (disclosing cash on hand of $1,963,568.40 and debts of $856,744.05); Committee 2020 August Monthly Report at 2 (disclosing cash on hand of $143,946.98 and debts of $272,591.12); Committee 2020 September Monthly Report at 2 (disclosing cash on hand of $30,011.95 and debts of $121,269.26).

[24] *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00728154&two_year_transaction_period=2020&min_date=03%2F14%2F2020&max_date=08%2F20%2F2020 (last visited May 1, 2023) (reflecting 11,533 disbursements from the Committee between March 14 and August 20, 2020). For example, the Committee disclosed $2.1 million recurring monthly payments to Hawkfish LLC for "digital consulting," legal fees on July 29, 2020 of approximately $1.5 million, and recurring monthly payments in excess of $1 million to Vensure HR LLC for health insurance. *Id.*

[25] MUR 7722 Compl. at 6-8, 10 (stating Bloomberg directed and approved the Committee's transfer and that he has "plenary authority" over the funds); Compl. at 3 (Mar. 25, 2023), MUR 7723 ("MUR 7723 Compl.") (stating Bloomberg "directed" the Committee's transfer).

were still controlled by him; therefore, the Committee was unable to make unlimited transfers under 11 C.F.R. § 113.2(c).[26] The Complaints allege that the $18 million provided to the DNC and the assets given to the Unknown State Party Committees violated the Act in the following ways:

- Bloomberg made an excessive contribution to the DNC in violation of 52 U.S.C. § 30116(a)(1)(B);
- Bloomberg made an excessive contribution to the Unknown State Party Committees in violation of 52 U.S.C. § 30116(a)(1)(D);
- The DNC knowingly accepted an excessive contribution from Bloomberg in violation of 52 U.S.C. § 30116(f); and
- Bloomberg made, and the Committee knowingly permitted its name to be used to effect, a contribution in the name of another, and the DNC knowingly accepted a contribution in the name of another in violation of 52 U.S.C. § 30122.[27]

The MUR 7722 Complaint also makes several alternative allegations, should the Commission decline to consider the $18 million given to the DNC and the assets given to the Unknown State Party Committees to constitute contributions attributable to Bloomberg personally. In that event, the MUR 7722 Complaint makes the following allegations:

- Bloomberg made an excessive contribution to the Committee (*i.e.*, his own authorized committee) in violation of 52 U.S.C. § 30116(a)(1)(A);
- The Committee made an excessive earmarked contribution to the 2020 Democratic Presidential nominee in violation of 52 U.S.C. § 30116(a)(1)(A), (a)(8);
- The Committee made an excessive contribution to the DNC in violation of 52 U.S.C. § 30116(a)(1)(B);
- The Committee made an excessive contribution to Unknown State Party Committees in violation of 52 U.S.C. § 30116(a)(1)(D); and

[26] MUR 7722 Compl. at 13.

[27] *Id*. at 6-12; MUR 7723 Compl. at 3-4.

- The DNC knowingly accepted an excessive contribution from the Committee in violation of 52 U.S.C. § 30116(f).[28]

D. The Responses

The Bloomberg Respondents and the DNC deny violating the Act and argue that the transfers were permissible.[29] They argue that the Supreme Court's decision in *Buckley v. Valeo*,[30] established a constitutional right of federal candidates to make "unlimited expenditures from personal funds" in support of their own campaigns as codified by 11 C.F.R. § 110.10 and articulated in the Commission's advisory opinions.[31] They contend that the $18 million given to the DNC was not a contribution but a transfer permitted by 52 U.S.C. § 30114(a)(4), which provides that "[a] contribution accepted by a candidate . . . may be used by the candidate . . . for transfers, without limitation, to a national, State, or local committee of a political party," and 11 C.F.R. § 113.2(c), which provides for the unlimited transfer of "funds in a campaign account" to a "national, State, or local committee of any political party."[32]

The DNC also argues that Congress amended the Act in 2002 to remove any limiting language of the Act's transfer provision — which previously addressed "excess campaign funds" — and therefore allowed candidate committees to transfer any campaign funds "in a campaign account" to the national or state party committee without limitation and for any lawful purpose.[33] The Bloomberg Respondents and the DNC further argue that "when funds are transmitted to

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28 MUR 7722 Compl. at 12-20.

29 *See* Bloomberg Resp.; DNC Resp. Both the Bloomberg Respondents and the DNC each submitted a single Response simultaneously addressing the allegations raised in the MUR 7722 Complaint and MUR 7733 Complaint. References to the Responses in this Report thus do not distinguish between those filed in MUR 7722 and MUR 7723, because the Responses in each matter are identical.

30 424 U.S. 1 (1976) (per curiam).

31 11 C.F.R. § 110.10; Bloomberg Resp. at 3-5; DNC Resp. at 4-5; *see also Buckley*, 424 U.S. at 52.

32 52 U.S.C. § 30114(a)(4); 11 C.F.R. § 113.2(c); Bloomberg Resp. at 4-5; DNC Resp. at 7-8.

33 DNC Resp. at 7.

another entity for a legitimate purpose and not to make contributions to specific political committees, subsequent contributions by that entity will not be considered contributions in the name of another."[34] Next, the Bloomberg Respondents and the DNC assert that there is no evidence that, at the time Bloomberg contributed his personal funds to his campaign, he intended or acted with the purpose that those funds be transferred to the DNC at a later date; therefore, no contribution in the name of another occurred.[35] Finally, the DNC argues that if the Commission does find a violation of the Act under the Complaints' "novel theory" that the transfer was not permissible, the Commission should not punish the DNC under principles of due process.[36]

III. LEGAL BACKGROUND

A. Relevant Statutory and Regulatory Provisions

Under the Act, the term "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[37] 52 U.S.C. § 30116(a) sets forth limits on how much a person may contribute to a candidate and candidate's authorized committee, as well as to the national and state party committees.[38] During the 2020 election cycle, persons were prohibited from contributing more than $2,800 to a candidate and his or her authorized committee with respect to

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34 DNC Resp. at 8-9; *accord* Bloomberg Resp. at 8-9.

35 *See* Bloomberg Resp. at 8-9; DNC Resp. at 8-9.

36 DNC Resp. at 8 n. 31 (citing Statement of Reasons ("SOR"), Comm'rs. Petersen, Hunter & Goodman at 2, MURs 6485 (W Spann LLC, *et al.*), *et al.* (Apr. 1, 2016); SOR, Comm'rs. Hunter & Goodman at 2, MUR 6920 (American Conservative Union, *et al.*) (Dec. 20, 2017)).

37 52 U.S.C. § 30101(8)(A).

38 *Id.* § 30116(a)(1)(A), (B), (D).

a federal election,[39] $35,500 to a committee of a national political party in a calendar year,[40] and $10,000 to a committee of a state political party in a calendar year.[41] The Supreme Court has explained that contribution limits, as opposed to limits on expenditures made independently of a candidate, "entail[] only a marginal restriction upon the contributor's ability to engage in free communication" because "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."[42] The Supreme Court has consistently upheld base contribution limits as a permissible means to guard against the potentially corrupting influence, and appearance of such influence, of large financial contributions.[43]

In contrast, a candidate may make unlimited expenditures in support of his or her own candidacy. In *Buckley*, the Supreme Court found that a "ceiling on personal expenditures by candidates *on their own behalf* . . . imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression."[44] Consistent with *Buckley*, Commission

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39 *Id.* § 30116(a)(1)(A); 11 C.F.R. § 110.1(b); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019) ("Price Index Adjustments").

40 52 U.S.C. § 30116(a)(1)(B); 11 C.F.R. § 110.1(c); Price Index Adjustments, 84 Fed. Reg. at 2506.

41 52 U.S.C. § 30116(a)(1)(D); 11 C.F.R. § 110.1(c)(5).

42 *Buckley*, 424 U.S. at 20-21.

43 *McCutcheon v. FEC*, 572 U.S. 185, 192-93 (2014) (describing the "base limits" established by the Act as serving the government's "permissible objective of combatting corruption"); *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (contribution limits "have been an accepted means to prevent *quid pro quo* corruption") (citing *McConnell v. FEC*, 540 U.S. 93, 136-38 & n.40 (2003) (citing cases)); *Buckley*, 424 U.S. at 25-33, 58 (upholding base limits of the Federal Election Campaign Act Amendments of 1974 as permissible to protect against "the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions"); *see also McCutcheon v. FEC* ("*McCutcheon II*"), 496 F. Supp. 3d 318, 322 (D.D.C. 2020) (explaining that limiting corruption and its appearance "animates limits on contributions to political party committees").

44 424 U.S. at 52 (emphasis added). In addition to limiting candidates' ability to "engage in the discussion of public issues and vigorously and tirelessly . . . advocate his own election," the Court concluded that the limits on candidate expenditures of their own personal funds "reduces the candidate's dependence on outside contributions

regulation 11 C.F.R. § 110.10 recognizes the right of candidates to make "unlimited expenditures from personal funds" in support of their own campaigns.[45] In a series of advisory opinions, the Commission has consistently interpreted this provision allowing unlimited expenditures "to mean that a candidate may also make unlimited contributions to his or her authorized committee" from personal funds.[46]

In 52 U.S.C. § 30114, the Act provides a list of "[p]ermitted uses" for "contribution[s] accepted by a candidate."[47] That list includes "transfers, without limitation, to a national, State, or local committee of a political party."[48] Commission regulation 11 C.F.R. § 113.2(c) provides that "funds in a campaign account . . . [m]ay be transferred without limitation to any national, State, or local committee of any political party."[49]

B. 2020 *McCutcheon v. FEC* Litigation

On May 29, 2020, Shaun McCutcheon, a self-financed Libertarian Party candidate who was solely responsible for funding his campaign from his personal funds and who was characterized as having "complete control over [his campaign committee's] actions," submitted

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and thereby counteracts the coercive pressures and attendant risks of abuse to which the [1974 Amendments'] contribution limits are directed." *Id.* at 52-53.

45 11 C.F.R. § 110.10; *see also* H.R. DOC. NO. 95-44, at 70 (1977) (noting that this regulation was intended to "comport[] . . . with the Supreme Court decision in *Buckley*").

46 Advisory Opinion ("AO") 2010-05 at 2 (Pike for Congress) (citing AO 1985-33 (Citizens to Re-Elect Cardiss Collins); AO 1984-60 (W. Patrick Mulloy, II)); *see also, e.g.*, AO 2003-31 at 2 (Mark Dayton) ("Under the Act and Commission regulations, a Senate candidate may make unlimited expenditures from personal funds, including unlimited contributions to his or her own campaign."); AO 1997-10 at 3 (Hoke for Congress, *et al.*) ("Under the Act and Commission regulations, a candidate for Congress may make unlimited expenditures from personal funds. This permits such candidates to make loans or contributions in unlimited amounts to their own campaigns."); AO 1994-26 at 2-3 (Scott Douglas Cunningham, *et al.*) (contributions by candidate to his committee derived from personal lines of credit obtained years before candidacy were from candidate's personal funds and therefore permissible in unlimited amounts).

