

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON,**

455 Massachusetts Ave., N.W.
Washington, D.C. 20001,

ANNE L. WEISMANN
6117 Durbin Road
Bethesda, MD 20817,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION

999 E Street., N.W.
Washington, D.C. 20463,

Defendant.

Civil Action No.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action for injunctive and declaratory relief under the Federal Election Campaign Act of 1971 (“FECA” or “the Act”), 52 U.S.C § 30109(a)(8)(C), and the Administrative Procedure Act, 5 U.S.C. § 706, challenging as arbitrary, capricious, an abuse of discretion, and contrary to law the dismissal by the Federal Election Commission (“FEC” or “Commission”) of an administrative complaint by Citizens for Responsibility and Ethics in Washington (“CREW”) and Anne L. Weismann (collectively “Plaintiffs”) against Unknown Respondent(s) for violating the FECA’s ban on making political contributions in the name of another. This action seeks to remedy the injuries to Plaintiffs and the public resulting from “an egregious example of someone using a web of organizations to hide the true source of a \$1.7 million contribution to a super PAC – and getting away with it.” *In the Matter of Amer.*

Conservative Union, et al., Statement of Reasons of Comm’r Ellen L. Weintraub 1, MUR No. 6920 (Dec. 19, 2017) (attached as Exhibit 1).

2. As found by the FEC’s Office of General Counsel (“OGC”), funds that were originally reported by Now or Never PAC as a contribution from a social nonprofit organization, American Conservative Union (“ACU”), actually originated from an unknown source and were passed through ACU and a previously undisclosed LLC, Government Integrity, LLC (“GI LLC”), before they reached their ultimate destination, the PAC, which used the funds to pay for political ads. Third General Counsel’s Report 2–3, MUR No. 6920 (Sept. 15, 2017) (attached as Exhibit 2). The use of these pass-throughs and the wrongful attribution of the contribution as originating with ACU had the effect of hiding the true source of the funds Now or Never PAC used to pay for its political ads. The Commission ultimately entered into a conciliation agreement with ACU, GI LLC, Now or Never PAC, and James C. Thomas III, the treasurer for Now or Never PAC and counsel for GI LLC, fining them \$350,000 for their actions. *See* Conciliation Agreement, MUR No. 6920 (Oct. 31, 2017) (attached as Exhibit 3).

3. Nevertheless, by a split decision, the Commission failed to adopt the OGC’s recommendation to find reason to believe two additional participants in the pass-through scheme, the John Doe Trust and its trustee, John Doe Trustee (collectively, the “John Doe entities”), violated the FECA. *See* Certification, MUR No. 6920 (Sept. 21, 2017) (attached as Exhibit 4). The true identities of the John Doe Trust and the John Doe Trustee are currently unknown to Plaintiffs.¹ Moreover, because the Commission also split on whether to adopt the OGC’s recommendation to enforce outstanding subpoenas, the FEC failed to ascertain whether the John

¹ Pursuant to a court order, the FEC is not currently able to disclose the name of the trust or identity of the trustee. Accordingly, the FEC materials that identify the true name of the John Doe Trust and John Doe Trustee are redacted. *See, e.g.*, Certification 1 (Sept. 21, 2017), Ex. 4.

Doe Trust was merely a pass-through itself or was the true source of the contribution to Now or Never PAC, and thus did not conclude whether the John Doe Trust is an Unknown Respondent alleged in CREW's complaint or whether some other entity or entities are the alleged Unknown Respondent(s). Those failures resulted in the dismissal of Plaintiffs' complaint.

4. On December 20, 2017, nearly two months after closing the file on Plaintiffs' complaint, two of the three commissioners who refused to adopt the OGC's recommendation to find reason to believe and to enforce the subpoenas issued a statement of reasons to explain their vote. Statement of Reasons of Vice Chair Caroline C. Hunter and Comm'r Lee E. Goodman, MUR No. 6920 (Dec. 20, 2017) (attached as Exhibit 5). While congratulating themselves for setting "clear precedent" that the ban on pass-throughs applies to social welfare nonprofits, *id.* at 5, they refused to take any position on the use of LLC's (or trusts) as pass-throughs, arguing the very lack of clarity in the law prevented them from doing their jobs to clarify the law, *id.* at 2–3. Their statement fails to provide a reasonable basis for dismissal and rests on impermissible interpretations of law. Thus, their failure to find reason to believe the John Doe Trust and John Doe Trustee violated the FECA, their failure to pursue an investigation into the true source of the contribution and the identity of the Unknown Respondent(s), and the dismissal that resulted from those failures are contrary to law.

JURISDICTION AND VENUE

5. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 52 U.S.C. § 30109(a)(8)(A) and 5 U.S.C. § 702. This Court also has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 2201(a), and 2202. Venue lies in this district under 52 U.S.C. § 30109(a)(8)(A) and 28 U.S.C. § 1391(e).

PARTIES

6. Plaintiff CREW is a non-profit, non-partisan corporation organized under Section 501(c)(3) of the Internal Revenue Code.

7. CREW is committed to protecting the right of citizens to be informed about the activities of government officials, ensuring the integrity of government officials, protecting our political system against corruption, and reducing the influence of money in politics. CREW works to advance reforms in the areas of campaign finance, lobbying, ethics, and transparency. Further, CREW seeks to ensure that campaign finance laws are properly interpreted, enforced, and implemented.

8. To advance its mission, CREW uses a combination of research, litigation, advocacy, and public education to disseminate information to the public about public officials and their actions, and the outside influences that have been brought to bear on those actions. A core part of this work is examining and exposing the special interests that have influenced our elections and elected officials and using that information to educate voters regarding the integrity of public officials, candidates for public office, the electoral process, and our system of government.

9. Toward this end, CREW monitors the activities of those who run for federal office as well as those groups financially supporting candidates for office or advocating for or against their election. CREW regularly reviews campaign finance reports that groups, candidates, and political parties file with the FEC disclosing their expenditures and, in some cases, their contributors. Using the information in those reports, CREW, through its website, press releases, reports, and other methods of distribution, publicizes the role of these individuals

and entities in the electoral process and the extent to which they have violated federal campaign finance laws.

10. CREW also files complaints with the FEC when it discovers violations of the FECA. Publicizing violations of the FECA and filing complaints with the FEC serve CREW's mission of keeping the public, and voters in particular, informed about individuals and entities that violate campaign finance laws and deterring future violations of campaign finance laws.

11. CREW is hindered in carrying out its core programmatic activities when those individuals and entities that attempt to influence elections and elected officials are able to keep their identities hidden. Likewise, the FEC's refusal to properly administer the campaign finance laws, particularly the FECA's reporting requirements, hinders CREW in its programmatic activity, as compliance with those reporting requirements often provides CREW with the only source of information about those individuals and groups funding the political process. As a result of the FEC's refusal to enforce the FECA, organizations and individuals are able to launder their contributions through third parties. This deprives CREW of information critical to advancing its ongoing mission of educating the public to ensure the public continues to have a vital voice in our political process and government decisions.

12. As part of CREW's work in carrying out its central mission CREW focuses on so-called "pay-to-play" schemes. Toward that end, CREW looks for correlations between donations to the campaign of a member of Congress or candidate and that member's subsequent congressional activities, including advocating for policies and legislation that serve the interests of the member's donors. Information that an individual or entity made a large-dollar contribution may be very revealing about the influences that donor has brought to bear on the member post-election. Without information about the individuals and entities funding the

political activities of organizations and individuals, CREW is stymied in fulfilling its central mission.

13. As an example, in May 2013, CREW issued a report, *Rise of the Machines*, detailing the growing political influence of high-frequency traders in Washington. CREW's analysis was based in large part on the lobbying and campaign contribution records of 48 companies specializing in high frequency trading. That data revealed that between the 2008 and 2012 election cycles, the campaign contributions of these firms increased by 673 percent, from \$2.1 million during the 2008 election cycle to \$16.1 million during the 2012 cycle. CREW was able to obtain this information because of the disclosure requirements to which the organizations receiving those contributions – federal candidates, party committees, PACs, and super PACs – are subject under the FECA.

