FEDERAL ELECTION COMMISSION
1050 FIRST STREET, N.E.
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 8038
Angel Staffing, Inc., *et al.*	)	
	)	

STATEMENT OF REASONS OF
COMMISSIONERS ALLEN J. DICKERSON AND JAMES E. "TREY" TRAINOR, III

In this Matter, a government contractor, Angel Staffing, Inc., contributed to Protect and Serve PAC, an independent expenditure-only committee.[1] Such contributions are prohibited by the Act.[2] Nevertheless, we voted to invoke our prosecutorial discretion and provide this Statement of Reasons to explain why.[3]

I. THE STATE OF THE LAW

In 2010, the Supreme Court held that bans on independent expenditures by corporations violate the First Amendment.[4] Later that year, the U.S. Court of Appeals for the D.C. Circuit determined, *en banc* and unanimously, that "because *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law… the government can have no anti-corruption interest in limiting contributions to independent expenditure–only organizations."[5] Accordingly, it invalidated the limitations of the Federal Election

[1] Such groups are often called "independent expenditure-only political committees," or more commonly, "Super PACs." *See* Fed. Election Comm'n, Form 1 (Statement of Organization), *available at*: https://www.fec.gov/resources/cms-content/documents/fecfrm1.pdf.

[2] 52 U.S.C. § 301119(a)(1).

[3] Cert. at 2, MUR 8038 (Angel Staffing, Inc., *et al.*), May 31, 2023*; see e.g. Democratic Congressional Campaign Comm. v. Fed. Election Comm'n*, 831 F.2d 1131, 1135 (D.C. Cir. 1987) (establishing requirement that "[t]he Commission or the individual Commissioners" must provide a Statement of Reasons why the agency "rejected or failed to follow the General Counsel's recommendation").

[4] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

[5] *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 696 (D.C. Cir. 2010) (*en banc*).

Campaign Act of 1971, as amended, ("FECA" or "Act") as applied to such contributions. In its opinion, the court of appeals held, unmistakably, that the government lacks any legitimate interest in preventing independent expenditures by an American entity, and therefore also lacks any legitimate interest in preventing Americans, singly or in combination using the corporate form, from amalgamating their resources to do together what they can plainly do separately.[6]

But none of the plaintiffs in *SpeechNow* held a government contract. And just five years later, the *en banc* D.C. Circuit held in *Wagner v. Federal Election Commission* that individuals holding federal contracts could be constitutionally barred from contributing directly to candidates.[7] Those plaintiffs, however, "frame[d] their challenge narrowly" and explicitly repudiated any challenge to the statutory ban on contractors making or funding independent expenditures.[8]

These "cases, Janus*like*, point in two directions."[9] The statutory ban on government contractor contributions – which predates even the existence of independent expenditure-only committees – has never been directly challenged. On the other hand, the writing is on the wall. *SpeechNow*'s unanimous reasoning is unmistakable in noting that no anti-corruption rationale can save limitations on the funding of independent expenditures.

And while *Wagner* articulated a governmental interest in "protecting merit-based administration," it evaluated that interest only in the context of direct contributions to candidates and political parties.[10] Because of the narrow question

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[6] This constitutional protection is not afforded to foreign nationals. *Bluman v. Fed. Election Comm'n*, 800 F.Supp.2d 281 (D.D.C. 2011) (three-judge court); *aff'd* 565 U.S. 1104 (2012).

[7] *Wagner v. Fed. Election Comm'n*, 793 F.3d 1, 23 (D.C. Cir. 2015 (*en banc*) ("In sum, we conclude that a flat prohibition is closely drawn to the important goals that [the statutory bar] serves") (citing *Williams-Yulee v. The Fla. Bar*, 573 U.S. 433, 455 (2015)). *But see* Zac Morgan and Joe Trotter, *'Avengers' of Campaign Finance*, Daily Caller, July 24, 2013 (noting the asymmetries inherent in a system that allows individuals in charge of federal contracting companies to make personal donations to Super PACs while prohibiting individuals holding small contracts from doing the same).