47 52 U.S.C. § 30114(a)(1)-(6).

48 *Id.* § 30114(a)(4). Such contributions and donations may also be used "for any other lawful purpose" unless expressly prohibited by the Act. *Id.* § 30114(a)(6).

49 11 C.F.R. § 113.2(c).

an advisory opinion request to the Commission.[50] That request termed the Committee's transfer the "Bloomberg Billionaire Loophole," describing it as "blatantly" illegal.[51] Seeking the FEC's approval to conduct a similar transaction, the request asked, among other things, whether McCutcheon could transfer $50,000 of his committee's funds and unlimited amounts of additional funds (consisting solely of contributions from McCutcheon's personal funds) to the Libertarian National Committee ("LNC") after McCutcheon had suspended his campaign.[52] The Commission, however, could not issue an advisory opinion because it lacked a quorum at the relevant time in 2020.[53] On September 4, 2020, McCutcheon and his campaign committee filed a lawsuit seeking a preliminary injunction to bar the Commission from bringing an enforcement action against McCutcheon and his committee and a declaratory judgment that the proposed transfers of funds to the LNC were legal.[54]

In considering the plaintiffs' motion in the court case, the district court recognized that plaintiffs' complaint stemmed from the Bloomberg campaign's $18 million transfer to the DNC and noted that counsel for McCutcheon had filed the MUR 7722 Complaint and made numerous public statements that Bloomberg campaign's transfer was an excessive contribution to a political party.[55] The court ultimately denied plaintiffs' motion for preliminary injunction and declaratory judgment because it found that plaintiffs had failed to show a likelihood of success

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50 Advisory Opinion Request ("AOR") at 2-4, Advisory Opinion 2020-03 (McCutcheon for Freedom, *et al.*).

51 *Id.* at 1.

52 *Id.* at 2.

53 Letter to Dan Backer, Esq. (Aug. 10, 2020), AOR 2020-03 (McCutcheon for Freedom, *et al.*).

54 *See McCutcheon II*, 496 F. Supp. 3d at 328; *see also* Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj., *McCutcheon v. FEC*, No. 20-2485 (D.D.C. Sept. 4, 2020).

55 *McCutcheon II*, 496 F. Supp. 3d at 325.

on the merits of the complaint.[56] The court stated that "[f]undamental" to its conclusion in denying the plaintiffs' motion was that the Commission's conduct in processing and disposing of the advisory opinion request was "not only legal, it was statutorily mandated," given that the Act requires the affirmative vote of four Commissioners to issue an advisory opinion.[57]

In addition to the procedural grounds for denying the motion, the court considered whether the proposed transfers were permissible under the Act in the context of the plaintiffs' request for a declaratory judgment that the proposed transfers were legal.[58] In rejecting this request, the court observed that the Supreme Court had upheld the constitutionality of the Act's base limits on contributions and that the Act contained safeguards to prevent circumvention of those limits.[59] The court further noted that while 52 U.S.C. § 30114(a)(4) permitted unlimited transfers to party committees, "[t]his statutory provision does not apply to all funds in a campaign account, but only to 'contribution[s] accepted by a candidate.'"[60] However, the court indicated that the Act did not define what it meant for a candidate to "accept" a contribution, and there appeared to be a lack of judicial or Commission precedent "interpreting the precise contours of when a contribution is deemed 'accepted by a candidate' so as to be eligible for unlimited transfer to a party committee under § 30114(a)(4)."[61]

While the court did not reach a dispositive conclusion as to the legality of the proposed transfers, it nevertheless determined that plaintiffs did not establish a likelihood of success in

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56 *Id.* at 330.

57 *Id*.

58 *Id.* at 334-35.

59 *See id*. at 322-23.

60 *Id*. at 323.

61 *Id*.

obtaining a declaratory judgment that the proposed transfers to the LNC were permissible.[62] Although it recited that plaintiffs set forth "a straightforward two-step analysis rooted in the [Commission's] regulations" — first, that a candidate may make unlimited contributions to his or her own campaign under 11 C.F.R. § 110.10; and second, that a campaign committee may transfer unlimited funds to a national party committee under 11 C.F.R. § 113.2(c) — the court observed that this analysis appeared to disregard other provisions of the Act.[63] The court explained: "[i]f these two provisions stood alone, plaintiffs might well persuade the Court that the Proposed Transactions are legal under [the Act]. But they do not stand alone."[64] While the court acknowledged that there appeared to be "some tension" between the 52 U.S.C. § 30114(a) permitting the unlimited transfer of campaign funds to a political party and the Act's "safeguards against circumvention of contribution limits through conduits,"[65] it reasoned that "[i]n the case of a totally self-funded candidate like McCutcheon, it is indeed difficult to distinguish on principle a transfer of funds from his now-inactive campaign to a party committee from an individual contribution subject to statutory limits imposed to mitigate actual or apparent corruption in campaign finance."[66]

The court concluded that under existing law, it was "far from clear" how the Commission or a court would rule on the legality of the transfers and that plaintiffs had not met their burden to obtain a preliminary injunction.[67] Further, the court held that the plaintiffs were not entitled to

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62 *Id*. at 335.

63 *Id*. at 334-35.

64 *Id.* at 335.

65 *Id*.

66 *Id*.

67 *Id.*

declaratory relief that there was a First Amendment right to make unlimited transfers of campaign funds to party committees.[68] Plaintiffs subsequently dismissed the case, with the effect that there was no further ruling addressing the merits.[69]

IV. LEGAL ANALYSIS

A. The Commission Should Find Reason to Believe That the Bloomberg Respondents Made, and the DNC Knowingly Accepted, an Excessive $18 Million Contribution in Violation of 52 U.S.C. §§ 30116(a)(1)(B), (f)

The available information in this matter indicates that in shifting from funding Bloomberg's own speech through expenditures of his personal funds in the context of his own candidacy, to providing those funds to support the speech of others, namely, supporting the DNC's efforts to elect the Democratic nominee and other Democratic candidates, the $18 million transfer to the DNC constituted a contribution that exceeded the Act's base limits on contributions to national party committees. This conclusion is established by the Act's specific treatment of the kinds of funds that legally may be transferred under 52 U.S.C. § 30114 — those "accepted" by the candidate but not those previously possessed by the candidate — and it is not superseded by the Commission's regulation in 11 C.F.R. § 113.2(c) or refuted by Respondents' other arguments.

1. The Bloomberg Respondents' $18 Million Transfer to the DNC Is an Impermissible Excessive Contribution, Not a Permissible Expenditure

At their core, the Complaints contend that because "[i]t would be blatantly illegal for Bloomberg to directly contribute $18 million of his own funds to the DNC directly," it is likewise illegal to "circumvent contribution limits" by first placing the funds in his self-funded

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68 *Id*.

69 Pls.' Notice of Dismissal, *McCutcheon v. FEC*, No. 20-2485, Docket No. 18 (D.D.C. Oct. 22, 2020).

campaign and later transferring them to the DNC.[70] The Complaints thus contend, among other things, that these actions by the Bloomberg Respondents constituted an excessive contribution in violation of 52 U.S.C. § 30116.[71]

As discussed above, the Act guards against corruption and its appearance by limiting large financial contributions.[72] During the 2020 election cycle, persons were prohibited from contributing more than $2,800 to a candidate and his or her authorized committee with respect to a federal election, $35,500 to a committee of a national political party in a calendar year, and $10,000 to a committee of a state political party in a calendar year.[73] These base contribution limits have been consistently upheld by the Supreme Court as constitutional[74] because they "serv[e] the permissible objective of combatting corruption."[75] Further, the Act's anti-circumvention provisions underscore the importance Congress placed on maintaining the integrity of the base contribution limits.[76]

Notwithstanding these base contribution limits, candidates like Bloomberg may generally make expenditures on their own behalf without limit because of their strong First Amendment interests and a reduced danger of corruption in that context.[77] Commission regulations thus

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70 MUR 7722 Compl. at 2.

71 *Id.* at 6-8, 12-13; MUR 7723 Compl. at 3-4.

72 *See Buckley*, 424 U.S. at 26-27 (pointing to the "deeply disturbing examples" of corruption recited in the D.C. Circuit's opinion, which relied on evidence uncovered as a result of Congress' investigations); *McConnell*, 540 U.S. at 122, 129-32 (describing the "disturbing findings" of the U.S. Senate's investigation into the 1996 election); *supra* note 43 and accompanying text.

73 *See supra* notes 39-41 and accompanying text.

74 *See supra* note 43.

75 *McCutcheon*, 572 U.S. at 192-93.

76 *See, e.g.*, 52 U.S.C. §§ 30116(a)(5) (non-proliferation provision), 30116(a)(7)(B) (coordinated expenditures treated as contributions), 30122 (contributions in the name of another prohibited), 30125 (restrictions on the use of soft money by entities established, financed, maintained or controlled or acting on behalf of federal candidates).

77 *Buckley*, 424 U.S. at 52-53.

permit such "unlimited expenditures from personal funds,"[78] and the Commission's prior advisory opinions have construed this regulation to permit candidates to not only make direct expenditures from their personal funds, but also provide unlimited amounts of personal funds to their candidate committees to have those committees make the expenditures instead.[79] The underlying character of an *expenditure* a candidate makes on their own behalf and in furtherance of their own campaign remains unaltered by first depositing candidate funds in the candidate's authorized campaign committee's depository. The Commission's regulation at 11 C.F.R. § 110.10 accordingly describes the "personal funds . . . defined in 11 [C.F.R. §] 100.33" as "expenditures" by candidates, not contributions.[80]

The conception of personal funds provided to self-fund a candidacy as expenditures comports with the Supreme Court's decisions from *Buckley* to the present. In *Buckley*, the Court determined that "[t]he ceiling on personal expenditures by candidates on their own behalf, like the limitations on independent expenditures . . . , imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression."[81] The Court thus found that "[t]he primary governmental interest served by the Act[,] the prevention of actual and apparent corruption of the political process[,] does not support the limitation on the candidate's expenditure of his own personal funds."[82] More recently, in *Davis v. FEC*, the Court reaffirmed that "[i]n *Buckley*, we soundly rejected a cap on a candidate's expenditure of personal funds to

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78 11 C.F.R. § 110.10.

79 *E.g.*, AO 2003-31 at 2 (explaining that candidate "may make unlimited expenditures from personal funds, including unlimited contributions to his or her own campaign").