14. As another example, CREW published *Stealth Donors*, a December 2012 report on donors who gave more than \$1,000,000 to super PACs trying to influence the 2012 election. The report revealed a dozen donors with policy or business interests that depended on the outcome of the elections, but whose efforts to sway voters largely were out of the public view. CREW obtained the information used in this report from information the FECA requires political committees to disclose.

15. At the time the administrative complaint underlying this case was filed, plaintiff Anne L. Weismann was CREW's Interim Executive Director, and she currently is CREW's Chief FOIA Counsel. She is a citizen of the United States and a registered voter and resident of the state of Maryland. As a registered voter, Ms. Weismann is entitled to receive all the information the FECA requires those engaged in political activities to report publicly. She is further entitled to the FEC's proper administration of the provisions of the FECA. Ms.

Weismann is harmed in exercising her right to an informed vote when a political committee fails to report the true source of its contributions, as the FECA requires.

16. When Plaintiffs file complaints against violators of the FECA, they rely on the FEC, as the preliminary civil enforcement authority, to comply strictly with the FECA when making its enforcement decisions. *See* 52 U.S.C. § 30107(e). Plaintiffs are harmed and are “aggrieved” parties when the FEC dismisses their complaints contrary to the FECA, refuses to enforce the FECA’s mandatory disclosure requirements, or otherwise acts contrary to the requirements of the FECA. *See* 52 U.S.C. § 30109(a)(8)(C).

17. Defendant FEC is the federal agency established by Congress to oversee the administration and civil enforcement of the FECA. *See* 52 U.S.C. §§ 30106, 30106(b)(1).

STATUTORY AND REGULATORY BACKGROUND

18. The FECA imposes a number of disclosure requirements to ensure the public and voters are fully apprised of election-related spending. In particular, the law requires organizations that engage in significant electioneering, called “political committees,” *see* 52 U.S.C. § 30101(4); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), to disclose the source of their contributions, 52 U.S.C. § 30104(b)(3)(A).

19. To ensure the public learns the true-source of a contribution and to prevent the reporting of a mere pass-through entity as that source, the FECA and FEC regulations prohibit making a contribution in the name of another person, knowingly permitting one’s name to be used for the purpose of making a contribution in the name of another person, and knowingly accepting a contribution made by one person in the name of another person. Specifically, 52 U.S.C. § 30122 provides: “No person shall make a contribution in the name of another person or

knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.”

20. FEC implementing regulations echo these prohibitions on making a contribution in the name of another, knowingly permitting one’s name to be used to effect a contribution, knowingly helping or assisting another to do so, and knowingly accepting a contribution made by one person in the name of another person. 11 C.F.R. § 110.4(b). The regulation includes, as an example of a prohibited contribution, giving money, “all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money[.]” *Id.* at § 110.4(b)(2).

21. Under the FECA, any person who believes there has been a violation of the Act may file a sworn complaint with the FEC. 52 U.S.C. § 30109(a)(1). Based on the complaint, the response from the person or entity alleged to have violated the Act, facts developed by the Office of General Counsel (“OGC”), and any OGC recommendation, the FEC then votes on whether there is “reason to believe” a violation of the FECA has occurred. 52 U.S.C. § 30109(a)(2). A “reason to believe” exists where a complaint “credibly alleges” a violation of the FECA “may have occurred.” FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12545 (Mar. 16, 2007). If four commissioners find there is “reason to believe” a violation of the FECA has occurred, the FEC must notify the respondents of that finding and “shall make an investigation of such alleged violation.” 52 U.S.C. § 30109(a)(2).

22. If four commissioners fail to find reason to believe a violation of the FECA has occurred and the Commission then dismisses the matter, the complainant, as a “party aggrieved” by the dismissal, may seek judicial review of the failure to find reason to believe in the United

States District Court for the District of Columbia. 52 U.S.C. § 30109(a)(8)(A). All petitions from the dismissal of a complaint by the FEC must be filed “within 60 days after the date of the dismissal.” 52 U.S.C. § 30109(a)(8)(B).

23. The district court reviewing the FEC’s dismissal of a complaint may declare the FEC’s actions “contrary to law.” 52 U.S.C. § 30109(a)(8)(C). The court also may order the FEC “to conform with such declaration within 30 days.” *Id.* If the FEC fails to abide by the court’s order, the FECA provides the complainant with a private right of action, brought in the complainant’s own name, “to remedy the violation involved in the original complaint.” *Id.*

FACTUAL BACKGROUND

24. On February 27, 2015, Plaintiffs filed a complaint with the FEC against ACU, Now or Never PAC (a political committee), James C. Thomas III (in his capacity as Treasurer of Now or Never PAC), and Unknown Respondent (“MUR 6920”). The complaint alleged that ACU permitted its name to be used to effect a contribution in the name of another person, by acting as a conduit to contribute \$1.7 million to Now or Never PAC, in violation of 52 U.S.C. § 30122. The complaint further alleged that Now or Never PAC knowingly accepted a contribution from ACU in the name of another, in violation of 52 U.S.C. § 30122. Finally, the complaint alleged that Unknown Respondent, the “true source” of the funds ultimately donated to Now or Never PAC, violated 52 U.S.C. § 30122 by contributing to Now or Never PAC in the name of ACU.

25. Specifically, Plaintiffs’ complaint alleged that Now or Never PAC disclosed receiving \$8,200,500 in contributions in the 2012 election cycle, the largest being a \$1,710,000 contribution from ACU. The vast majority of Now or Never PAC’s spending went towards its independent expenditures. Despite this report by Now or Never PAC, ACU first reported in its

tax filings that it engaged in no direct or indirect political campaign activities. About two years after Now or Never PAC's report, in May 2014, ACU's amended 2012 tax return reported the contribution to Now or Never PAC. However, this tax return stated that the funds did not originate with ACU. Rather, according to ACU's amended tax return, ACU admitted to acting as a conduit for a contribution earmarked to Now or Never PAC, stating that "\$1,710,000 was a political contribution received by the Organization and promptly and directly delivered to a separate political organization." In violation of the FECA, neither ACU nor Now or Never PAC had identified the source of the funds that flowed through ACU to Now or Never PAC.

26. Based on Plaintiffs' complaint, the FEC conducted an investigation which uncovered that, on October 31, 2012, ACU received \$1.8 million from GI LLC. On the very same day ACU received the funds from GI LLC, it sent \$1.71 million of the money it received from GI LLC to Now or Never PAC. Thomas, who was GI LLC's attorney as well as Now or Never PAC's treasurer, transferred the funds from GI LLC and received them at Now or Never PAC. Correspondence between individuals at ACU and Thomas confirmed everyone knew the purpose of the transfer to ACU was to send the funds to Now or Never PAC, stating that ACU would "take action immediately upon receipt." Conciliation Agreement ¶ 9, Ex. 3, *see also* Weintraub Statement 2, Ex. 1.

27. The FEC's investigation also uncovered, however, facts to show GI LLC was not the true source of these funds either. The investigation shows that on October 31, 2012—the same day GI LLC contributed funds to ACU to pass on to Now or Never PAC—John Doe Trust, through John Doe Trustee, transferred \$2.5 million to GI LLC. GI LLC had only been formed a few weeks earlier, in September 2012, and its "only known organizational purpose was to support conservative organizations and causes." Third General Counsel's Report 4, Ex. 2. The

John Doe Trust or John Doe Trustee “funded GI LLC.” *Id.* at 5. Thomas’s correspondence once again confirms that GI LLC itself was merely a pass-through, stating that “[t]he 2.5 million is here [at GI LLC]. I am about to wire the \$1.8 million to American Conservative Union.” *Id.* at 6; *accord* Weintraub Statement 2 n.5, Ex. 1.

