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**By Electronic Mail**

August 2, 2024

Ms. Wanda D. Brown
Federal Election Commission
Office of Complaints Examination
& Legal Administration
1050 First Street, NE
Washington, DC 20002

**Re: MUR 8274 (Biden for President, *et al.*)**

Dear Ms. Brown:

We write on behalf of President Joseph Biden, Biden for President ("BFP" or "the campaign")[1], and Keana Spencer in her official capacity as Treasurer of BFP, in response to the Complaint filed by America First Legal Foundation ("AFLF") and designated as MUR 8274.

The Complaint should be dismissed with no further action because it fails to allege any facts that amount to a violation of the Federal Election Campaign Act of 1971, as amended ("the Act"). Instead, the Complaint makes the novel and completely unsubstantiated legal argument that the New York state prosecution of former President Donald J. Trump by the New York County District Attorney ("District Attorney") was a coordinated expenditure with, and therefore an in-kind contribution to, Biden for President.[2] It charges that BFP therefore both accepted, and failed to report, an excessive contribution in the form of the prosecution.

For the Trump prosecution to amount to a coordinated expenditure, there must be both "coordination" and an "expenditure" as those terms are defined in the Act. Lacking a factual basis for its allegation of coordination, AFLF asks the Commission to rely instead on "circumstantial indications" and what it calls an "inescapable inference" of collusion.[3] Under

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[1] Since the filing of this Complaint, Respondent Biden for President has amended its Form 1 Statement of Organization to reflect the committee's new name, Harris for President. Because the Complaint was filed when the committee was registered as Biden for President and refers to it as such, this Response continues to use that name for the sake of clarity.

[2] While the Complaint names Alvin Bragg as a respondent, its theory of the case would seem to mean that, if successful, it was the New York County District Attorney's office that made the in-kind contribution of prosecutorial services. AFLF's argument that the FEC should begin investigating state and local governmental entities to see if their routine operations are coordinated expenditures, based on "circumstantial indications," is flawed in theory and execution.

[3] Compl. ¶¶ 28, 33.

FEC precedents, pure speculation and inference cannot support a Complaint. The Complaint's arguments that the District Attorney's prosecution of Trump is an expenditure under the Act fare no better. Therefore, BFP neither accepted nor failed to report any such contribution. The weakness in the Complaint demonstrates that the Complainants' concern is not a campaign finance issue at all and is instead an attempt to abuse the Commission's complaint process to achieve its political ends. The Commission should find no reason to believe a violation occurred and close the matter.

## I. The Complaint's Speculative Assertions Do Not Support a Coordination Claim

Under the Act and Commission regulations, "coordination" means "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee" or an agent thereof.[4] Commission precedent requires that a complaint must present facts sufficient to show a violation. As current and former Commissioners have explained, "At the reason-to-believe stage, we cannot proceed to authorize an investigation based upon '[u]nwarranted legal conclusions from asserted facts or mere speculation.'"[5] Nor does making evidence-free, conclusory allegations shift the burden to respondents to disprove.[6]

The Complaint cites no facts, sworn or otherwise, supporting a claim of coordination between the District Attorney and BFP. Instead, it lists a few allegations which, through innuendo and speculation, the Complaint argues should be treated as evidence of coordination. Speculation and inference-upon-inference is the only basis on which the coordination claim in this Complaint relies. What the Complaint refers to as the "overall record" in this matter and its evidence of coordination includes: (1) the District Attorney hired his former colleague, who was also a former Biden Administration appointee, to work on the prosecution; (2) the Attorney General of the United States refused to commit to disclosing to Congress any communications between the Department of Justice and the District Attorney's office; and (3) BFP held a press event and issued a statement about the trial when it ended.[7] Elsewhere, the Complaint alleges that two individuals who would later work in the Biden Administration made contributions to the District Attorney's campaign in 2019, before either the District Attorney or President Biden

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[4] 11 C.F.R. § 109.20(a); *see also* 52 U.S.C. § 30116(a)(7)(B)(i).

[5] MUR 7868 (Twitter, Inc., *et al.*), Statement of Reasons of Vice Chair Dickerson and Comm'r Trainor at 4 (quoting MUR 4960 (Clinton), Statement of Reasons of Comm'rs Mason, Sandstrom, Smith, and Thomas at 2).

[6] *See, e.g.*, MUR 4850 (Deloitte & Touche, LLP), Statement of Reasons of Chairman Wold and Comm'rs Mason and Thomas at 2 ("The burden of proof does not shift to a respondent merely because a complaint is filed.").

[7] Compl. ¶¶ 28, 33.

was elected; and that George Soros and his son supported the District Attorney's campaign while Soros also supported a joint fundraising committee of which BFP was a member.[8]

None of these assertions even allege coordination between the District Attorney and Respondents BFP, President Biden, or Spencer. To find coordination, the law requires evidence of activity "in cooperation, consultation or concert with, or at the request or suggestion of" a candidate or campaign.[9] That the District Attorney hired someone who once worked in the Biden Administration does not make any allegation related to the candidate or campaign at all, nor does it allege any coordinating action with the candidate or campaign. Similarly, the Attorney General's initial refusal to commit to turning over documents does not implicate the candidate or campaign and does not allege any coordinating action – and any innuendoes about the refusal to commit are undermined by the Department of Justice's letter, sent the day before this Complaint was filed and reported the next day in *Politico*, explaining that it had searched for email communications between Department of Justice leadership and the District Attorney's office regarding the prosecution and found none.[10] BFP's press conference and statement at the end of the trial are the only alleged actions by *Respondents* at all (the other claims relate only to current or former federal officials), and again do not show cooperation, consultation, concert, request, or suggestion, as they relate to *Respondent's* actions only and have nothing to say about the District Attorney. Finally, that various individuals supported the campaigns of both the District Attorney and President Biden or supported the District Attorney and later worked for President Biden, sometimes years before any of these events are alleged to have occurred, is simply irrelevant.