80 11 C.F.R. § 110.10. *But see supra* note 46 (collecting Commission advisory opinions also describing expenditures by a candidate or via a candidate's committee as contributions, consistent with Commission reporting requirements and not in the context of the transfer at issue here).

81 424 U.S. 51-52.

82 *Id*. at 53.

finance campaign speech."[83] And most recently, in *FEC v. Ted Cruz for Senate*, the Supreme Court invalidated Section 304 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") by explaining, in part, that the provision "by design and effect, burdens candidates who wish to make expenditures on behalf of their own candidacy through personal loans."[84] That provision, the Court said, constituted a "'drag' on a candidate's First Amendment right to use his own money to facilitate political speech."[85] In these cases, the Court consistently rooted the right of candidates to self-fund in excess of the Act's contribution limits in the candidate's First Amendment right to make unlimited expenditures, even when those expenditures take the form of loans provided to and deposited in the candidate's committee's depository.[86]

While the foregoing cases illustrate that the Court has upheld First Amendment rights associated with the making of expenditures, including expenditures by candidates, the Court has also maintained a careful distinction between expenditures and contributions in view of the "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign."[87] For example, in considering specific challenges to BCRA's soft money restrictions in *FEC v. McConnell*, the Court explained that the Act's soft money provisions "have only a marginal impact on the ability of contributors . . . and parties to engage in effective

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83 554 U.S. 724, 738 (2008); *id.* at 740 ("The burden imposed by [BCRA's Millionaire's Amendment] on the expenditure of personal funds is not justified by any governmental interest in eliminating corruption or the perception of corruption.").

84 *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1650 (2022).

85 *Id.* at 1651.

86 *E.g.*, *id.* at 1646 ("Before election day, Cruz loaned $260,000 to the other appellee here, Ted Cruz for Senate (Committee).").

87 *FEC v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 497 (1985).

political speech."[88] Rejecting the plaintiffs' request to apply a stricter standard of review, the Court determined that "it is irrelevant that Congress chose in § [30125] to regulate contributions on the demand rather than the supply side."[89] Thus, although § 30125(b) "prohibits state party committees from spending nonfederal money on federal election activities," it does not "limit[] the total amount of money parties can spend."[90] "That [it] do[es] so by prohibiting the spending of soft money does not render [it an] expenditure limitation[]."[91] Numerous other cases similarly focus on the key difference between expenditures and contributions, and the resulting constitutional implications that are based specifically on the nature of the First Amendment rights at issue.[92]

The Bloomberg Respondents' $18 million transfer to the DNC purports to be permissible on the basis of Bloomberg's right to self-fund without limitation on such expenditures. This view ignores the shift from Bloomberg expending funds, initially in furtherance of his own First Amendment speech, to contributing them via transfer to the DNC, to fund the DNC's speech. The change to funding the speech of others is what subjects the transfer of funds provided by the

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88 540 U.S. 93, 138.

89 *Id.*

90 *Id.* at 139.

91 *Id.*

92 *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734-35 (2011) (discussing examples of invalidated government-imposed restrictions on campaign expenditures and contrasting the upholding of "government-imposed limits on contributions"); *Davis*, 554 U.S. at 737 (explaining how the Court has previously sustained contribution limits); *FEC v. Beaumont*, 539 U.S. 146, 161-62 (2003) ("While contributions may result in political expression if spent by a candidate or an association . . . , the transformation of contributions into political debate involves speech by someone other than the contributor. This is the reason that instead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, a contribution limit involving significant interference with associational rights passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." (internal quotation marks and citations omitted)); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001) ("Restraints on expenditures generally curb more expressive and associational activity than limits on contributions do."); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-88 (2000); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986).

candidate to the base contributions limits that are always applicable to contributions to fund the speech of others.[93] It implicates the base contribution limits in the same way, for example, that an independent expenditure — a speaker's own speech — becomes a contribution when it is coordinated with a candidate — by becoming the candidate's speech.[94] The accompanying explanation in the record behind the $18 million at issue highlights the change in character of the speech at issue. The Committee's memorandum recites Bloomberg's intent to "support whomever the eventual Democratic nominee is, as well as Democrats in key races that we must elect to help undo the damage President Trump has done in office," while acknowledging that "our campaign has ended."[95] These statements factually confirm the shift from the self-funding of a candidate's own speech ("our campaign," which "has ended") to funding the speech of others ("support[ing]" and "help[ing]" "the eventual Democratic nominee . . ., as well as Democrats in key races").[96] The nature of the transaction thus establishes the $18 million transfer to be a contribution, not an expenditure, consistent with the Court's treatment of the key distinctions between expenditure and contributions, and their distinct effects on First Amendment rights.[97] This understanding also accords with the candidates' First Amendment

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93 *Cf. Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) ("[c]essante ratione legis cessat ipse lex (the rationale of a legal rule no longer being applicable, that rule itself no longer applies)" (internal quotation marks omitted)).

94 Any expenditure made by a person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate," or the candidate's authorized political committee is considered an in-kind contribution to that candidate, 52 U.S.C. § 30116(a)(7)(B)(i); *accord* 11 C.F.R. §§ 109.20-.21, 109.37, and these "coordinated" expenditures are treated as contributions to the candidate and must be reported as expenditures made by the candidate's authorized committee. 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.20(b).

95 MUR 7722 Compl., Ex.1.

96 *Id.*

97 *See Nat'l Conservative Pol. Action Comm.*, 470 U.S. at 497 (distinguishing the "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign"); *supra* note 92 (collecting numerous Supreme Court cases distinguishing between expenditures and contributions).

rights to make unlimited expenditures on their own behalf,[98] as well as the important government interest in limiting *quid pro quo* corruption, or the appearance thereof, by limiting large individual contributions to national party committees, that the Court has also upheld.[99]

2. Bloomberg's Personal Funds Are Not Contributions "Accepted by a Candidate," Under 52 U.S.C. § 30114(a)

The notion that a self-funded candidate's transfer to a national party committee constitutes a contribution is reaffirmed by the Act's transfer provision that Respondents invoke, 52 U.S.C. § 30114.[100] That provision, like the foregoing analysis, heeds the Court's distinctions between expenditures and contributions, and the concomitant distinctions between a person expending funds in furtherance of their own speech and contributing funds to further the speech of others.

As the court observed in *McCutcheon II*, 52 U.S.C. § 30114(a)(4) "does not apply to *all* funds in a campaign account, but only to 'contribution[s] accepted by a candidate.'"[101] The Complaints in these matters raise the issue of whether the personal funds of a candidate, contributed to his or her principal campaign committee, constitute contributions "accepted by a candidate" under 52 U.S.C. § 30114. Based on the Act's text, structure, legislative history, and purpose, such funds do not appear to be "accepted by a candidate."[102]

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98 *Buckley*, 424 U.S. at 52-53.

99 *McConnell*, 540 U.S. at 143-54.

100 Bloomberg Resp. at 4-5; DNC Resp. at 6-8.

101 *McCutcheon II*, 496 F. Supp. 3d at 323 (emphasis added).

102 *See, e.g.*, Factual & Legal Analysis ("F&LA") at 4, MURs 7165, 7196 (Jesse Benton) ("In the absence of any precedent squarely on point, the Commission interprets the Act and forms a conclusion based on the plain meaning[, policy, and structure]"); *id.* at 6-7 (considering the history of the relevant section). Courts also utilize this method of statutory interpretation. *See, e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 & n.33 (1976) (finding SEC's original interpretation of Rule 10b-5 rule to require scienter is "compelled by the language and history of § 10(b) [of the Securities Exchange Act of 1934] and related sections of the Acts," thereby avoiding the need to examine "considerations of policy"); *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 45 F.4th 306,

Starting with the text, the Act does not define "accepted." When words in a statute are undefined, courts have looked to the words' plain meaning.[103] The Commission has done the same when interpreting the Act.[104] Here, the plain meaning of "accept" can mean "[t]o take or receive (a thing offered) willingly" and "[t]o receive as sufficient or adequate."[105] For its part, the word "receive" means to "to take possession or delivery of."[106] Consistent with this plain meaning, Commission regulations provide that the "[d]ate of receipt" of a contribution is the date a person "obtains possession of the contribution."[107]

The plain meaning of "accept" indicates that 52 U.S.C. § 30114(a)'s use of the phrase "contribution[s] accepted by a candidate" refers to funds or contributions not previously possessed by the candidate.[108] The phrase "contribution[s] accepted by a candidate" on its face thus would appear not to include within its scope funds already belonging to a candidate — *i.e.*,

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314 (D.C. Cir. 2022) (relying on the "ordinary tools of statutory interpretation — 'text, structure, purpose, and legislative history'" to determine whether the National Firearms Act and Gun Control Act's definition of "machinegun" extends to bump stocks) (quoting *Pharm. Rsch. & Mfrs. of Am. v. Thompson*, 251 F.3d 219, 224 (D.C. Cir. 2001)).

[103] *See, e.g.*, *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").

[104] *See, e.g.*, SOR, Comm'rs. Toner, Lenhard, Mason, von Spakovsky, Walther, & Weintraub at 3, MUR 5526 (Graf for Congress) (applying ordinary meaning of the word "print" to determine meaning of "printed communications" in 52 U.S.C. § 30120(c)); F&LA at 5, MUR 6673 (David Lee for Supervisor 2012) (relying on Merriam Webster's Dictionary to determine that the definition of "handbill" extends to door hangers).

[105] *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9-10 (2013) (quoting 1 OXFORD ENGLISH DICTIONARY 70 (2d ed. 1989)).

[106] *In re World Imports, Ltd* ., 862 F.3d 338, 342 (3d Cir. 2017) (ordinary meaning of "receive" is to "'[t]o take . . .; to come into possession of or get from some outside source'") (quoting BLACK'S LAW DICTIONARY (10th ed. 2014)); *United States v. Mazza-Alaluf*, 621 F.3d 205, 212 (2d Cir. 2010) ("[C]ommon meaning of 'receive' is 'to take possession or delivery of.'") (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1894 (1986)); *United States v. Stanley*, 896 F.2d 450, 451 (10th Cir. 1990) ("[C]ommon-sense understanding of the verb 'to receive' is either 'to take possession or delivery of' or 'to have (something) given or sent to one.'") (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1894 (1986); THE RANDOM HOUSE COLLEGE DICTIONARY 1101 (Rev. Ed.1980)).

[107] 11 C.F.R. § 102.8(a) (setting forth rule governing the receipt of contributions).