28. Due to the stonewalling of the respondents and their obstruction of the FEC’s investigation, the FEC was unable to identify whether the John Doe Trust was the true source of the funds, or whether it was merely a pass-through itself for some other entity or entities. Weintraub Statement 2, Ex. 1 (noting subpoenaed witnesses “refused to cooperate”); Third General Counsel’s Report 5-6. Nevertheless, three commissioners of the FEC voted against enforcing the FEC subpoenas against the uncooperative witnesses, Certification (Sept. 21, 2017) 1, Ex. 4, thereby stymieing the investigation into the true source of the contribution to Now or Never PAC, Weintraub Statement 2, Ex. 1.

29. Following this investigation, the FEC found reason to believe that GI LLC, ACU, Now or Never PAC, and James C. Thomas, III (in his capacity as treasurer of Now or Never PAC) violated 52 U.S.C. § 30122. The FEC further found reason to believe that Now or Never PAC and Thomas also violated 52 U.S.C. § 30104(b)(3)(A). Certification, MUR No. 6920 (July 12, 2017) (attached as Exhibit 6); Certification, MUR No. 6920 (Jan. 24, 2017) (attached as Exhibit 7).

30. On October 31, 2017, the FEC entered into a conciliation agreement with the respondents ACU, Now or Never PAC, Thomas, and GI LLC. Per this agreement, GI LLC, ACU, Now or Never PAC, and Thomas, agreed not to contest the Commission’s conclusion they violated 52 U.S.C. § 30122, and Now or Never PAC and Thomas agreed not to contest violating section 30104(b)(3)(A).

31. The FEC's Office of General Counsel also recommended that the Commission find reason to believe that the John Doe Trust and John Doe Trustee violated 52 U.S.C. § 30122 by making or assisting in the making of a contribution in the name of another. Third General Counsel's Report 9–15, Ex. 2. However, on September 20, 2017, the FEC failed, by a vote of 2–3, to find reason to believe. *See* Certification (Sept. 21, 2017) 1, Ex. 4. The same three commissioners who refused to vote to enforce the FEC's subpoenas were also the ones who refused to vote to approve the OGC's recommendation to find reason to believe the John Doe Trust and John Doe Trustee violated the FECA. *Id.* at 2.

32. On October 24, 2017, the Commission voted to close the file and dismiss Plaintiffs' complaint. Certification, MUR No. 6920 (Oct. 24, 2017) (attached as Exhibit 8).

33. On December 19, 2017, Commissioner Ellen Weintraub, who voted to find reason to believe against the John Doe entities and to enforce the outstanding subpoenas, issued a Statement of Reasons. She noted that, by reason of the failure of the other commissioners to pursue the case, “whoever concocted this elaborate scheme—in which money was funneled through at least four organizations (that we know of) in order to influence elections—succeeded in hiding their identity from the American public.” Weintraub Statement 1, Ex. 1. She also noted that the reason the Commission was only considering the 2012 contribution so many years later was because “[t]he information underlying the complaint did not surface until years after the events took place” due to ACU's false IRS filings and due to the failure of respondents to report the true source of the contribution, because the respondents engaged in “deliberate [acts of] concealment” during the investigation, and because “the Commission failed to act for a full year” after it received the OGC's first set of recommendations. *Id.* at 3. Due to pending

litigation, Commissioner Weintraub redacted the names of the John Doe entities from her statement. *Id.* at 2.

34. On December 20, 2017, two of the three commissioners who voted against finding reason to believe the John Doe entities violated the FECA and against enforcing the subpoenas issued a Statement of Reasons. Hunter, Goodman Statement, Ex. 5. The two commissioners argued it was unclear whether the FECA's ban on contributions in the name of another would apply to LLCs like GI LLC and "[i]t would have been unfair and possibly inefficient to pursue enforcement against [redacted] for engaging in similar conduct where the issue was not clear, we had dismissed similar legal theories against other persons, and a federal court is currently reviewing the reasonableness of our action." *Id.* at 2. The two commissioners therefore decided not to clarify the law. Rather, based on these concerns, the two commissioners decided to abdicate enforcement of the conduit contribution laws to LLCs, refusing even to clarify the law for other contributors who may use LLCs to deprive Plaintiffs (and the public) of access to the identity of the true source of contributions.

35. In addition, the two commissioners, citing the "risk" of the running of the statute of limitations, argued in favor of entering a conciliation agreement with the four disclosed entities immediately. *Id.* at 3–4. The two commissioners never explained why an investigation into the John Doe entities and any other Unknown Respondent(s) would prevent entry and enforcement of the conciliation agreement with the disclosed parties. Nor did they explain how the statute of limitations—which would only prevent entry of a civil penalty if it ran but would not prevent the FEC from requiring disclosure of the true source of the contribution—justified their refusal to vote to enforce outstanding subpoenas. Rather, the controlling commissioners voted to end the investigation leaving Plaintiffs and the public little better off than they were

previously: possessing the name of another straw donor but still in the dark about the true source of the contribution used to fund Now or Never PAC.

PLAINTIFFS' FIRST CLAIM FOR RELIEF

The FEC's Failure to Find Reason to Believe that John Doe Trust and John Doe Trustee Violated 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b) was Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law

36. Plaintiffs re-allege and incorporate by reference all preceding paragraphs as fully set forth herein.

37. The evidence in the records shows the John Doe Trust and John Doe Trustee made a contribution or assisted in the making of a contribution to Now or Never PAC by routing that contribution first through GI LLC and then through ACU, without any respondent disclosing the John Doe Trust as the source of the funds, in violation of 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b). Accordingly, the three commissioners' refusal to vote to find reason to believe the John Doe Trust and John Doe Trustee violated the FECA was arbitrary and capricious, an abuse of discretion, and contrary to law.

38. The statement by two of the three commissioners who voted against the OGC's recommendation to find reason to believe the John Doe Trust and John Doe Trustee violated 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b) fails to adequately justify their vote not to find reason to believe and relies on impermissible interpretations of law. Furthermore, the third commissioner has failed to provide any reason to justify his vote. Accordingly, the three commissioners' refusal to vote to find reason to believe the John Doe Trust and John Doe Trustee violated the FECA was arbitrary and capricious, an abuse of discretion, and contrary to law.

39. Plaintiffs are therefore entitled to relief in the form of a declaratory order that defendant FEC is in violation of its statutory responsibilities under 52 U.S.C. § 30109(a)(8) and 5 U.S.C. § 706, and has acted arbitrarily and capriciously, abused its discretion, and acted contrary to law in dismissing MUR 6920.

PLAINTIFFS' SECOND CLAIM FOR RELIEF

The FEC's Dismissal of Plaintiffs' Complaint Without Identifying the True Source of the Funds Contributed to Now or Never PAC was Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law

40. Plaintiffs re-allege and incorporate by reference all preceding paragraphs as fully set forth herein.

41. Plaintiffs' complaint identified as an "Unknown Respondent" the "true source" of the funds that were passed-through ACU and ultimately contributed to Now or Never PAC.

42. The FEC investigation revealed GI LLC was an additional pass-through entity of the funds and that it received its funds from John Doe Trust.

43. Nevertheless, the FEC investigation has neither confirmed that the John Doe Trust was the true source of the contribution nor identified the true source of the contribution if it originated elsewhere.

44. The FEC's dismissal of Plaintiffs' complaint against this Unknown Respondent(s) who is the true source of the funds, and who was not identified as the source of the contribution in violation of 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b), is arbitrary, capricious, an abuse of discretion, and contrary to law.

45. Further, three commissioners voted against authorizing the enforcement of subpoenas against uncooperative witnesses stymied the FEC's investigation and led to the dismissal of the complaint against the Unknown Respondent(s) who is the true source of the

contribution. The statement by two of those three commissioners fails to offer an adequate explanation of justification for their vote and relies on impermissible interpretations of law. The third commissioner has failed to issue any statement. Accordingly, their votes and the dismissal were arbitrary, capricious, an abuse of discretion, and contrary to law.