[8] *Wagner*, 793 F.3d at 3-4.

[9] *Van Orden v. Perry*, 545 U.S. 677, 683 (2005).

[10] *Wagner*, 793 F.3d at 4 ("Nor do they challenge the law as the Commission might seek to apply it to donations to PACs that themselves only make only independent expenditures, commonly known as 'Super PACs'").

presented in that case, it neither discussed nor considered evidence concerning contributions for independent expenditures.[11]

Finally, FECA's text remains clear, despite muddied constitutional waters: "It shall be unlawful for any person…who enters into any contract with the United States or any department or agency thereof either for the rendition of personal services or furnishing any material, supplies, or equipment to the United States" to "directly…make any contribution of money…to any…committee."[12]

II. THE SPECIFIC FACTS OF THIS CASE MERITED DISCRETIONARY DISMISSAL

The facts in this case are, mercifully, less complicated than the law.

Angel Staffing, Inc. is a Texas corporation that is a longstanding federal contractor.[13] Its president and chief executive officer is Shannon Ralston.[14] The available evidence indicates that Ms. Ralston intended to make a personal contribution to the Protect and Serve PAC, an independent expenditure-only committee, but ran into a technical issue with her bank.[15] So she did what many Americans have had to do when faced with our Nation's complicated campaign finance regime: she consulted a lawyer.[16]

Ms. Ralston's "attorneys and tax consultant" then "assure[d]" her of "the permissibility of using the Angel Staffing non-repayable drawing account" to make a

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[11] *Id.* at 10. As the *Wagner* Court's extensive history of the contractor prohibition demonstrated, Congress was particularly concerned with the danger of *quid pro quo* arrangements involving direct bribery of individual representatives. *Id.* at 15 ("In 2005, for example, Representative Randy "Duke" Cunningham pled guilty to accepting millions of dollars in bribes in exchange for influencing Defense Department contract awards. Mitchell Wade, the defense contractor who pled guilty to bribing Cunningham, admitted to making illegal 'straw' contributions to two other Members of Congress as well…") (internal citations omitted).

[12] 52 U.S.C. § 30119(a)(1).

[13] First Gen'l Counsel's Report ("FGCR") at 2, MUR 8038 (Angel Staffing, Inc., *et al.*), Feb. 8, 2023.

[14] *Id.*

[15] Aff. of Shannon Ralston at 1, ¶ 4 ("On February 22, 2022, I attempted to make a $250,000 contribution to Protect and Serve PAC using a personal bank account, but ran into some processing difficulties with my bank").

[16] *Cf. Citizens United*, 558 U.S. at 324 ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day").

donation to Protect and Serve, and she used that account to make the contribution to the PAC.[17] Ms. Ralston's attorneys seem to have concluded that because the money in that account derived from a $4 million loan from Ms. Ralston to Angel Staffing "largely to cover payroll costs,"[18] and because she had authority to withdraw those funds from Angel Staffing,[19] the money essentially belonged to Ms. Ralston personally.[20]

While an understandable conclusion, this was technically incorrect as a matter of law.[21] Once Ms. Ralston lent funds to Angel Staffing, Inc. and the corporation took possession of those funds, they ceased to belong to her. Respondents, in protesting their innocence, would have us overlook the foundational principle that a corporation and its principals are separate legal persons.[22] We declined, as we regularly have in other contexts, the invitation to carve out a FECA-specific exception to ancient principles of corporate law.[23]

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[17] Aff. of Shannon Ralston at 1, ¶¶ 4-7.

[18] Angel Staffing, Inc. and Ms. Ralston Resp. at 2, Sept. 30, 2022; *id.* Ex. B.

[19] Resp. at 2 ("[S]he approved a $250,000 wire transfer to [the PAC] using that account").

[20] *See id.* at 3 (arguing such).

[21] Good faith confusion of this kind is common. Tr. of Oral Arg. 17, *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (Oct. 8, 2013) (Scalia, J.) ("I agree that – that this campaign finance law is so intricate that I can't figure it out").