[108] *J.R. v. Walgreens Boots All., Inc.*, No. 20-1767, 2021 WL 4859603 at *5 n.7 (4th Cir. July 2, 2021) ("To 'receive' means 'to take possession or delivery of,' suggesting that the information was not previously possessed by that legal entity.") (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (2002)).

the candidate's "personal funds," which include assets that the candidate had "legal right or access to or control over" and income "received" by the candidate.[109]

Considering the text of 52 U.S.C. § 30114(a) in the context of the Act as a whole further supports the understanding that the phrase "contribution[s] accepted by a candidate" is meant in accordance with the ordinary meaning of "accepted" and excludes contributions of the candidate's personal funds.[110] Not only is this understanding consonant with other parts of the Act,[111] but it also avoids the potential "tension" the district court in *McCutcheon II* identified between 52 U.S.C. § 30114(a)(4)'s provision regarding transfers and the Act's "safeguards against circumvention of contribution limits through conduits," because Bloomberg and the Committee would be considered a "single unit" in accordance with 52 U.S.C. § 30102(e)(2) and 52 U.S.C. § 30116(a)(7)(A).[112] It also avoids conflict with the Act's soft-money ban in 52 U.S.C. § 30125(a) and (e) because the makeup of any funds transferred pursuant to 52 U.S.C.

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109 11 C.F.R. § 100.33(a)-(b) (defining personal funds of a candidate to include (a) "[a]mounts derived from any asset that, under applicable State law, at the time the individual became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had (1) [l]egal and rightful title; or (2) [a]n equitable interest . . . (b) . . . [i]ncome received during the current election cycle[] of the candidate.").

110 "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)).

111 *See* SCALIA & GARNER, *supra* note 110, at 180 ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory . . . . [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.").

112 *United States v. Goland*, 959 F.2d 1449, 1453 (9th Cir. 1992) ("Federal election law treats the candidate and his committees as a single unit for the purpose of accepting contributions.") (citing 52 U.S.C. §§ 30102(e)(2), 30116(a)(7)(A)). When a candidate "receives" a contribution, it is considered received by his or her authorized committee because the Act treats candidates as agents of their committee. 52 U.S.C. § 30102(e)(2). And the Act treats contributions made to a candidate's committee as being made to the candidate. *Id.* § 30116(a)(7)(A). Under the Bloomberg Respondents' and DNC's reading of 52 U.S.C. § 30114(a), the Committee's receipt of Bloomberg's personal funds would cause Bloomberg to accept (*i.e.*, receive) the very funds he already possessed.

§ 30114(a)(4) — individual contributions complying with Act's amount limitations and source prohibitions — would reduce anticircumvention concerns.[113]

The history and legislative history of 52 U.S.C. § 30114(a) likewise reinforce the notion that, for purposes of the statutory provision, a candidate does not accept contributions from themselves. As originally phrased, 52 U.S.C. § 30114 prohibited candidates from converting "[a]mounts *received* by a candidate as contributions that are in excess of any amount necessary to defray his expenditures . . . to any personal use."[114] No committee report or floor statement indicate that this phrase extended to the personal funds of a candidate (*i.e.*, funds not "received" by a candidate because they are already possessed). Indeed, such an extension would run contrary to the 1979 Amendments' articulated aim of "encourag[ing] *grass roots* participation,"[115] because, were it to be legal for a self-funded candidate to convert any amount of personal funds into a contribution to the national party committee, it would easily enable national party committees to rely on wealthy benefactors and undermine the value of grassroots participation.

Similarly, nothing in BCRA's legislative history supports the notion that "contribution[s] accepted by a candidate" would cover a candidate's personal funds used for campaign purposes. The Bloomberg Respondents argue that floor statements by BCRA co-sponsor Senator Russell

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113 *See* 52 U.S.C. § 30125(a)(1) (prohibiting national party committees from receiving nonfederal funds), (e)(1)(A)-(B) (prohibiting candidates, federal officeholders and entities directly or indirectly established, financed, maintained or controlled by or acting on behalf of a candidate or federal officeholder from transferring nonfederal funds in connection with an election for federal office or nonfederal office).

114 Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 113, 93 Stat. 1339, 1366-67 (1980) (emphasis added).

115 S. REP. NO. 96-319 at 1 (1979) ("The bill as reported has two major goals: (1) [t]o simplify reporting requirements for candidates and committees under the Federal Election Campaign Act, and (2) to encourage grass roots participation in Federal election campaigns."); *see Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) ("The general purpose of the 1979 [A]mendments to the [Act] . . . was to simplify reporting and administrative procedures.") (citing H.R. REP. NO. 96-422 at 3 (1979), *as reprinted in* 1979 U.S.C.C.A.N. 2860, 2862; S. REP. NO. 96-319 (1979)).

Feingold confirm their view that the Act imposes "no conditions or restrictions" on a campaign's ability to transfer campaign assets to a party committee.[116] But even assuming that a statement of a single Senator could overcome 52 U.S.C. § 30114's plain text,[117] the Bloomberg Respondents' reliance on Feingold's statement of apparent support for transfers "without limitation" is misplaced because Feingold was most likely referring to the total *amounts* of funds permitted to be transferred, not the composition of those funds.[118] The same Congress that passed BCRA in order to take "national parties out of the soft-money business" should not be understood to have unwittingly and simultaneously opened the door for wealthy candidates to give unlimited sums of their personal funds to the national party committees through the vehicle of a self-funded candidacy.[119]

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[116] Bloomberg Resp. at 4-5; *id.* at n.20 ("The intent to permit unlimited transfers was confirmed in the Senate's floor debate . . . by co-sponsor[] Russell Feingold") (citing 148 CONG. REC. S2096, S2143 (daily ed. Mar 20, 2002)).

[117] *See SW Gen. Inc. v. NLRB*, 796 F.3d 67, 77 (D.C. Cir. 2015) (statement of a single Senator (and bill's sponsor) "is only weak evidence of congressional intent" and does not overcome the statute's clear text).

[118] Instead, Feingold's discussion of the transfer provision reveals an intent to "codify the [Commission]'s current regulations," 148 CONG. REC. S2096, S2143 (daily ed. Mar 20, 2002), which, at the time, defined "[e]xcess campaign funds" as "amounts *received* by a candidate as contributions." *See* 11 C.F.R. § 113.1(e) (2001) (emphasis added). As discussed above, to "receive" means to "to take possession or delivery of." *Supra* note 106.

[119] *McConnell*, 540 U.S. at 133; *see* 147 CONG. REC. S2696 (daily ed. Mar. 22, 2001) (statement of Sen. Russell Feingold) ("The soft money ban is the centerpiece of this bill. Our legislation shuts down the soft money system, prohibiting all soft money contributions to the national political parties from corporations, labor unions, and wealthy individuals."); 148 CONG. REC. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. John McCain) ("It is a key purpose of the bill to stop the use of soft money as a means of buying influence and access with Federal officeholders and candidates."); 148 CONG. REC. H409 (daily ed. Feb. 13, 2002) (statement of Rep. Christopher Shays) ("Because the national parties operate at the national level, and are inextricably intertwined with federal officeholders and candidates, who raise the money for the national party committees, there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process."). BCRA restricted the raising and spending of soft money not only to national party committees but also to state and local party committees to avoid "wholesale evasion" of BCRA's soft money restrictions. *McConnell*, 540 U.S. at 161; 147 CONG. REC. S3251 (daily ed. Apr. 2, 2001) (soft money ban is designed to ensure "that national parties, federal officeholders and federal candidates use only funds permitted in federal elections to influence federal elections, and that state parties stop serving as vehicles for channeling soft money into federal races to help federal candidates") (statement of Sen. Fred Thompson). BCRA also included the "Millionaire's Amendment "[t]o reduce that advantage [of wealthy candidates spending their own money] and to combat the perception that congressional seats are for sale to the highest bidder." *Davis*, 554 U.S. at 749 (Stevens, J., dissenting). In *Davis*, the Supreme Court ruled that the provisions of BCRA known as the "Millionaire's Amendment" were unconstitutional. *Id.* at 744.

In sum, because virtually all of the funds in the Bloomberg Committee's campaign account were derived from expenditures that Bloomberg made to support his own campaign, not "contribution[s] accepted by the candidate," those funds may not be transferred without limitation to the DNC and instead constitute contributions to the DNC. This analysis accords with the fundamental principle that "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored" and supports the Act's plain meaning that "contribution[s] accepted by a candidate" exclude a candidate's personal funds.[120]

3. The Commission's Regulation in 11 C.F.R. § 113.2(c) Does Not Make a Candidate's Personal Funds Eligible for Transfer in Unlimited Amounts

Because 11 C.F.R. § 113.2(c) permits "funds in a campaign account" to be "transferred without limitation to any national, State, or local committee of any political party,"[121] Respondents argue that this includes *all* funds in a campaign account.[122] This argument is unpersuasive because it contravenes key principles of interpretation and is unsupported by the regulation's history and context.

As an initial matter, the regulation should be interpreted in a manner consistent with the plain meaning of the statute and its purpose.[123] As discussed above, the plain meaning of "contribution[s] accepted by a candidate" in 52 U.S.C. § 30114(a) does not include funds already in a candidate's possession at the time the person became a candidate. Instead, contributions

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120 SCALIA & GARNER, *supra* note 110, at 63.

121 11 C.F.R. § 113.2(c).

122 Bloomberg Resp. at 4-5; DNC Resp. at 7 (adding the caveat that funds must be from a lawful source).

123 *See CREW v. FEC*, 316 F. Supp. 3d 349, 387-95 (D.D.C. 2018) (invalidating independent expenditure reporting rule that conflicted with plain meaning of the Act), *aff'd*, 971 F.3d 340 (D.C. Cir. 2020); *Shays v. FEC*, 414 F.3d 76, 102-07 (D.C. Cir. 2005) (invalidating solicitation rule permitting what BCRA prohibits); SCALIA & GARNER, *supra* note 110, at 63 ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored").

"accepted by a candidate" means contributions accepted *from others* that are subject to the Act's base limits, the transfer of which to a party committee does not undermine the Act's purpose of guarding against corruption and the appearance thereof by limiting large financial contributions and harmonizes with other sections of the Act.[124]

Further, Respondents' view that 11 C.F.R. § 113.2 imposes no conditions or restrictions on the makeup of funds eligible to be transferred is not supported by the regulation's history. To the extent that BCRA was "intended to codify the [Commission's then-]current regulations on the use of campaign funds for personal expenses," the regulatory history is particularly important.[125] At the time of BCRA's enactment, the Commission defined "[e]xcess campaign funds" (*i.e.*, funds capable of being transferred to national or state party committees) as amounts "*received* by a candidate as contributions."[126] On its face, this earlier version of the regulation, like the statutory provision it implements, captures the concept of receipt and/or acceptance as coming from others, in contrast to funds already possessed. Moreover, the Commission's focus during the personal use rulemaking appears to have been on addressing the use of contributions *given* to candidates, not funds candidates already possessed.[127] The Commission's Explanation and Justification ("E&J") accompanying its post-BCRA changes to the regulation reveals no hint that the Commission's understanding of the word "funds" had changed to include unlimited

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124 *See Orloski v. FEC*, 795 F.2d 156, 164-65 (D.C. Cir. 1986) (no deference to interpretation that "unduly compromises the Act's purposes" by "creat[ing] the potential for gross abuse").