46. Plaintiffs are therefore entitled to relief in the form of a declaratory order that defendant FEC is in violation of its statutory responsibilities under 52 U.S.C. § 30109(a)(8) and 5 U.S.C. § 706, and has acted arbitrarily and capriciously, abused its discretion, and acted contrary to law in dismissing MUR 6920

REQUESTED RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

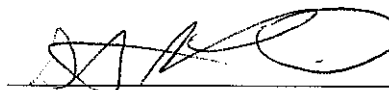
(1) Declare that the FEC's dismissal of Plaintiffs' complaint against Unknown Respondent(s), including the John Doe Trust, the John Doe Trustee, and the as-yet unidentified true source of the contribution to Now or Never PAC, was arbitrary, capricious, an abuse of discretion, and contrary to law.

(2) Order the FEC to conform to such declaration within 30 days pursuant to 52 U.S.C. § 30109(a)(8)(C);

(3) Award Plaintiffs their costs, expenses, and reasonable attorneys' fees in this action; and

(4) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,



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December 22, 2017
Attorneys for Plaintiffs

Exhibit 1



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**COVER LETTER TO THE STATEMENT
OF COMMISSIONER ELLEN L. WEINTRAUB
IN MUR 6920 (AMERICAN CONSERVATIVE UNION)**

DECEMBER 19, 2017

Due to pending litigation, I must take the unprecedented step of releasing the attached statement with the identities of certain persons and entities redacted. As can be seen from my statement and the third General Counsel's Report, these were not incidental witnesses swept up in the agency's probe, but rather key players in the scheme the Commission unanimously found to have violated the law against making contributions in the name of another.

After engineering an intricate plot to defeat the public's interest in knowing who was actually behind a \$1.7 million political contribution, the plaintiffs are now taking the extraordinary step of suing the Commission to force us to continue to hide their identities.¹ I am looking forward to the expeditious resolution of this litigation with a ruling in the FEC's favor that will allow me to reissue my statement unredacted.

The public has the right to know as much as this agency was able to determine about who was trying to influence the election with this huge contribution. Likely the beneficiaries of their largesse already do.

¹ I suspect this will prove unwise. See "Streisand effect," https://en.wikipedia.org/wiki/Streisand_effect



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

American Conservative Union;)
Government Integrity LLC; Now or)
Never PAC and James C. Thomas, III in)
his official capacity as treasurer; James C.)
Thomas III)

MUR 6920

**STATEMENT OF REASONS
OF COMMISSIONER ELLEN L. WEINTRAUB**

This important case is an egregious example of someone using a web of organizations to hide the true source of a \$1.7 million contribution to a super PAC – and getting away with it. The complaint that Citizens for Responsibility and Ethics in Washington (“CREW”) filed with the Commission in this matter in February 2015 alleged serious violations of the laws against making, accepting, or assisting with a federal campaign contribution in the name of another.¹ Amended tax filings had revealed that \$1.71 million had been routed through the American Conservative Union (“ACU”) to Now or Never PAC, but the true source of the money was unknown. Almost three years later, CREW, the Commission, and the American public are still in the dark.

The Commission unanimously confirmed that the prohibitions against contributions in the name of another apply to super PACs, made rare knowing and willful findings, and negotiated a \$350,000 penalty. Nonetheless, whoever concocted this elaborate scheme – in which money was funneled through at least four organizations (that we know of) in order to influence federal elections – succeeded in hiding their identity from the American public. A penalty has been extracted from some of the culpable entities here, but we still have no idea who was behind the illegal behavior.

In *Citizens United*, the Supreme Court recognized the important public interests served by transparency in campaign finance, in holding “elected officials accountable for their . . .

¹ 52 U.S.C. § 30122; 11 C.F.R. § 110.4(b).

MUR 6920 (American Conservative Union)
Statement of Commissioner Ellen L. Weintraub

supporters,” in revealing “whether elected officials are “‘in the pocket’ of so-called moneyed interests,” and in “enabl[ing] the electorate to make informed decisions.”² Unfortunately, as has been demonstrated in this matter, the courts have been naïve to allow corporations to fund super PACs without taking into account the ease with which they can be used to circumvent disclosure.

While the penalty is not insignificant, it fails to reflect the magnitude of the violation and the lengths to which respondents went to conceal the true source of the money and is an inadequate deterrent to future wrongdoing. Penalties that are not commensurate with the amount in violation risk being written off as a “cost of doing business.” For someone who is willing and able to pour millions of dollars into political activity, an additional \$350,000 is a rounding error.

Here’s what we know happened. [REDACTED] (“[REDACTED]”), a trust created and owned by unknown parties, through its trustee, [REDACTED], [REDACTED] the ironically named Government Integrity LLC (“GI”) in September 2012, [REDACTED].³ On or about Oct. 31, 2012, [REDACTED] transferred \$2.5 million to GI. GI, through its lawyer, James Thomas, immediately transferred \$1.8 million to ACU (a 501(c)(4) tax-exempt organization). ACU immediately turned around and sent \$1.71 million to Now or Never PAC, whose treasurer was none other than GI’s lawyer, James Thomas.

ACU would not have had the money to make the contribution to Now or Never PAC without the transfer from GI.⁴ ACU pocketed \$90,000 for funneling the money and allowing its name to be used as the “donor” to the PAC.⁵ Thomas, as the PAC’s treasurer, reported the \$1.71 million contribution as coming from ACU, although he plainly knew that ACU was not the ultimate source of the funds because *he himself had transferred the money from GI to ACU*.

The Commission was able to discover this much, but despite authorizing subpoenas, we never learned the most important fact: the ultimate source of the almost two million dollars given to the PAC – the identity of the person who wrote the *first* check.

Why? With everyone well aware of the clock ticking down to the expiration of the statute of limitations, subpoenaed witnesses refused to cooperate. A motion to authorize our Office of General Counsel to file suit to enforce our subpoenas (and find out the true source of the funds) failed 2-3, with my Republican colleagues all voting No.⁶

² 558 U.S. 301, 370 (2010).

³ Third General Counsel’s Report, dated September 15, 2017, at 4.

⁴ *Id.* at n.8.

⁵ On or very shortly before October 31, 2012, [REDACTED] wired \$2.5 million to GI. On October 31, 2012, Thomas sent an email to Now or Never PAC consultants stating, “The 2.5 million is here. I am about to wire \$1.8 million to American Conservative Union.” *Id.* Later that same day, immediately after ACU’s receipt of \$1.8 million from GI, ACU wired \$1.71 million to Now or Never PAC, keeping \$90,000 (exactly 5 percent). *Id.* After Thomas confirmed that Now or Never PAC received ACU’s transfer, ACU’s executive director wrote to ACU’s then-National Finance Director: “FYI. We have the 90k.” She replied, “Well done!!!!” MUR 6920 Global Conciliation agreement at 4.

⁶ Certification in MUR 6920 (ACU) dated Sept. 20, 2017.

MUR 6920 (American Conservative Union)
Statement of Commissioner Ellen L. Weintraub

How did we find ourselves running up against the statute of limitations? The information underlying the complaint did not surface until years after the events took place.⁷ Then, after the Office of General Counsel forwarded its first set of recommendations to the Commission, the Commission failed to act for a full year. The recommendations were not even placed on a meeting agenda for almost a year.⁸ By the time my colleagues were willing to move forward on this matter earlier this year, we were just about out of time. Ultimately, they directed staff to pursue a fine that was a fraction of the amount in violation. The Commission's lawyers were able to get the respondents to the negotiating table, a small miracle in itself, but they were unable to unearth the full truth of the matter. They traced the money back from Now or Never PAC to ACU to GI to [REDACTED] (the latter two entities having been unknown to the complainant). [REDACTED] was identified late as a link in the chain, and while our General Counsel recommended finding reason to believe [REDACTED] had violated the law and seeking further information from it, a motion to do so again failed on a 2-3 party line vote.⁹ Who provided the money to [REDACTED] and how far back did this chain extend? Frustratingly, we still do not know.