AFLF has no evidence to support the coordination allegations in the Complaint. For that reason alone, this Complaint must be dismissed, and the Commission should find no reason to believe a violation occurred.

## II. The Activities Alleged in the Complaint Do Not Constitute an Expenditure

While the lack of coordination is alone enough to dismiss this Complaint, the Complaint similarly cites no facts supporting the claim that the Trump prosecution was an "expenditure." Absent an expenditure, there also can be no contribution as alleged.

An expenditure is a payment or anything of value made "for the purpose of influencing any election for Federal office."[11] The Complaint recognizes that an expenditure occurs if it was "provided for the purpose of influencing a federal election."[12] But where, as here, there is no

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[8] *Id.* ¶¶ 18, 19, 21.

[9] 11 C.F.R. § 109.20(a).

[10] Letter from Asst. Att'y Gen. Carlos Uriarte to Rep. Jim Jordan, June 10, 2024, https://www.politico.com/f/?id=00000190-075b-d29e-a9f3-677bfc9e0000.

[11] 11 C.F.R. § 100.111(a).

[12] Compl. ¶ 29 (quoting MUR 7024 (Van Hollen for Senate *et al.*), Factual & Legal Analysis at 6).

objective or subjective indication that an action was taken for the purpose of influencing an election, there is no expenditure.[13]

The facts cited in the Complaint in support of finding an expenditure are the same facts described in the coordination section above[14] and suffer from the same speculative deficiencies when put to use here. None of the facts included in the Complaint – the District Attorney hiring a former Biden Administration official, the Attorney General not immediately agreeing to turn over documents sought by a Member of Congress, and the press conference and statement – provide any evidence that the prosecution was for the purpose of influencing an election. Nor does Complaint cite any law supporting the theory that these facts amount to an expenditure under the Act.

Furthermore, the mere possibility of affecting the outcome of an election is insufficient to meet the purpose threshold. The FEC generally does not treat the routine activities of government officials as "contributions" or "expenditures," even if those actions may have a political effect. The Complaint acknowledges this when it cites FEC AO 1981-37 (Gephardt). There, a sitting Member of Congress asked whether he could moderate a series of public affairs programs for a production company without compensation.[15] The Commission explained that the purpose of the activity was not to influence an election but instead was in connection with his duties as an officeholder, which "the Commission has consistently held" not to be contributions or expenditures.[16] This is true even though it was possible that the work could indirectly impact the Member's future campaigns.[17] The same logic applies here. The *purpose* of the District Attorney's activities was fulfilling a normal part of his official duties, not influencing any election.[18] As the Complaint itself concedes, "activity to fulfill the obligations of holding government office" does not necessarily constitute an expenditure "even if such activity confers a benefit on a federal candidate or otherwise impacts a federal election."[19]

The Complaint cites FEC AO 1980-57 (Bexar County Democratic Party) and FEC AO 1990-05 (Mueller) as examples of decisions where activity was found to be for the purpose of influencing an election. But these opinions are easily distinguishable. In AO 1980-57, the

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[13] MUR 7024 (Van Hollen for Senate *et al.*), Factual & Legal Analysis at 6.

[14] *See* Compl. ¶ 33.

[15] FEC AO 1981-37 (Gephardt) at 2.

[16] *Id.* at 3.

[17] *Id.*

[18] *See also, e.g., id.* at 2 ("Other examples of activities having possible election related aspects but not considered as connected with or influencing an election, include: where a candidate for Federal office hosted a radio talk show, Advisory Opinion 1977-42; where a union was permitted to pay the salaries of interns who manned a mobile congressional office in a congressman's district, Advisory Opinion 1979-25; and where a congressman established an informational forum in order to 'bring Washington home to the citizens' of his district, the Commission's response to Advisory Opinion Request 1976-89.").

[19] *See* Compl. ¶ 32.

Commission determined funds raised to pay for a legal proceeding brought by a federal candidate to remove his opponent from the ballot were contributions. In AO 1990-05, the Commission found a candidate's newsletter referring to her campaign or issues in her campaign would be an expenditure. Both describe situations where the facts are closely tied to the candidate and the candidate's election, and actions taken by the candidate themselves, as opposed to by a different elected official in an unrelated jurisdiction.

For these reasons, the Complaint must be dismissed.

## III. Conclusion

Commissioners Dickerson and Trainor have noted that "there is a tendency to recast political disputes as campaign finance violations and enlist the Commission as a party to larger conflicts. . . . But one need not shrink from the difficult policy questions involved with [such disputes] to realize that they are not, at their core, campaign finance issues."[20] That is the case with this issue. Complainants have attempted to bring their political grievance to the Commission, but lack evidence to support their legal claims that there has been a violation of federal campaign finance law. Therefore, the Commission should find no reason to believe the Respondents have violated the Act and dismiss the complaint.

Respectfully submitted,

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[20] *See* MURs 7821, 7827 & 7868 (Twitter, Inc., *et al.*), Statement of Reasons of Vice Chair Dickerson and Comm'r Trainor at 4.