125 148 CONG. REC. S2143 (daily ed. Mar. 20, 2002) (statement of Sen. Russell Feingold).

126 11 C.F.R. § 113.1(e) (2001).

127 *See* Tr. of Public Hearing on Proposed Personal Use Regulations at 2 (Jan. 12, 1994), https://sers.fec.gov/fosers/showpdf.htm?docid=60369 ("Campaign funds are a form of public trust, *given to* candidates only to enable them to campaign for public office.") (emphasis added) (statement of Chairman Trevor Potter); *id.* at 34 ("[C]ontributors *give this money to* the candidates. It is not a gift with conditions in its pure sense. . . . [L]egally it is a gift, *they give it away* with no strings attached.") (emphases added) (statement of Comm'r Scott Thomas).

personal funds of a candidate.[128] As the Court in *Buckley* observed decades ago, "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed,"[129] including the context of personal use. Thus, as the Commission's E&J indicated, the replacement of the words "excess campaign funds," with "funds in a campaign account," simply aligned the regulation with BCRA's deletion of the phrase "that are in excess of any amount necessary to defray his expenditures" in 52 U.S.C. § 30114.[130]

4. Respondents' Other Arguments Are Unavailing

a. Restricting Transfers to Contributions "Accepted By the Candidate" Does Not Discriminate Against Self-Funded Candidates

Citing *Davis*, the Bloomberg Respondents contend that restricting the transfer of contributions made by Bloomberg would result in discriminatory contribution limits to wealthy, self-funded candidates such as himself.[131] However, *Davis* is inapt because it involved limits that applied to a self-funded candidate's own election where their opponent would be entitled to increased contribution limits if the self-funded candidate spent over a certain threshold to support their campaign.[132] The Supreme Court held that such increased limits resulted in "an unprecedent penalty" on the self-funded candidate who sought to exercise their constitutional right to spend unlimited funds on their own election.[133] Here, however, the issue is not how

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128 *See generally* Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962 (Dec. 13, 2002) ("Personal Use E&J").

129 424 U.S. at 53.

130 Personal Use E&J, 67 Fed. Reg. at 76,974-75; *see* 2 U.S.C. 439(a) (2001).

131 Bloomberg Resp. at 10 (citing *Davis*, 554 U.S. at 726).

132 *Davis*, 554 U.S. at 728-31.

133 *Id*. at 739.

much Bloomberg was permitted to spend on his own campaign, an unlimited amount without any penalty or relaxed limits for an opponent, per the holdings of *Buckley* and *Davis*, but rather how much he could contribute to support the DNC and other Democratic candidates, amounts that are restricted to the same base contribution limits that apply to every contributor.

b. Restricting Transfers to "Contribution[s] Accepted by the Candidate" Does Not Conflict with *Buckley* or 11 C.F.R. § 110.10

Nor does understanding "contribution[s] accepted by a candidate" in accordance with its plain meaning conflict with *Buckley* or 11 C.F.R. § 110.10, the very regulation intended to comport with *Buckley* with respect to the use of a candidate's personal funds.[134] As discussed above, *Buckley*'s rationale for invalidating the Act's limits on candidate *expenditures* of personal funds was that expenditure ceilings limit a candidate's ability to discuss public issues and advocate their own election, and that a candidate's use of his or her own personal funds reduces dependence on potentially corrupting outside contributions.[135] But this rationale does not extend to the transfer of funds to political party committees, which, in the context at issue of a self-

[134] H.R. DOC. NO. 95-44, at 70 (1977) (noting regulation intended to "comport[] . . . with the Supreme Court decision in *Buckley v. Valeo*"). While the Commission has described section 110.10 as "mean[ing] that a candidate may also make unlimited contributions to his or her authorized committee," AO 2010-15 at 2 (Pike for Congress), that characterization is founded on section 110.10's allowance for "unlimited expenditures" of a candidate's "personal funds," 11 C.F.R. § 110.10, and is distinguishable from a candidate making unlimited contributions to others, which the Act limits. 52 U.S.C. § 30116(a).

[135] *Buckley*, 424 U.S. at 52-53; *see also supra* Section III.A; *supra* notes 81-92.

funded candidacy, constitutes a contribution.[136] Indeed, the Commission has said "in the context of [52 U.S.C. § 30114], the term 'transfer' is indistinguishable from the term 'contribution.'"[137]

Accordingly, it is *Buckley*'*s* rationale for upholding *contribution* limits, not its rationale for invalidating *expenditure* ceilings that applies, because the DNC's spending of the funds it received from Bloomberg "involves speech by someone other than the contributor."[138] As the Court explained, because the "ceiling on personal expenditures by candidates on their own behalf" imposed "a substantial restraint" on protected First Amendment expression, the Court held that Congress could not limit how much a candidate could spend on his own campaign.[139] In contrast, *Buckley* found that contribution limits entailed "only a marginal restriction" on the contributor's speech, and "[a] limitation on the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication."[140] Further, in *McConnell*, the Supreme Court, when analyzing BCRA's soft money prohibition, held that limiting large contributions to national party committees was constitutional given that such contributions can result in corruption of federal candidates, as well

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136 *McConnell*, 540 U.S. at 143-54 ("[L]arge soft-money contributions to national political parties give rise to corruption and the appearance of corruption."); *accord McCutcheon II*, 496 F. Supp. 3d at 334-35 ("In the case of a totally self-funded candidate like McCutcheon, it is indeed difficult to distinguish on principle a transfer of funds from his now-inactive campaign to a party committee from an individual contribution subject to statutory limits imposed to mitigate actual or apparent corruption in campaign finance.").

137 AO 1981-17 at 2 (Vt. State Democratic Comm.).

138 *Buckley*, 424 U.S. at 20-21; *id.* at 52 n.58 (viewing candidate spending *on their own behalf as* an expenditure and not a contribution because "a candidate's expenditure of his personal funds directly facilitates his own political speech"); *see also Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 196-97 (1981) (plurality op.) ("[T]he 'speech by proxy' that CMA seeks to achieve through its contributions to CALPAC is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.").

139 *See Buckley*, 424 U.S. at 52-54; *see also McCutcheon II*, 496 F. Supp. 3d at 324 (describing the law concerning a candidate's ability to make unlimited expenditures).

140 *Buckley*, 424 U.S. at 20-21.

as the appearance of corruption.[141] Determining that the personal funds of a candidate are outside the meaning of the phrase "contribution[s] accepted by a candidate" in 52 U.S.C. § 30114(a) thus does not conflict with *Buckley* and 11 C.F.R. § 110.10 because the application of the base contribution limits to how much Bloomberg may transfer to the DNC does not limit how much he can spend on his own campaign.

c. Respondents' Reliance on Commission Advisory Opinions Involving the Repayment of Candidate Loans Is Misplaced

The Bloomberg Respondents and the DNC further argue that the Commission has consistently applied the same rules to all funds in a campaign account.[142] In particular, they contend that 52 U.S.C. § 30114(a) applies to the funds in question by citing to advisory opinions involving the application of the Act's personal use prohibition at 52 U.S.C. § 30114(b) to funds contributed or loaned by a candidate.[143] Critically, however, none of those advisory opinions involved situations where the candidate's personal funds comprised 99.9% of a committee's contributions. Indeed, the requestor in one of the cited advisory opinions explicitly acknowledged that the committee's cash on hand included *zero* personal funds of the candidate.[144] More importantly, however, requests to repay candidate loans with individual contributions made by others necessarily involves the use of funds "accepted by a candidate,"

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141 *McConnell*, 540 U.S. at 144 ("The premise behind these restrictions has been, and continues to be that contributions to a federal candidate's party in aid of that candidate's campaign threaten to create — no less than would a direct contribution to the candidate — a sense of obligation.") (citing *Buckley*, 424 U.S. at 38).

142 Bloomberg Resp. at 6-7; DNC Resp. at 6.

143 Bloomberg Resp. at 6-7 (citing AO 2010-15 (Pike for Congress); AO 2006-37 (Kissin for Congress); AO 2003-30 (Fitzgerald for Senate Comm., *et al.*); AO 1980-147 (Yearout Campaign Comm.); AO 1980-114 (Calabrese for Congress Comm.)); DNC Resp. at 6 (citing AO 2006-37 (Kissin for Congress); AO 2007-07 (Craig for U.S. Congress)).

144 *See* Supp. to AOR at 1 (Sept. 26, 2003), AO 2003-30 (Fitzgerald for Senate Comm., *et al.*).

thereby implicating 52 U.S.C. § 30114. Finally, repaying candidate loans from individual contributions is not the issue in this matter.[145]

d. Respondents' Fair Notice Argument Is Unpersuasive and Concerns Remedy, Not Liability

The Bloomberg Respondents and the DNC also argue that treating candidate personal funds as not being contributions "accepted by a candidate" under 52 U.S.C. § 30114(a) and therefore outside 11 C.F.R. § 113.2(c) would be "novel" and a "new limitation," suggesting that enforcement would violate the due process principle of fair notice.[146]

"[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law."[147] "[A] party has fair notice when, 'by reviewing the regulations and other public statements issued by the agency,' it can 'identify, with ascertainable certainty, the standards with which the agency expects parties to conform.'"[148] Put another way, fair notice is provided if the agency's interpretation is "reasonably comprehensible to people of good faith."[149]

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[145] The Act states that an advisory opinion "rendered by the Commission . . . may be relied upon by . . . any person involved in any specific transaction or activity which *is indistinguishable in all its material aspects* from the transaction or activity with respect to which such advisory opinion is rendered." 52 U.S.C. § 30108(c)(1). The Act further states that any person who relies on and acts in good faith in accordance with the advisory opinion "shall not, as a result of any such act, be subject to any sanction provided by th[e] Act." *Id.* § 30108(c)(2).

[146] *See* Bloomberg Resp. at 5 (reading candidate contributions of personal funds as not being "accepted" and therefore outside 11 C.F.R. § 113.2 would be a "novel interpretation" and impose a "new limitation"); DNC Resp. at 8 n. 31 (viewing such interpretation as "novel rule" which would "revers[e] long-standing Commission precedent") (citing SOR, Comm'rs. Hunter & Goodman at 2, MUR 6920 (American Conservative Union, *et al.*); SOR, Comm'rs. Petersen, Hunter & Goodman at 2, MURs 6485 (W Spann LLC. *et al*.), *et al.*).