This case is just the latest illustration of a longstanding concern of mine: Effective enforcement of the law is undermined by pervasive delays. On May 21, 2015, I introduced a proposal to impose some discipline on the process and force the Commission to vote on our counsel's enforcement recommendations on a timely basis.¹⁰ Despite protracted negotiations and attempts to reach agreement at four separate meetings,¹¹ I could not get a commitment from a majority of the Commission to abide by any firm deadlines.

In this case, Commission neglect and respondents' deliberate concealment combined to defeat the public interest. Given their votes not to enforce the subpoenas or make findings against [REDACTED], it is not clear whether my colleagues would have been willing to investigate more vigorously even if we hadn't been up against the statute of limitations. But this much is clear: This case languished on commissioners' desks, and we failed in our mission to follow the money and trace it back to its ultimate source. The public had a right to know the true source of \$1.7

⁷ Third General Counsel's Report at n.29.

⁸ The Commission received the first General Counsel's Report on Jan. 20, 2016, and did not take its first vote until Dec. 6, 2016. That vote split, accomplishing nothing, and the Commission did not find reason to believe that a violation of the law had occurred until Jan. 24, 2017, on a complaint where the SOL would begin to expire on Oct. 31, 2017. Certifications in MUR 6920 (ACU), dated Dec. 6, 2016 and Jan. 24, 2017.

⁹ Certification in MUR 6920 (ACU) dated Sept. 20, 2017.

¹⁰ Memorandum dated May 18, 2015 from Commissioner Ellen L. Weintraub to the Commission, Proposed Directive 74 on the Timely Resolution of Enforcement Matters, Agenda Document No. 15-25-B, *found at* https://www.fec.gov/resources/updates/agendas/2015/mtgdoc_15-25-b.pdf

¹¹ See FEC open-meeting agendas of May 21, 2015 (*found at* <https://www.fec.gov/updates/may-21-2015-open-meeting/>); June 18, 2015 (*found at* <https://www.fec.gov/updates/june-18-2015-open-meeting/>); July 16, 2015 (*found at* <https://www.fec.gov/updates/july-16-2015-open-meeting/>); and Sept. 17, 2015 (*found at* <https://www.fec.gov/updates/september-17-2015-open-meeting/>).

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million spent to influence the 2012 elections and routed through a series of transfers designed to obfuscate. That interest will likely never be vindicated.

12-19-17
Date

Ellen L. Weintraub
Ellen L. Weintraub
Commissioner

1-0344444-1

Exhibit 2



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 20, 2017

Note: Two names and associated identifying information have been temporarily redacted from the following document in the public file for FEC Matter Under Review 6920. This information is the subject of litigation and will remain redacted pending the resolution of the litigation or further order of the Court. *See Doe v. FEC*, No. 17-02694 (D.D.C.).

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 6920
 American Conservative Union, *et al.*)
)
)

THIRD GENERAL COUNSEL'S REPORT

I. ACTIONS RECOMMENDED

We recommend that the Commission: 1) find reason to believe that

and , in his official capacity as trustee, () violated

52 U.S.C. § 30122 by making or assisting in the making of a contribution in the name of another;
 and 2) authorize the Office of the General Counsel to file a civil suit for relief in United States
 District Court against and in his official capacity as trustee, for failure to comply
 with the Commission's Subpoena and Order to produce documents and answer interrogatories.

II. BACKGROUND

The Federal Election Commission (the "Commission") received a Complaint alleging
 that, on October 31, 2012, an Unknown Respondent made a \$1.71 million contribution to Now
 or Never PAC in the name of American Conservative Union ("ACU"), in violation of
 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b).¹ Based on ACU's representation in its IRS Form
 990 that the contribution to Now or Never PAC was "a political contribution received by the
 Organization and promptly and directly delivered to a separate political organization,"² the

¹ While other Respondents in this matter have agreed to varying amounts of tolling, the statute of limitations as to which has not tolled, will run on October 31, 2017.

If does not agree to toll, we anticipate sending out a probable cause to believe ("PCTB") General Counsel's Brief as to both and Government Integrity LLC within the next week. This would allow the Commission to consider a possible PCTB determination prior to the expiration of the statute of limitations on October 31, 2017.

² See Compl. (Feb. 27, 2015). Ex. C at Schedule O, Schedule C (ACU Amended Form 990, May 12, 2014).

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1 Commission found reason to believe that an Unknown Respondent made a contribution in the
2 name of another.³

3 During the initial stage of its investigation, the Commission learned that Government
4 Integrity, LLC ("GI LLC") wired \$1.8 million to ACU on the same date ACU wired \$1.71
5 million to Now or Never PAC, and that James C. Thomas, III, the treasurer of Now or Never
6 PAC, also acted as the agent of GI LLC in wiring the funds to ACU. Based on this information,
7 the Office of General Counsel ("OGC") notified GI LLC and Thomas of the Complaint and the
8 Commission's findings as to Unknown Respondents. The Commission subsequently found
9 reason to believe that GI LLC violated 52 U.S.C. § 30122 by making a contribution in the name
10 of another, that Thomas knowingly and willfully violated 52 U.S.C. § 30122 by assisting in the
11 making of, accepting, and misreporting a contribution in the name of another, and that Now or
12 Never PAC violated 52 U.S.C. § 30122 by knowingly and willfully accepting and misreporting a
13 contribution in the name of another.⁴

14 As set forth below, OGC has recently learned that provided GI LLC with the funds
15 that GI LLC then immediately sent to ACU. The record establishes a reasonable inference that
16 purpose for funding GI LLC was to make a contribution to Now or Never PAC. Based on
17 this information, we recommend that the Commission find reason to believe that and

³ See Factual & Legal Analysis (Unknown Respondent), MUR 6920 (Feb. 7, 2017).

⁴ See Factual & Legal Analyses (Government Integrity LLC; Thomas; Now or Never PAC), MUR 6920 (July 13, 2017).

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in his official capacity as trustee, violated 52 U.S.C. § 30122 by either making or assisting in making a contribution in the name of another.⁵

III. FACTS

A. Relevant Parties

American Conservative Union is registered with the IRS as a social welfare organization under section 501(c)(4) of the Internal Revenue Code,⁶ and is not registered with the Commission as a political committee. ACU describes itself as the oldest and largest conservative grassroots organization in the United States. It received donations totaling \$8,485,503 in 2012.⁷ ACU states that prior to its receipt of funds from GI LLC, it had a combined total balance of approximately \$538,000 across its bank accounts.⁸ In 2012, ACU's executive director was Gregg Keller.

Now or Never PAC is an independent expenditure-only committee that filed its Statement of Organization with the Commission on February 21, 2012. Thomas, who is both an attorney and an accountant, has been Now or Never PAC's treasurer since its organization in 2012. During the 2012 cycle, Now or Never PAC raised \$8,250,500 and reported \$7,760,174 in independent expenditures. The group raised \$540,000 during the 2014 cycle and reported \$714,811 in independent expenditures. Now or Never PAC has been largely inactive since that time. It has not reported independent expenditures since then, and raised only \$8,000 in 2016.

⁵ received notice of the Complaint along with the Commission's reason to believe findings as to Unknown Respondents and the later reason to believe findings as to GI LLC. This notice resulted in trustee, Since that time, counsel has participated in multiple joint calls with OGC and counsel for GI LLC,

⁶ ACU Resp. at 1 (April 23, 2015).

⁷ See Compl., Ex. C at Part I.

⁸ ACU Resp. at 1 (April 9, 2017).

