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July 21, 2022

Federal Election Commission
Office of Complaints Examination
and Legal Administration
Attn: Trace Keeys, Paralegal
1050 First Street, NE
Washington, DC 20463

Re: MUR 8010; Response of Medical Place, Inc.

Dear Mr. Keeys,

This response is submitted by the undersigned counsel on behalf of Medical Place Inc., in connection with MUR 8010.

The Complaint, Campaign Legal Center, alleges that Medical Place Inc. violated 52 U.S.C. § 30119(a)(1) when it made two contributions to an independent expenditure-only committee ("Super PAC"), Alabama Conservatives Fund, while it qualified as a federal government contractor under the Federal Election Campaign Act (the "Act"). Complaint concerns a $50,000 contribution to Alabama Conservatives Fund on February 2, 2022 and a second $50,000 contribution to Alabama Conservatives Fund on April 6, 2022. Both contributions were refunded on June 21, 2022.

As outlined below, the Commission should dismiss this matter as an exercise of its prosecutorial discretion pursuant to *Heckler v. Chaney* for two reasons. First, the contributions at issue were quickly refunded to the Respondent. Second, while the Federal Election Commission ("Commission") has continued to apply the Act's federal contractor contribution prohibition in cases where contractors make contributions to Super PACs, that application is almost certainly unconstitutional under *Citizens United v. FEC* and *SpeechNow.org v. FEC*. The fact that several contractors have submitted to civil penalties rather than bear the much greater burden and expense of litigating this issue against the Commission does not make the Commission's current position legally correct or defensible.

FACTUAL BACKGROUND

Medical Place Inc. is a Verified Service Disabled Veteran Owned small business specializing in medical, respiratory, pharmaceutical, laboratory, telemedicine equipment and supplies Headquartered in Montgomery, Alabama. In February and April 2022, Medical Place Inc. made two $50,000 contributions to Alabama Conservatives Fund. Medical Place Inc. does not contest that it was performing federal contracts at the time these two contributions were made. Upon learning that the Commission may consider these contributions impermissible, Medical Place Inc. promptly investigated the matter and then requested and received a refund of

the contributions from Alabama Conservatives PAC on June 21, 2022.

LEGAL ANALYSIS

The Commission should exercise its prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985), and dismiss this matter. Upon discovery of the issue, the contributions were refunded in full to Medical Place Inc. Further, the Commission may not constitutionally enforce the federal contractor prohibition against contributions made to the independent expenditure-only committees. Under binding D.C. Circuit precedent, contributions to an independent expenditure-only committee do not present a risk of *quid pro quo* corruption or the appearance thereof and cannot be restricted.

I. Medical Place Inc. Took Prompt Measures To Cure

As noted above, Medical Place Inc. acted promptly to investigate and remedy the contributions at issue. Following its investigation of the matter, Medical Place Inc. requested that its contributions be refunded, and Alabama Conservatives Fund issued a refund on June 21, 2022. The time between the two dates the contributions were made and the date of they were refunded was brief and any alleged violation, however constitutionally suspect, was cured. The Commission should not devote resources to pursuing matters that were quickly cured where the legal basis for that action is an application of the law that is likely unconstitutional.

II. The Federal Contractor Contribution Prohibition is Unconstitutional as Applied to Medical Place Inc.'s Contributions to Super PACs

In *Citizens United v. FEC*, the Supreme Court held that corporate independent expenditures pose no threat of *quid pro quo* corruption and therefore cannot be restricted. The Court explained that "[l]imits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing quid pro quo corruption," and held "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." *Citizens United*, 558 U.S. 310, 357 (2010). This conclusion was not the result of applying facts to a judicially created test, nor was it conditioned on the presence of certain circumstances.[1] Rather, the Court determined that *as a matter of law* independent expenditures do not give rise to corruption or the appearance of corruption.

The U.S. Court of Appeals for the District of Columbia Circuit extended the holding and logic of *Citizens United* to contributions made to independent expenditure only committees, explaining:

> [B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then **the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations**.

[1] *See American Tradition Partnership, Inc. v. Bullock*, 567 U.S. 516 (2012) (per curiam) (rejecting Montana's effort to avoid applying the Court's holding in *Citizens United* based on particular factual record).

SpeechNow.org, 599 F.3d 686, 696 (D.C. Cir. 2010) (emphasis added). Since 2010, the Court has repeatedly emphasized that the *only* legitimate state interest in restricting political contributions is the prevention of *quid pro quo* corruption or the appearance thereof. *See*, *e.g.*, *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1652 (2022) ("This Court has recognized only one permissible ground for restricting political speech: the prevent of '*quid pro quo*' corruption or its appearance."); *McCutcheon v. FEC*, 572 U.S. 185, 206-207 (2014); *see also Davis v FEC*, 554 U.S. 724, 741-742 (2008).

While no court has specifically held that the conclusion in *SpeechNow.org* applies where the contributor to an independent expenditure-only committee is a federal contractor, the D.C. Circuit's decision does not appear to couch any exceptions. If "the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations," then, as a matter of law, the contributions at issue in this matter did not give rise to any *quid pro quo* corruption, and therefore, cannot be restricted.