[147] *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (plurality opinion).

[148] *Northstar Wireless, LLC v. FCC*, 38 F.4th 190, 216 (D.C. Cir. 2022) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

[149] *General Elec. Co.*, 53 F.3d at 1330 (quoting *McElroy Elecs. Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993)).

Here, hallmarks indicative of a lack of fair notice do not appear to be present. Although the Commission has not previously addressed the precise legal issue presented by the facts in this matter, resolving whether the $18 million transfer was permissible involves applying well-settled principles of campaign finance law concerning the legal distinction between expenditures and contributions established by the Supreme Court in *Buckley*.[150] Respondents can point to no "change" in the Commission's position.[151] Nor can they contend that the relevant legal landscape has been recently "remade."[152] The Commission has not been silent in the face of widespread violative conduct.[153] Indeed, in the over four decades since the transfer provision in 52 U.S.C. § 30114 was first enacted, the Commission has never had to reject the position now advanced by the Bloomberg Respondents and the DNC. But that alone does not make Commission enforcement "novel." Rather, it suggests that 52 U.S.C. § 30114 and 11 C.F.R. § 113.2(c) are, at the very least, reasonably comprehensible to prohibit unlimited transfers of a

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150 *See supra* Section III.A; *supra* notes 81-92.

151 *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012) ("The Commission's lack of notice to Fox and ABC that its interpretation had *changed* . . . fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.") (emphasis added) (internal quotation marks omitted).

152 *See Campaign Legal Ctr. v. FEC*, 312 F. Supp. 3d 153, 166 (D.D.C. 2018) (finding decision by three Commissioners to dismiss allegations because of fair notice concerns was not contrary to law where matters involved "an issue of first impression, in a campaign finance environment remade by *Citizens United*, where existing Commission regulations and precedent offered few helpful clues about how the straw donor prohibition applied"), *aff'd*, 952 F.3d 352 (D.C. Cir. 2020).

153 *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156-58 (2012) (finding "unfair surprise" where industry had engaged in "decades-long practice" and the Department of Labor first announced its regulatory interpretation in an enforcement proceeding). The DNC Response references former President Donald Trump's transfer of $3 million to the Republican National Committee in 2018, and notes Trump contributed $66 million of personal funds to his campaign in 2015 and 2016. *See* DNC Resp. at 5, n.21. But one prior example does not a longstanding practice make. More importantly, the example is distinguishable on the basis that the entirety of Trump's $3 million transfer could have been comprised of contributions "accepted," because Trump's total contributions of his own personal funds comprised just 10.35% of his principal campaign committee's funds between 2015-2018 ($18,633,208.8 out of $179,966,692.4 total). Even when Trump's loans to his committee are included, his total portion between 2015-2018 amounts to 29.08% of the Committee's funds ($66,141,714.19 out of $227,475,197.79). Bloomberg's contributions of personal funds, on the other hand, comprised 99.92% of the Committee's total funds for the 2020 cycle ($1,089,225,531.67 out of $1,090,140,018.73). *See supra* Figure 1. By contrast, it is mathematically impossible for the Committee's $18 million transfer to have been comprised of less than $17,085,512.94 (94.92%) of Bloomberg's personal funds.

candidate's personal funds to political party committees, as reflected by the court's decision in *McCutcheon II*, which observed that § 30114 "does not apply to all funds in a campaign account" and held that plaintiffs failed to establish a likelihood of success in obtaining a declaratory judgment that the transfer in question was legal.[154] As the Commission initially determined at the reason to believe stage in MURs 7165, 7196 (Jesse Benton), for example, the lack of prior occasion to enforce the Act in an identical circumstance does not foreclose the Commission's ability to enforce the Act.[155] Finally, even if Respondents were correct that the enforcement of the base contribution limits in this context would raise due process concerns, such concerns are relevant to remedy, not liability.

5. The Commission Should Find Reason to Believe as to Bloomberg, the Committee, and the DNC

The Committee reported making an $18 million transfer with funds overwhelmingly made up of Bloomberg's personal funds. Because the $18 million that the Committee transferred to the DNC did not qualify as contributions "accepted by the candidate" and therefore could not be transferred without limitation under 52 U.S.C. § 30114(a)(4), Bloomberg and the

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154 *McCutcheon II*, 496 F. Supp. 3d at 323, 335.

155 F&LA at 1, 4, MURs 7165, 7196 (Jesse Benton) (finding reason to believe despite it being "a matter of first impression whether the Act's prohibitions on the solicitation of foreign nationals reach the solicitation of a foreign contributor who is fictitious"); *see also Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 707 (D.C. Cir. 2007) (en banc) ("The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise.") (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950)). *But see Bankamerica Corp. v. United States*, 462 U.S. 122, 131 (1983) ("It is true, of course, that [a]uthority granted by Congress . . . cannot evaporate through lack of administrative exercise, ... [but] the Government's failure for over 60 years to exercise the power it now claims," after thousands of citizens relied on its interpretation, "strongly suggests that it did not read the statute as granting such power" (internal quotation marks and citations omitted)). In MURs 7165, 7196 (Jesse Benton), the Commission ultimately conciliated with the political committee Great America PAC for violating the Act's foreign national ban and the Commission's implementing regulation when its agent solicited contributions from undercover reporters posing as representatives of a fictitious foreign national. Conciliation Agreement, MURs 7165, 7196 (Great America PAC).

Committee appear to have made a contribution in excess of the Act's $35,500 contribution limit on contributions from individuals to party committees.

As for Bloomberg's potential liability, the Commission has found reason to believe regarding candidates when there appears to have been sufficient candidate involvement in the violative conduct and the statutory provision specifically provides for candidate liability or liability on "any person."[156] Here, 52 U.S.C. § 30116(a)(1) states "no person" shall make a contribution to a committee of a national political party in excess of $35,500 per calendar year.[157]

The available information at this stage also indicates that Bloomberg was involved in the Committee's activities and likely directed its $18 million transfer to the DNC. In its March 20, 2020 memorandum to the DNC, the Bloomberg Committee explained the purpose of the $18 million transfer by explicitly referring to Bloomberg's personal considerations: "While our campaign has ended, Mike's number one objective this year remains defeating Trump and helping Democrats win in November.'"[158] The use of the present tense "remains" is instructive; by highlighting Bloomberg's ongoing interests, the memorandum suggests that Bloomberg exerted control over the decision to transfer the Committee's funds, even after his campaign ended. This is consistent with the Bloomberg Respondents' statement that Bloomberg personally "ran a robust, national campaign" and that both he and his authorized committee

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[156] *See, e.g.*, F&LA at 1-2, 10-11, MUR 7292 (Clifford B. Stearns, *et al.*) (finding reason to believe candidate and his campaign committee violated 52 U.S.C. § 30114(b) by converting funds to personal use); F&LA at 6, MUR 5924 (Tan Nguyen) (finding reason to believe candidate accepted excessive contribution "[b]ased on the personal involvement of the candidate"); F&LA at 8, MUR 5783 (Carl J. Romanelli, *et al.*) ("[T]he standard for candidate liability has been the personal involvement of the candidate in the activities from which the violation resulted.") (citing matters).

[157] 52 U.S.C. § 30116(a)(1)(B); 11 C.F.R. § 110.1(c); Price Index Adjustments, 84 Fed. Reg. at 2506. The term "person" includes individuals and committees. 52 U.S.C. § 30101(11).

[158] *See* MUR 7722 Compl., Ex. 1 (referring to what "Mike said" and "Mike's number one objective").

"hired more than 2,500 staff, and opened 250 field offices," among other things.[159] Bloomberg's near total funding of the Committee further suggests that he maintained a significant degree of control over the Committee.[160] Bloomberg also personally ensured that the Committee would be able to meet its financial obligations. The Committee had a negative cash-on-hand balance after the $18 million transfer, but Bloomberg continued his contributions through the primary period, even after he suspended his campaign.[161] Accordingly, it is appropriate to find reason to believe as to both the Committee and Bloomberg.

With respect to the DNC, the Act provides that no political committee shall knowingly accept any contribution that exceeds contribution limits.[162] Some courts have described knowing acceptance as turning on whether the committee had knowledge of the facts that make the conduct unlawful.[163] Here, the DNC's Response supports the notion that the DNC knew at the

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159 Bloomberg Resp. at 1-2.

160 *Cf.* 52 U.S.C. § 30125(e); AO 2006-04 at 4 (Tancredo for Congress Comm.) (50% financing by candidate indicates establishment, financing, maintenance, or control ("EFMC")). Even if the Committee was not financed by Bloomberg, it would still be considered EFMC'd by him. F&LA at 6, MUR 7337 (Debbie Lesko, *et al.*) (same); F&LA at 4, MUR 6985 (Zeldin for Senate, *et al.*) (citing AO 2009-26 at 5 (Elizabeth Coulson, *et al.*); AO 2007-01 at 3 (Claire McCaskill, *et al.*); F&LA at 9, MUR 6601 (Steve Oelrich for Congress, *et al.*)).

161 *See supra* note 23; *supra* Figure 1.

162 52 U.S.C. § 30116(f).

163 *See FEC v. Friends of Jane Harman*, 59 F. Supp. 2d 1046, 1056 n.11 (C.D. Cal. 1999) ("A 'knowing' standard, as opposed to a 'knowing and willful' one, does not require knowledge that one is violating a law, but merely requires an intent to act.") (quoting *FEC v. John A. Dramesi for Congress Comm.*, 640 F. Supp. 985, 987 (D. N.J. 1986)); *see also FEC v. Cal. Med. Ass'n*, 502 F. Supp. 196, 203-04 (N.D. Cal. 1980) (knowledge of the facts making conduct unlawful constitutes a knowing acceptance under the Act). *But see FEC v. Re-Elect Hollenbeck to Congress Comm.*, No. 85-2239, slip op. at 3-5 (D.D.C. June 16, 1986) (viewing compliance with former regulation 11 C.F.R. § 103.3(b)(1) to preclude liability under 52 U.S.C. § 30116(a)(f) unless the contributions appear to be illegal "to any reasonable treasurer"). Only one court appears to have ever interpreted 52 U.S.C. § 30116(f) to require actual knowledge of the contributions' illegality. *See In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044, 1047 n.3 (D.D.C. 1979). The Commission does not appear to have ever supported that interpretation. *See, e.g.*, F&LA at 4, MUR 6919 (Canseco for Congress, *et al.*) ("The 'knowing' acceptance of a contribution requires knowledge of the underlying facts that constitute the prohibited act, but not knowledge that the act itself — such as acceptance of an excessive contribution — is unlawful."); Gen. Counsel's Report ("GCR") at 6 n.5 (Oct. 5, 1995), MUR 3546 (Dec. 6, 1995) (Clinton for President Comm., *et al.*) (recommending Commission apply standard

relevant time that Bloomberg self-funded his campaign and that the overwhelming majority of the $18 million transferred was comprised of funds contributed by Bloomberg to the Committee.[164] Moreover, the facts that Bloomberg's self-funded candidacy was well publicized, was reported on the Committee's disclosure reports, and was stated so by Bloomberg himself at a presidential debate held by the DNC, further suggest that the DNC would have known that Bloomberg himself was the source of the $18 million that it accepted from the Committee.[165] Therefore, the record indicates that the DNC knowingly accepted an excessive contribution.