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1 Axiom Strategies is a Missouri-based political consulting firm that has connections to
 2 both Now or Never PAC and GI LLC. Axiom Strategies provides political consulting services,
 3 including fundraising services, to Now or Never PAC.⁹ Axiom Strategies has “participated in
 4 [Now or Never PAC’s] operations and financial activities,” and Thomas’s terms of engagement
 5 with Now or Never PAC “expressly authorize” him to carry out the instructions of Axiom
 6 Strategies.¹⁰ Thomas represents that he primarily took direction from Axiom Strategies’
 7 founder, Jeff Roe. Axiom Strategies reportedly also provided GI LLC with recommendations
 8 regarding the distribution of its funds.¹¹

9 GI LLC is a Delaware limited liability corporation that was established in September
 10 2012.¹² GI LLC’s only known organizational purpose was to support conservative organizations
 11 and causes.¹³ Christopher W. Byrd, who died in 2014, served as the “sole manager and officer”
 12 of GI LLC in 2012.¹⁴ Byrd retained Thomas to prepare organizational paperwork, serve as
 13 attorney and perform various tasks on behalf of GI LLC.¹⁵ Thomas states that all tasks he
 14 performed for GI LLC were conducted at the request and under the direction of Byrd.¹⁶

15
 16 acting as trustee of

⁹ Axiom Interrogatory Answers at 2 (Sept. 1, 2017).

¹⁰ Thomas Interrogatory Answers at 7 (July 28, 2017).

¹¹ *Id.* at 2.

¹² GI LLC incorporated on September 10, 2012. *See* Delaware Secretary of State.

¹³ Thomas Interrogatory Answers at 3.

¹⁴ *Id.* at 1-2.

¹⁵ *Id.* at 1, 3.

¹⁶ *Id.* at 1.

¹⁷ In an August 24, 2017 telephone conversation with OGC,

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¹⁸ funded GI LLC, wiring it \$2.5 million only
 seven weeks after the LLC's formation.¹⁹

²⁰

B. Subpoena and Order to

On August 10, 2017, the Commission served through its trustee, with a
 Subpoena and Order requesting the production of documents and the answers to interrogatories
 regarding its role in the transaction and the source of the funds used to make a contribution to
 Now or Never PAC. response was due on August 25, 2017. The day before
 response was due, newly retained counsel requested an extension of seventeen days.
 Because of statute of limitations concerns, OGC was unable to grant the request. Nonetheless,
 counsel for stated that would not respond to the Subpoena and Order until September
 11, 2017.²¹ OGC explained that it considered to be in non-compliance, but informed
 counsel that non-compliance could be mitigated by providing the Commission with
 documents and information on a rolling basis, or by otherwise making partial productions prior
 to September 11, 2017. declined to do so and reiterated its intention to respond by
 September 11, 2017. Contrary to those representations, however, did not respond by
 September 11, 2017, and instead informed OGC the following day that it "cannot comply" with
 the Commission's Subpoena and Order. urged that the Commission resolve GI LLC's

¹⁸ Thomas Interrogatory Answers at 2. A "nominee" is "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." Black's Law Dictionary (10th ed. 2014).

¹⁹ See Thomas Interrogatory Answers at 4.

²⁰

²¹ Letter from Mike Dry at 2 (Aug. 31, 2017).

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liability without obtaining further information from

²² OGC has informed and GI LLC of the need for further fact-finding—*i.e.*, in the form of Subpoena and Order response—as well as Commission approval,

C. Contribution to Now or Never PAC

On or very shortly before October 31, 2012, wired \$2.5 million to GI LLC.²³ On October 31, 2012, Thomas emailed consultants for Now or Never PAC, stating “[t]he 2.5 million is here. I am about to wire \$1.8 million to American Conservative Union.”²⁴ Later that same day and immediately after ACU’s receipt of \$1.8 million from GI LLC, ACU wired \$1.71 million to Now or Never PAC.

Contemporaneous emails among Thomas, Axiom Strategies consultants, and ACU’s Keller indicate that the parties agreed to the three-step transaction to effect a contribution in the name of another. For example, shortly after receiving confirmation of the wire transfer from GI LLC to ACU, Keller wrote to Thomas and Axiom consultants to state, “[w]ill take action

²² Letter from Mike Dry at 2 (September 12, 2017). Prior to that correspondence, made reference to significant privilege issues involved in this matter. OGC requested any non-privileged information and a privilege log. has not complied, and in its most recent letter, does not provide a reason for not complying with the Subpoena and Order.

²³ See Thomas Interrogatory Answers at 4; Thomas Documents at JT2017-0003. It is unclear if GI LLC, which had only been formed the previous month, had any funds prior to receiving that transfer.

²⁴ JT2017-0003.

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1 immediately upon receipt.”²⁵ He followed up with that email minutes later, stating that he’d
2 “need wiring instructions,” presumably to transfer funds from ACU to Now or Never PAC.²⁶

3 Now or Never PAC, acting through its treasurer, Thomas, reported ACU as the source of
4 the contribution in its post-general report. ACU’s Director of Operations later characterized the
5 funds sent to Now or Never PAC as a “pass through” in an email asking Keller if ACU had to
6 make its own filing with the Commission in connection with the transaction.²⁷ In May 2014,
7 apparently after an independent auditor reviewed its 2012 finances,²⁸ ACU filed an Amended
8 2012 IRS Form 990 that disclosed the \$1.71 million contribution to Now or Never PAC as “a
9 political contribution received by the Organization and promptly and directly delivered to a
10 separate political organization.”²⁹

11 None of the Respondents or witnesses have offered an explanation as to the reasons for
12 the multistep structure of the transfers from to GI LLC, from GI LLC to ACU, and from
13 ACU to Now or Never PAC. As noted above, GI LLC’s sole officer, Christopher Byrd, is
14 deceased. Thomas, who was GI LLC’s attorney, states that he was not a party to
15 communications with ACU about what it would do with the GI LLC funds. Further, ACU has
16 indicated that the personnel with knowledge of the transaction are no longer employed at ACU
17 and former ACU Executive Director Keller has refused to comply with a Commission Subpoena
18 and Order to answer interrogatories, which sought information regarding the transaction. Axiom

²⁵ JT2017-0011.

²⁶ ACU Document Submission at FEC000006. A Now or Never PAC consultant responded with instructions for wiring funds to Now or Never PAC.

²⁷ ACU Second Document Submission, November 30, 2012 email from Melissa Bowman to Gregg Keller.

²⁸ Compl. ¶¶ 15-17, Exs. B (Conlon & Associates Independent Auditor’s Report, Apr. 9, 2014) and C.

²⁹ *Id.*, Ex. C at Schedule O, Schedule C. ACU states that its auditors included that language without consulting with contemporaneous ACU staff, but does not affirmatively dispute its auditors’ characterization of the transaction.

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Strategies acknowledges that it both recommended the transfer of funds from GI LLC to ACU and solicited the nearly simultaneous transfer of funds from ACU to Now or Never PAC.³⁰ Axiom states, however, that it did not communicate with either Thomas or Byrd its belief that ACU would donate to Now or Never PAC.³¹

IV. LEGAL ANALYSIS

A. The Legal Standard

The Act prohibits a person from making a contribution in the name of another.³² 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.

Under Commission regulations, that prohibition extends to knowingly helping or assisting "any person in making a contribution in the name of another."³³ The Commission has explained that the provision addressing such a contribution applies to "those who initiate or

³⁰ See Axiom Interrogatory Answers at 4, 7.

³¹ See *Id.* at 7.

³² 52 U.S.C. § 30122; see also 11 C.F.R. § 110.4(b). The term "person" for purposes of the Act and Commission regulations includes partnerships, corporations, and other organizations. 52 U.S.C. § 30101(11); 11 C.F.R. § 100.10.

³³ 11 C.F.R. § 110.4(b)(1)(iii).