The Complainant has filed many complaints with the Commission alleging this same violation, and in each instance, the Complainant cites the D.C. Circuit's decision in *Wagner v. FEC* in supports of its claims. The Complainant, however, always omits an important detail and intentionally misstates *Wagner*'s holding. In *Wagner*, the D.C. Circuit issued the following disclaimer regarding the scope of its decision:

> The plaintiffs have been careful to frame their challenge narrowly. First, they challenge the constitutionality of § 30119 "only as it applies to plaintiffs and other individual contractors," not as it applies to contractors that are corporations or other kinds of entities. Pls. Br. 1. Second, they do not challenge the statute as the FEC might seek to apply it to a contractor's independent expenditures on electoral advocacy, as opposed to his or her contributions to candidates, parties, or political action committees (PACs). *Id.* at 40 n.5 (stating that the "[p]laintiffs have no interest in making independent expenditures"); Oral Arg. Recording 26:59-27:06 (same). *Nor do they challenge the law as the Commission might seek to apply it to donations to PACs that themselves make only independent expenditures, commonly known as "Super PACs."* Oral Arg. Recording 25:59-26:33 ("Super PACs . . . . are not at issue here; none of my clients wants to make a contribution to them or anything like them."); *Id.* 26:59-27:06 (same). In short, the plaintiffs challenge § 30119 only insofar as it bans campaign contributions *by* individual contractors *to* candidates, parties, or traditional PACs that make contributions to candidates and parties.

Wagner v. FEC, 793 F.3d 1, 3-4 (D.C. Cir. 2015) (emphasis added). *Wagner* upheld the federal contractor contribution prohibition only as it applies to contributions made to candidates, and the court was very clear that its conclusion did not address contributions made to independent expenditure-only committees. Contrary to Complainant's assertions, the outcome of the present matter is controlled by *SpeechNow.org*, not *Wagner*.

In the past, the Commission has applied the logic of *Citizens United* to factual situations that were not directly and specifically addressed by the Court's decision. For example, when

presented with the issue of whether an authorized candidate committee could make independent expenditures without violating the Act's candidate "support" provision at 52 U.S.C. § 30102(e)(3), the Commission notably did *not* take the position that candidate committees remain prohibited from making independent expenditures until a court specifically says otherwise. *See* MUR 6405 (McCain), Factual and Legal Analysis at 8-10. Instead, the Commission acknowledged that "this precise question has not been addressed by the Supreme Court," but noted that "in *Citizens United v. FEC*, the Supreme Court reaffirmed that 'independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,' and thus cannot constitutionally be limited." *Id*. at 10. The Commission concluded:

> It is unlikely that independent spending by authorized committees would be deemed more potentially corrupting than independent expenditures by individuals, political parties, or corporations, each of which has been found to have a constitutional right to make unlimited independent expenditures. Therefore, the Commission dismisses the allegation that John McCain and Friends of John McCain Inc. … violated 52 U.S.C. § 30102(e)(3)(A).

Id. The Commission's conclusion in MUR 6405 predicted what a court was likely to do if presented with the question at issue, and was an entirely reasonable one that sought to apply existing case law. By voting to dismiss, the Commission also recognized and gave effect to the Supreme Court's instruction to err on the side of free speech. *See FEC v. Wisconsin Right to Life, Inc*., 551 U.S. 449 (2007) ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor.").

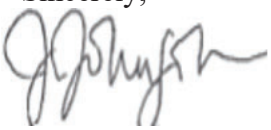
As to the question of whether the federal contractor contribution prohibition applies to contributions made to independent expenditure-only committees, the Commission has thus far taken up the role of censor by continuing to enforce Section 30119 in a constitutionally suspect manner. This position is inconsistent with *Citizens United*, *SpeechNow.org*, *Wisconsin Right to Life, Inc*., and the Commission's own decision in MUR 6405.

The Commission should take this opportunity to announce that it will no longer enforce the federal contractor contribution prohibition in cases where a contractor makes a contribution to an independent expenditure-only committee on the grounds that such application of the law is likely unconstitutional. Until this issue is definitively settled, complaints of this nature should be dismissed on grounds of prosecutorial discretion. Invoking prosecutorial discretion would not represent a substantive determination on the law, but instead would reflect the very clear uncertainty that exists. If the courts subsequently determine that the contractor prohibition may be constitutionally applied in this situation, the Commission would of course resume enforcing the prohibition. But unless and until that happens, the Commission should not continue to enforce a restriction in a manner that is widely believed to be unconstitutional just because a court has not yet confirmed that the general rule does indeed apply to the specific situation at hand. To do so is to abusively extract civil penalties from innocent parties who make the rational decision to settle with the Commission because it is cheaper than litigation.

III. Conclusion

In the present matter, prosecutorial discretion is warranted because: (1) any alleged violation has been cured; and (2) pursuing enforcement necessarily would rest on a constitutionally questionable application of the law. Medical Place Inc. acted promptly to review its contributions and requested and received a refund from Alabama Conservatives Fund. This action was taken in light of the Commission's current position on such contributions and reflects the respondent's desire to comply with the law as the Commission enforces it. However, as explained above, the Commission's position is almost certainly unconstitutional. We urge the Commission to reconsider that position, conclude that there is no sound constitutional basis to continue applying the contractor contribution ban to contributions made to independent expenditure-only committees, and dismiss this matter for reasons of prosecutorial discretion. We believe this exercise of prosecutorial discretion will prove prescient.

Sincerely,



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