* * *

Accordingly, we recommend that the Commission find reason to believe that Bloomberg and the Committee made, and the DNC knowingly accepted, an excessive almost $18 million contribution[166] in violation of 52 U.S.C. § 30116(a)(1)(B) and (f), respectively.

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articulated in *Dramesi* for "knowingly accept[ing]" excessive contributions); Certification ("Cert.") ¶ 1 (Dec. 6, 1995), MUR 3546 (Clinton for President Comm., *et al.*) (approving OGC's recommendations); GCR at 3 (July 14, 1978), MUR 515 (Comm. of 1976 for Bates for Congress, *et al.*) (recommending *against* applying the criminal law definition of knowingly); Cert. ¶1 (July 19, 1978), MUR 515 (Comm. of 1976 for Bates for Congress, *et al.*) (finding reasonable cause to believe campaign committee knowingly accepted excessive contributions); Conciliation Agreement ¶ 10, MUR 515 (Comm. of 1976 for Bates for Congress) (in the context of accepting excessive contributions, "the term 'knowingly accepted' only implies that Respondent was aware of the facts of the situation and not that Respondent was aware that a violation of the Act had occurred").

[164] DNC Resp. at 2 ("Throughout his candidacy, Mr. Bloomberg elected to finance his presidential campaign with his personal funds.").

[165] *See supra* Figure 1; Michelle Ye Hee Lee, *Does Money Even Matter? And Other Questions You May Have About Bloomberg's Half-Billion-Dollar Failed Candidacy*, WASH. POST (Mar. 4, 2020, 4:22 PM), https://www.washingtonpost.com/politics/2020/03/04/does-money-even-matter-other-questions-you-may-have-about-bloombergs-half-billion-dollar-failed-candidacy/; *Full Transcript: Ninth Democratic Debate in Las Vegas*, NBC NEWS (Feb. 20, 2020), https://www.nbcnews.com/politics/2020-election/full-transcript-ninth-democratic-debate-las-vegas-n1139546 (Bloomberg says that he is "not asking for any money").

[166] The size of the excessive contribution is between $17 million and $18 million. Initially, the $18 million at issue should be reduced to $17,964,500, to account for the portion of the $35,500 base limit available to Bloomberg at that time. 52 U.S.C. § 30116(a)(1)(B); 11 C.F.R. § 110.1(c); Price Index Adjustments, 84 Fed. Reg. at 2506. Bloomberg's subsequent $15,019.50 contribution to the DNC on October 5, 2020, raises it to $17,979,520. DNC, 2020 Pre-General Report at 4501 (Oct. 22, 2020), https://docquery.fec.gov/pdf/075/202010229336216075/202010229336216075.pdf. Furthermore, to account for the possibility that up to $914,487.06 of the funds transferred to the DNC consisted of funds provided by others to the Committee, as summarized above in Figure 1, further reducing the amount of the potential excessive by

B. The Commission Should Find Reason to Believe That the Bloomberg Respondents Violated 52 U.S.C. § 30116(a)(1)(D) By Making In-Kind Transfers to Unknown State Party Committees in Excess of $10,000

The analysis of the Complaints' allegations regarding the in-kind receipts by the State Committees follows from the foregoing analysis regarding the $18 million transfer to the DNC. The phrase "anything of value" in the Act's definition of "contribution" includes "all in-kind contributions."[167] In-kind contributions include the "provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services."[168] Contributions to a state party committee are limited to $10,000 per calendar year.[169]

Under 52 U.S.C. § 30114(a)(4), a candidate committee's transfer of non-cash assets is "materially indistinguishable" from the transfer of campaign funds.[170] As discussed above, the $18 million given by the Committee to the DNC was overwhelmingly comprised of Bloomberg's personal funds and not contributions "accepted by a candidate."[171] Thus, the Committee's $18 million transfer is subject to the Act's contribution limits to national party committees. Similarly, given the Committee's near total funding by Bloomberg, the Committee's in-kind transfers to Unknown State Party Committees summarized above in Figure 2[172] were not goods

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$914,487.06, to $17,065,032.44, would mathematically represent the smallest possible amount of the excessive contribution.

167 11 C.F.R. § 100.52(d)(1).

168 *Id.* (listing examples of goods or services, such as "[s]ecurities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists").

169 52 U.S.C. § 30116(a)(1)(D); 11 C.F.R. § 110.1(c)(5).

170 *See* AO 1981-11 at 2 (Libertarian Nat'l Comm.) (mailing list may be transferred to national party committee pursuant to 52 U.S.C. § 30114); *see also* AO 1984-50 at 1-2 (Geraldine A. Ferraro) (same as to caricature cards and posters).

171 *See* Section IV.A; 52 U.S.C. § 30114.

172 *Supra* Figure 2.

or services purchased with contributions "accepted by a candidate." As a result, the Committee's in-kind transfers are subject to the Act's contribution limits to state party committees.[173]

Because the Committee reported transfers to Unknown State Party Committees in excess of $10,000 in a calendar year, we recommend that the Commission find reason to believe that the Bloomberg Respondents violated 52 U.S.C. § 30116(a)(1)(D).[174]

C. The Commission Should Find No Reason to Believe That Michael R. Bloomberg Made an Excessive Contribution to Mike Bloomberg 2020, Inc., in Violation of 52 U.S.C. § 30116(a)(1)(A)

The Act limits the amount an individual may contribute to a candidate's authorized committee per election, and likewise, the Act prohibits any candidate or committee from knowingly accepting an excessive contribution.[175] During the 2020 election cycle, the Act and Commission regulations limited an authorized committee to accepting a total of $2,800 per election from any individual.[176] The MUR 7722 Complaint alleges that Bloomberg violated the Act by contributing close to $1 billion to the Committee.[177]

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173 AO 1981-11 at 1 (Libertarian Nat'l Comm.) (without ability to transfer pursuant to 52 U.S.C. § 30114, candidate committee's gift of a non-cash asset would be "viewed as a contribution subject to limit").

174 For the same reasons indicating sufficient personal involvement to warrant a reason to believe finding that Bloomberg violated 52 U.S.C. § 30116(a)(1)(B), *see supra* Section IV.A.5, there also appears to have been sufficient involvement by Bloomberg to warrant a finding under 52 U.S.C. § 30116(a)(1)(D). Should the Commission find reason to believe as to the allegation that the Committee and/or Bloomberg made an excessive contribution to the DNC, we intend to notify the following recipients as respondents: the North Carolina Democratic Party and Anna Tilghman in her official capacity as treasurer, the Arizona Democratic Party and Rick McGuire in his official capacity as treasurer, the Michigan Democratic State Central Committee and Traci Kornak in her official capacity as treasurer, the Democratic Party of Wisconsin and Randy A. Udell in his official capacity as treasurer, the Minnesota Democratic-Farmer-Labor Party and Leah Midgarden Manney in her official capacity as treasurer, the Democratic Party of Virginia and Abbi Easter in her official capacity as treasurer, the Maine Democratic Party and Betty Johnson in her official capacity as treasurer, the New Hampshire Democratic Party and Caitlin Rollo in her official capacity as treasurer, and the Tennessee Democratic Party and Carol V. Abney in her official capacity as treasurer. These committees have not yet been notified as respondents.

175 52 U.S.C. § 30116(a)(1)(A), (f).

176 *Id.* § 30116(a)(1)(A); 11 C.F.R. § 110.1(b); Price Index Adjustments, 84 Fed. Reg. at 2506.

177 MUR 7722 Compl. at 17-18.

However, as extensively discussed above, federal candidates may make unlimited expenditures from their "personal funds" to their own campaigns.[178] Accordingly, we recommend that the Commission find no reason to believe that Bloomberg violated 52 U.S.C. § 30116(a)(1)(A) by making an excessive contribution to the Committee.

D. The Commission Should Find No Reason to Believe That Michael R. Bloomberg, the Committee, or the DNC Violated 52 U.S.C. § 30122 by Making, Permitting Their Name to Be Used to Effect, or Knowingly Accepting a Contribution in the Name of Another Person

The Act prohibits a person from making a contribution in the name of another person, knowingly permitting his or her name to be used to effect such a contribution, or knowingly accepting such a contribution.[179] The Commission has included in its regulations illustrations of activities that constitute making a contribution in the name of another:

> (i) Giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made; or
>
> (ii) Making a contribution of money or anything of value and attributing as the source of the money or thing of value another person when in fact the contributor is the source.[180]

The requirement that a contribution be made in the name of its true source promotes Congress's objective of ensuring the complete and accurate disclosure by candidates and

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178 *See, e.g.*, F&LA at 3, MUR 6566 (Lisa Wilson-Foley, *et al*.) ("Federal candidates may make unlimited contributions from their 'personal funds' to their campaigns.") (citing 11 C.F.R. § 110.10); F&LA at 6, MUR 6848 (George Demos) (same); AO 2010-15 (Pike for Congress) (citing AO 1985-33 (Citizens to Re-Elect Cardiss Collins); AO 1984-60 (W. Patrick Mulloy, II)); *see also* H.R. DOC. NO. 95-44, at 70 (1977) (noting regulation intended to "comport[] . . . with the Supreme Court decision in *Buckley*").

179 52 U.S.C. § 30122.

180 11 C.F.R. § 110.4(b)(2)(i)-(ii).

committees of the political contributions they receive.[181] Courts therefore have uniformly rejected the assertion that "only the person who actually transmits funds . . . makes the contribution,"[182] recognizing that "it is implausible that Congress, in seeking to promote transparency, would have understood the relevant contributor to be [an] intermediary who merely transmitted the campaign gift."[183] Consequently, both the Act and the Commission's implementing regulations provide that a person who furnishes another with funds for the purpose of contributing to a candidate or committee "makes" the resulting contribution.[184] This is true whether funds are advanced to another person to make a contribution in that person's name or promised as reimbursement of a solicited contribution.[185] Because the concern of the law is the true source from which a contribution to a candidate or committee originates, the Commission

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[181] *United States v. O'Donnell*, 608 F.3d 546, 553 (9th Cir. 2010) ("[T]he congressional purpose behind [Section 30122] — to ensure the *complete and accurate disclosure* of the contributors who finance federal elections — is plain." (emphasis added)); *Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000) (rejecting constitutional challenge to 2 U.S.C. § 441f [now 52 U.S.C. § 30122] in light of compelling governmental interest in disclosure).