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1 instigate or have some significant participation in a plan or scheme to make a contribution in the
2 name of another[.]”³⁴

3 The requirement that a contribution be made in the name of its true source promotes
4 Congress’s objective of ensuring the complete and accurate disclosure by candidates and
5 committees of the political contributions they receive.³⁵ Courts have uniformly rejected the
6 assertion that “only the person who actually transmits funds . . . makes the contribution,”³⁶
7 recognizing that “it is implausible that Congress, in seeking to promote transparency, would have
8 understood the relevant contributor to be [an] intermediary who merely transmitted the campaign
9 gift.”³⁷ Accordingly, the Act and the Commission’s regulations provide that a person who
10 provides funds to another for the purposes of contributing to a candidate or committee “makes”
11 the resulting contribution.³⁸

12 **B. The Record Supports a Reasonable Inference that Made a Contribution in**
13 **the Name of Another**

14
15 The undisputed facts demonstrate that transferred funds to GI LLC, that GI LLC
16 then almost immediately forwarded part of those funds to ACU, that ACU used those funds to
17 make a \$1.71 million contribution to Now or Never PAC, and that Now or Never PAC reported
18 the contribution as made by ACU. Contemporaneous emails among Thomas—who served both
19 as agent of GI LLC and treasurer of Now or Never PAC—ACU, and consultants for Now or

³⁴ Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34,098, 34,105 (Aug. 17, 1989).

³⁵ See, e.g., *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.”).

³⁶ *United States v. Boender*, 649 F.3d 650, 660 (7th Cir. 2011).

³⁷ *O'Donnell*, 608 F.3d at 554.

³⁸ See, e.g., *Boender*, 649 F.3d at 660 (“[W]e consider the giver to be the source of the gift, not any intermediary who simply conveys the gift from the donor to the donee.”).

INVESTIGATION

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1 Never PAC strongly suggest the parties entered into an agreement by which ACU would transfer
 2 funds to Now or Never PAC only after receiving those funds from GI LLC. Such an agreement
 3 is further supported by ACU's later characterization of the funds as a "pass through," as well as
 4 by its financial situation at the time of the transaction.

5 The record supports a reasonable inference that was the true source of the funds GI
 6 LLC funneled through ACU.

7 According to Thomas, an agent of GI LLC, the LLC's only known purpose was to
 8 support partisan organizations and causes.³⁹ Neither GI LLC nor claim, nor does the record
 9 show, that GI LLC conducts any other business. Instead, the only information in the record is
 10 that GI LLC acted as a transfer agent for contributions. The available facts do not indicate
 11 that GI LLC generated income, made investments, held assets, or had the means to wire \$1.8
 12 million without infusion of funds.⁴⁰ Accordingly, there is reason to believe that
 13 with the purpose of making political contributions, and that
 14 is the true source of the funds GI LLC wired to ACU for the purpose of making a
 15 contribution to Now or Never PAC.

³⁹ See Thomas Interrogatory Answers at 3.

⁴⁰ See Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 12, MUR 6485 (W Spann LLC, *et al.*), MURs 6487/6488 (F8, LLC, *et al.*), MUR 6711 (Specialty Investment Group, Inc., *et al.*), MUR 6930 (SPM Holdings LLC, *et al.*) (Apr. 1, 2016) ("Petersen, Hunter, Goodman SOR") ("[T]he Commission will look at whether, for instance, there is evidence indicating that the corporate entity did not have income from assets, investment earnings, business revenues, or bona fide capital investments, or was created and operated for the sole purpose of making political contributions. These facts would suggest the corporate entity is a straw donor and not the true source of the contribution."); see also Statement of Reasons of Vice Chairman Steven T. Walther and Commissioners Ann M. Ravel and Ellen L. Weintraub at 4, MUR 6485 (W Spann LLC, *et al.*), MURs 6487/6488 (F8 LLC, *et al.*), MUR 6711 (Specialty Investment Group, Inc., *et al.*), MUR 6930 (Prakazrel "Pras" Michel, *et al.*) (Apr. 1, 2016) ("Walther, Ravel, Weintraub SOR") ("An LLC cannot act on its own; it must do so at the direction of a person. Where an individual is the source of the funds for a contribution and the LLC merely conveys the funds at the direction of that person, the Act and Commission regulations require that the true source — the name of the individual rather than the name of the LLC — be disclosed as the contributor."). Here, it was not the name of the conduit LLC that the recipient committee improperly disclosed, but a second intermediary, ACU.

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Second, the temporal proximity between GI LLC's formation and its contribution to ACU, viewed in the context of GI LLC's purpose, suggests that it received \$2.5 million from specifically to funnel funds through ACU to Now or Never PAC. GI LLC was formed in September 2012, only seven weeks prior to the October 31, 2012 transaction. As noted, we know of no other activities that GI LLC engaged in either prior to or after the October transaction. That funded GI LLC shortly after GI LLC's formation suggests GI LLC was used to funnel funds to their ultimate recipient.

The timeline and structure of the transaction itself further supports an inference that may have been the true source of the funds at issue. funded GI LLC shortly after GI LLC's formation, providing it with \$2.5 million on or very shortly before the same day GI LLC wired \$1.8 million to ACU, as evidenced by Thomas confirming to the other parties that "the \$2.5 million is here" before executing GI LLC's wire transfer to ACU. Additionally, that the contribution required a *three*-step transfer—from to GI LLC, from GI LLC to ACU, and finally from ACU to Now or Never PAC—suggests that the parties went through significant lengths to disguise the true source of the funds.⁴¹ Notably, OGC has repeatedly asked both GI LLC and to provide an alternative explanation for the structure of the three-step transaction, and neither entity has done so.

Additionally, none of the information in the record overcomes the inference drawn from

⁴¹ See Petersen, Hunter, Goodman SOR at 2 ("[T]o vindicate the purpose underlying section 30122 without violating First Amendment rights, the proper focus in these matters is whether the funds used to make a contribution were intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements, making the individual, not the corporation or corporate LLC, the true source of the funds. Thus, in matters alleging section 30122 violations against such entities, the Commission will examine whether the available evidence establishes the requisite purpose."); see also Statement of Reasons of Commissioners Ann M. Ravel and Ellen L. Weintraub (April 13, 2016) (writing that proof of subjective intent is not necessary to prove a violation of 52 U.S.C. § 30122).

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1 the available facts, *i.e.*, that made a contribution in the name of another.⁴² and GI LLC
 2 have not addressed the provenance of the funds that GI LLC transferred to ACU; they do not
 3 aver that the funds were not provided to the LLC for the purpose of making a contribution to
 4 Now or Never PAC.

5 Indeed, has refused to comply with the Commission's Subpoena and Order to
 6 produce documents and interrogatory answers to shed further light on this matter. Given
 7 refusal, the Commission may make an adverse inference regarding role in the subject of
 8 the investigation.⁴³ OGC requested that provide information regarding, *inter alia*,
 9 purpose for transferring the funds to GI LLC, the source of its \$2.5 million transfer to GI LLC,
 10 and relationship with GI LLC. first refused to respond to the Subpoena and Order by
 11 the Commission's due date, and instead stated that it would respond two weeks later. When that
 12 day came, still had not responded, and waited an additional day to inform OGC that it
 13 "cannot comply."

⁴² A factually similar matter provides a useful contrast: In MUR 6930, the sole member of an LLC that contributed to an independent-expenditure-only political committee provided a detailed, sworn affidavit averring that any funds held by the LLC were *not* provided to it for the specific purpose of making political contributions. Because the information in the record was sufficient to rebut the allegations, we recommended that the Commission make a no reason to believe finding. See First Gen. Counsel's Report at 8-10, MUR 6930 (Prakazrel "Pras" Michel, *et al.*); The Commission was equally divided on that issue, however, and closed the file. See Certification, MUR 6930 (Prakazrel "Pras" Michel, *et al.*) (Feb. 25, 2016); see also Walther, Ravel, Weintraub SOR.