[22] While "[a] corporation is simply a form of organization used by human beings to achieve desired ends," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014), it is "[a] basic tenet of American corporate law…that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). Corporations are distinct legal persons, who may hold property, sue and be sued, and have limited liability for their investors. *Osborn v. Bank of the U.S.*, 22 U.S. 738, 830 (1824) (Marshall, C.J.) ("A corporation, it is true, can appear only by attorney, while a natural person may appear for himself"); *see also NAF Holdings, LLC v. Li & Fung (Trading), Ltd.*, 772 F.3d 740, 751 (2d Cir. 2014) (Lynch, J., concurring) ("The many benefits of limited liability (for society as well as for the shareholders) are built on the idea that every corporation is a distinct legal person from its parent or subsidiary corporations and from its various shareholders").

[23] Statement of Reasons of Chairman Dickerson and Comm'rs Cooksey and Trainor at 5-7, MUR 7491 (American Ethane Co., LLC), Oct. 27, 2022 (rejecting OGC recommendation to treat foreign investment in a U.S. company as if it were the same as foreign ownership of a domestic subsidiary); Statement of Reasons of Vice Chair Dickerson and Comm'rs Cooksey and Trainor at 3, MUR 7180 (GEO Correction Holdings, Inc.), Oct. 13, 2021 ("A vote to enforce under these circumstances would carry implications far beyond this particular Matter and potentially contradicts basic principles of corporate law and limited liability upheld by courts over decades"); Statement of Reasons of Vice Chair Dickerson and Comm'rs Cooksey and Trainor at 3, n.13, MUR 7243 (CITGO Petroleum Co.), Apr. 1, 2021 ("As the Supreme Court has recognized, it is '[a] basic tenet of American corporate law…that the corporation and its shareholders are distinct entities'") (quoting *Dole Food Co.*, 538 U.S. at 474).

Thus, our Office of General Counsel recommended that we find reason-to-believe that Respondent Angel Staffing, Inc. "made a prohibited government contractor violation."[24] Because Ms. Ralston relied upon advice of counsel, could have lawfully structured this transaction if correctly advised, and promptly attempted to correct her error,[25] we do not believe the public interest requires additional penalties.

Conversely, to pursue this violation would have exposed the Commission to a costly defense of the statutory ban's dubious constitutionality. Responsible adjudication requires us to consider whether "the agency [would be] likely to succeed"[26] in a particular enforcement action and to husband the scarce resources assigned to us by Congress. Directing additional attorney time toward punishing a technical violation occasioned by responsible reliance upon advice of counsel did not, to us, present a high enforcement priority.

Accordingly, while we may decide differently under different facts, such as in an egregious or clear-cut case, we did not believe further pursuit of this matter to be a wise use of Commission resources and dismissed it pursuant to our prosecutorial discretion.[27]

CONCLUSION

For the foregoing reasons, we voted to dismiss this matter pursuant to the agency's prosecutorial discretion.

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[24] FGCR at 13.

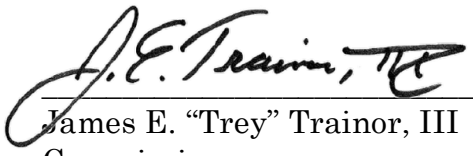
[25] FGCR at 5 ("Ralston attests that, after she was notified of the Complaint in this [M]atter, she 'directed [her] attorneys to request that [the Committee] amend its report to reflect the $250,000 contribution as coming from [her] personally and not Angel Staffing'; the Committee subsequently amended its 2022 April Quarterly Report to conform with this understanding") (first bracket supplied, rest in original, internal citation omitted).

[26] *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

[27] *Id.* (Agencies "must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts…An agency generally cannot act against each technical violation of the statute it is charged with enforcing").

Allen Dickerson
Commissioner

July 3, 2023
Date



James E. "Trey" Trainor, III
Commissioner

July 3, 2023
Date