[182] *United States v. Boender*, 649 F.3d 650, 660 (7th Cir. 2011).

[183] *O'Donnell*, 608 F.3d at 554; *see also Citizens United*, 558 U.S. at 371 ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."); *Doe v. Reed*, 561 U.S. 186, 199 (2010) ("Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot.").

[184] *See Boender*, 649 F.3d at 660 (holding that to determine who contributed "we consider the giver to be the *source* of the gift, not any intermediary who simply conveys the gift from the donor to the donee." (emphasis added)) (citing *O'Donnell*, 608 F.3d at 550); *Goland v. United States*, 903 F.2d 1247, 1251 (9th Cir. 1990) ("The Act prohibits the use of 'conduits' to circumvent . . . [the Act's reporting] restrictions." (quoting then-Section 441f)).

[185] *See O'Donnell*, 608 F.3d at 555. Moreover, the "key issue . . . is the *source* of the funds" and, therefore, the legal status of the funds when conveyed from a conduit to the ultimate recipient is "irrelevant to a determination of who 'made' the contribution for the purposes of [Section 30122]." *United States v. Whittemore*, 776 F.3d 1074, 1080 (9th Cir. 2015) (holding that defendant's "unconditional gifts" to relatives and employees, along with suggestion they contribute the funds to a specific political committee, violated 52 U.S.C. § 30122 because the source of the funds remained the individual who provided them to the putative contributors).

will look to the structure of the transaction itself and the arrangement between the parties to determine who in fact "made" a given contribution.[186]

While one could imagine a sham candidacy hypothetical in which a transfer to a national party following self-funding of an authorized committee could suggest a violation of the Act's prohibition against straw donations,[187] the facts of these matters differ substantially from that hypothetical. The Committee was formed four months prior to the central transactions at issue and made significant campaign-related expenses supporting Bloomberg's evidently bona fide candidacy (paying for staff, field offices, events, communications, etc.). Given these circumstances, as well as the ten-figure amount of personal investment in the campaign, the record does not indicate that the Committee was used merely as a vehicle to convey contributions from Bloomberg to the DNC.[189]

Accordingly, we recommend that the Commission find no reason to believe that Bloomberg, the Committee, or the DNC violated 52 U.S.C. § 30122 by making, permitting their name to be used to effect, or knowingly accepting a contribution in the name of another person.

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[186] As the court in *O'Donnell* acknowledged, the Commission's earmarking regulations require the entire amount of a contribution to be attributed to both the actual source and the intermediary if the intermediary also exercises direction and control "over the choice of the recipient candidate." 11 C.F.R. § 110.6(d); *O'Donnell*, 608 F.3d at 550 n.2. Those regulations, however, do not apply to contributions made to an independent-expenditure-only political committee.

[187] *Cf. O'Donnell*, 608 F.3d at 549 ("[F]alse name and straw donor schemes both facilitate attempts by an individual (or campaign) to thwart disclosure requirements and contribution limits."); *United States v. El-Saadi*, 549 F. Supp. 3d 148, 163 (D.D.C. 2021) ("[T]he ban on conduit contributions is also necessary to prevent circumvention of [the Act's] contribution limits.").

[189] *See* First GCR at 9-11, MURs 7013, 7015 (IGX, LLC, *et al.*) (recommending no reason to believe where alleged conduit (IGX, LLC) formed five months before contribution at issue, appeared to be an "ongoing business enterprise" rather than a vehicle to convey contributions, and was already "publicly linked" to the alleged true source). The Commission ultimately split on the issue. Cert. ¶¶ 1-2 (Apr. 13, 2018), MUR 7013 (IGX, LLC).

E. The Commission Should Find No Reason to Believe That the Committee Violated 52 U.S.C. § 30116(a)(1)(A), (a)(8) by Making an Excessive Earmarked Contribution to the 2020 Democratic Presidential Nominee

To promote the limits on the amount that any one person may contribute to a candidate in a given election cycle, the Act directs that "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate."[190] The Commission's earmarking regulation defines "earmarked" as "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee."[191]

In the past, the Commission has determined that contributions were earmarked where there was clear documentary evidence demonstrating a designation or instruction by the donor.[192] The Commission has rejected earmarking claims even where the timing of the contributions at issue appeared to be a significant factor, but the contributions lacked a clear designation or instruction.[193] More recently, however, a plurality of the Supreme Court observed

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190 52 U.S.C. § 30116(a)(8).

191 11 C.F.R. § 110.6(b).

192 *See* Conciliation Agreement ¶ IV.6, MURs 4831, 5274 (Nixon Campaign Fund) (conciliating where contributions were earmarked where checks contained express designations on memo lines); *see also* F&LA at 7-8, MUR 5732 (Matt Brown for U.S. Senate) (finding no reason to believe where the contributions "lack[ed] the requisite indicia of earmarking"); First GCR at 6-9 & Cert. (June 3, 2005), MUR 5520 (Republican Party of La., *et al.*) (approving the recommendation to find no reason to believe earmarking allegations based on "winking and nodding" implied earmarking); First GCR at 14-16 & Cert. (Feb. 8, 2005), MUR 5445 (Geoffrey Davis for Congress, *et al.*) (approving recommendation to find no reason to believe earmarking allegations in the absence of information or documents providing "any discernible designation, instruction, or encumbrance"); First GCR at 20-21 & Cert. ¶ 6 (July 22, 1999), MUR 4643 (Democratic Party of N.M.) (rejecting earmarking allegations where there was no evidence of a clear designation, instruction, or encumbrance by the donor).

193 *See* First GCR at 14-16 & Cert. (Feb. 8, 2005), MUR 5445 (Geoffrey Davis for Congress, *et al.*); First GCR at 20-21 & Cert. ¶ 6 (July 22, 1999), MUR 4643 (Democratic Party of N.M.).

in *McCutcheon* that the Commission's earmarking regulations "define earmarking broadly" and apply to "implicit agreements" as well as explicit ones.[194]

Here, the support for the MUR 7722 Complaint's earmarking allegation is the Committee's March 20, 2020 memorandum to DNC Chair Tom Perez.[195] The Complaint argues that the memo's "explanation of the terms and intent of its $18 million contribution to the DNC" shows that it was an earmarked contribution to the eventual 2020 Democratic presidential nominee.[196] But the memorandum itself describes no "terms" (*i.e.*, conditions or limitations) associated with the contribution. Rather, the memorandum suggests that the contribution was to "help the [DNC]," win "up and down the ballot."[197] In other words, it was to support the DNC's general mission.[198] The MUR 7722 Complaint points to no other information, such as a report of a concealed deal or instructions on a check that any portion of the contributed amount must go toward supporting the 2020 Democratic Party presidential nominee. Similar to the foregoing discussion concerning the MUR 7722 Complaint's straw donor allegations, the available facts do not indicate that the eventual transfers were planned at the time the funds used for the transfer were provided to the Committee.

Without more, and in light of the foregoing analysis analyzing the transfer as an excessive contribution, there is insufficient information indicating reason to believe with respect to the MUR 7722 Complaint's earmarking allegations. Accordingly, we recommend that the Commission find no reason to believe that the Committee violated 52 U.S.C. § 30116(a)(1)(A),

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194 *McCutcheon*, 572 U.S. at 201, 222-23.

195 MUR 7722 Compl. at 20-21, Ex. 1.

196 *Id.* at 20-21.

197 *Id.* at Ex.1.

198 *See Who We Are*, DEMOCRATIC NAT'L COMM., https://democrats.org/who-we-are/ (last visited May. 2, 2023) ("The Democratic National Committee is committed to electing Democrats everywhere.").

(a)(8) by making an excessive earmarked contribution to the 2020 Democratic Party presidential nominee.[199]

V. INVESTIGATION

We propose an investigation focused on the communications that took place between and among members of the Bloomberg campaign (including Bloomberg himself) and the DNC regarding the $18 million transfer. While the present record supports a reason to believe finding as to Bloomberg, additional information regarding the level of his personal involvement in the transfer is appropriate prior to entering into pre-probable cause conciliation. We recommend that the Commission authorize compulsory process to assist this investigation.

VI. RECOMMENDATIONS

1. Find reason to believe that Michael R. Bloomberg and Mike Bloomberg 2020, Inc., and Hayden Horowitz in his official capacity as treasurer violated 52 U.S.C. § 30116(a)(1)(B) by making an excessive contribution to DNC Services Corporation/Democratic National Committee and Virginia McGregor in her official capacity as treasurer;

2. Find reason to believe that DNC Services Corporation/Democratic National Committee and Virginia McGregor in her official capacity as treasurer, violated 52 U.S.C. § 30116(f) by knowingly accepting an excessive contribution from Michael R. Bloomberg and Mike Bloomberg 2020, Inc., and Hayden Horowitz in his official capacity as treasurer;

3. Find reason to believe that Michael R. Bloomberg and Mike Bloomberg 2020, Inc., and Hayden Horowitz in his official capacity as treasurer violated 52 U.S.C. § 30116(a)(1)(D) by making excessive in-kind contributions to the Unknown State Party Committees;

4. Find no reason to believe that Michael R. Bloomberg made an excessive contribution to Mike Bloomberg 2020, Inc., and Hayden Horowitz in his official capacity as treasurer in violation of 52 U.S.C. § 30116(a)(1)(A);

[199] We acknowledge that it is possible that information obtained in the course of our proposed investigation could indicate that the $18 million transfer was earmarked. In the event that the Commission prefers to wait to resolve this allegation pending an investigation, it alternatively would be appropriate for the Commission to take no action at this time with respect to the MUR 7722 Complaint's earmarking allegation.

5. Find no reason to believe that Michael R. Bloomberg, Mike Bloomberg 2020, Inc., and Hayden Horowitz in his official capacity as treasurer, and DNC Services Corporation/Democratic National Committee and Virginia McGregor in her official capacity as treasurer violated 52 U.S.C. § 30122 by making, permitting their name to be used to effect, or knowingly accepting a contribution in the name of another person;

6. Find no reason to believe that Mike Bloomberg 2020, Inc., and Hayden Horowitz in his official capacity as treasurer made an excessive earmarked contribution to the 2020 Democratic Presidential nominee in violation of 52 U.S.C. § 30116(a)(1)(A), (a)(8);

7. Authorize compulsory process;

8. Approve the attached Factual and Legal Analyses; and

9. Approve the appropriate letters.

May 4, 2023
Date

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