⁴³ See *Int'l Union v. Nation Labor Relations Board*, 459 F.2d 1329, 1336 (D.C.Cir. 1972). In the context of administrative law proceedings, the agency need not resort to enforcement of a subpoena in order to make the inference. *Id.* at 1339. "The adverse-inference rule, we said is a 'well recognized means available for vindicating [an agency's] power to require the production of relevant documents short of a subpoena enforcement proceeding.'" *Atlantic Richfield Company v. United States Department of Energy*, 769 F.2d 771, 794 (D.C.Cir. 1985).

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Accordingly, the Commission is entitled to draw an adverse inference from [redacted] refusal to comply, and to conclude that [redacted] made a contribution in the name of another to Now or Never PAC. This inference further bolsters the record's information indicating that [redacted] provided GI LLC with funds for the specific purpose of making a contribution in the name of another. We therefore recommend that the Commission find that [redacted] and [redacted] as trustee, violated 52 U.S.C. § 30122 by making a contribution in the name of another.

C. Alternatively, the Record Likewise Supports a Reasonable Inference that Assisted in Making a Contribution in the Name of Another

Even if currently unknown facts were to suggest that GI LLC, and not [REDACTED] was the true source of the funds, the record provides a reasonable inference that [REDACTED] assisted in making a contribution in the name of another. The Commission has noted that the regulation prohibiting assisting in the making of a contribution in the name of another applies to those who “initiate or instigate or have some significant participation” in making such a contribution.⁴⁴

Further, [REDACTED] has refused to respond to the Commission's Subpoena and Order seeking information as to its relationship with and involvement in GI LLC, allowing the Commission to draw an adverse inference regarding the level of involvement [REDACTED] and [REDACTED] had in the activities of GI LLC.⁴⁵ Such involvement suggests that [REDACTED] as trustee, may have played a significant role in assisting GI LLC in making the contribution. Further, [REDACTED] transferred funds to GI LLC on or very shortly before the same day GI LLC transferred funds to ACU, suggesting [REDACTED] may

⁴⁴ Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34,098, 34,105 (Aug. 17, 1989).

⁴⁵ See *supra*, note 43.

MUR 6920 (American Conservative Union, *et al.*)
Third General Counsel's Report
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have initiated or instigated the contribution to Now or Never PAC. Accordingly, we recommend that the Commission find reason to believe that [redacted] and [redacted] as trustee, either made or assisted in the making of a contribution in the name of another, in violation of 52 U.S.C. § 30122.

V. CIVIL SUIT AUTHORITY

On August 10, 2017, the Commission issued a legally enforceable Subpoena and Order requesting the production of documents and answers to interrogatories to [REDACTED] and [REDACTED].⁴⁶ The Commission's Subpoena and Order sought to learn additional information regarding [REDACTED] role in the transaction and the source of the funds. [REDACTED] has refused to comply.⁴⁷ [REDACTED] is a significant party in the current matter. It provided the funds used to make a contribution in the name of another, and has represented that it may have information about GI LLC's activities that GI LLC no longer possess. Accordingly, this Office recommends that the Commission authorize the filing of a subpoena enforcement action in United States District Court against [REDACTED] and [REDACTED] in his official capacity as trustee.⁴⁸

⁴⁶ An administrative agency's subpoena or order will be enforced provided that it was issued for a proper purpose, the information sought is reasonably relevant to the purpose, and the statutory procedures were observed. See *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950); *Government of Territory of Guam v. Sea-Land Serv.*, 958 F.2d 1150, 1154-55 (D.C. Cir. 1992).

⁴⁷ See *supra*, Part III.B.

⁴⁸ See 52 U.S.C. § 30107(b).

MUR 6920 (American Conservative Union, *et al.*)
Third General Counsel's Report
Page 15 of 15

VI. RECOMMENDATIONS

1. Find reason to believe that _____ and _____, as trustee, violated 52 U.S.C. § 30122 by making a contribution in the name of another or by assisting in the making of a contribution in the name of another;
2. Authorize the Office of the General Counsel to file a subpoena enforcement suit in United States District Court against _____ and _____, as trustee;
3. Approve the Factual & Legal analysis;
4. Approve the appropriate letters;
5. Approve the use of compulsory process as necessary.

Lisa Stevenson
Acting General Counsel

9/15/17
Date

Kathleen M. Guith
Kathleen Guith
Associate General Counsel
for Enforcement

Mark Shonkwiler
Mark Shonkwiler
Assistant General Counsel

Antoinette Fuoto
Antoinette Fuoto
Attorney

Exhibit 3



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA ELECTRONIC AND CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Charles R. Spies, Esq.
Clark Hill
1001 Pennsylvania Avenue, NW, Suite 1300
Washington, DC 20004

Elliot S. Berke, Esq.
Berke Farah
1200 New Hampshire Ave., NW, Suite 800
Washington, DC 20036

Chris Gober, Esq.
The Gober Group
3595 Ranch Road 620 S., Suite 200
Austin, TX 78738

NOV 03 2017

Kory Langhofer, Esq.
Statecraft PLLC
649 North Fourth Avenue, First Floor
Phoenix, AZ 85003

RE: MUR 6920
Global Conciliation

Dear Counsel:

On October 24, 2017, the Federal Election Commission accepted the signed joint conciliation agreement submitted to settle your respective clients' violations of 52 U.S.C. § 30122, a provision of the Federal Election Campaign Act of 1971, as amended (the "Act"). Accordingly, the file has been closed in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). Information derived in connection with any conciliation attempt will not become public without the written consent of the respondents and the Commission. *See*

Enclosed you will find a copy of the fully executed conciliation agreement for your files. Please note that the civil penalty is due within 30 days of the conciliation agreement's effective date. If you have any questions, please contact me at (202) 694-1634.

After

Enclosure
Conciliation Agreement

))))))))

NOW, THEREFORE, the Commission and the above-captioned Respondents, having duly entered into conciliation pursuant to 52 U.S.C. § 30109(a)(4)(A)(i), do hereby agree as follows:

MUR 6920 (Global Conciliation)
Conciliation Agreement
Page 2 of 7

I. The Commission has jurisdiction over the Respondents and the subject matter of this proceeding, and this agreement has the effect of an agreement entered pursuant to 52 U.S.C. § 30109(a)(4)(A)(i).

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

1. GI LLC is a Delaware limited liability company that was formed in September 2012, seven weeks prior to the transaction at issue. Christopher W. Byrd, who died in 2014, served as the sole manager and officer of GI LLC.

2. American Conservative Union is registered with the IRS as a social welfare organization under section 501(c)(4) of the Internal Revenue Code, and it is not registered with the Commission as a political committee. ACU describes itself as the oldest and largest conservative grassroots organization in the United States. In 2012, ACU's executive director was Gregg Keller.

3. Now or Never PAC is an independent expenditure-only political committee. It filed its Statement of Organization with the Commission on February 21, 2012. During the 2012 cycle, Now or Never PAC raised \$8,250,500 and reported \$7,760,174 in independent expenditures.

4. James C. Thomas, III has been Now or Never PAC's treasurer since its organization. Thomas's engagement letter with Now or Never PAC authorized him to communicate with, share financial information with, and make disbursements upon the

MUR 6920 (Global Conciliation)
Conciliation Agreement
Page 3 of 7

authorization of Now or Never PAC's political consultants. Thomas contends that he has never made any expenditures on behalf of Now or Never PAC without the authorization of Now or Never PAC's political consultants.

5. Thomas served as an attorney for GI LLC in 2012. Thomas contends that he never served as an officer or director of GI LLC, and he never possessed or exercised any independent decision-making authority over any aspect of GI LLC's operations or finances. All tasks and functions Thomas performed on GI LLC's behalf were conducted at the request and under the direction of Byrd.

6. On or around October 31, 2012, GI LLC received \$2.5 million from another source.

7. On the morning of October 31, 2012, after GI LLC received the \$2.5 million, GI LLC contributed \$1.8 million from its account to ACU.

8. Subsequently, also on October 31, 2012, ACU contributed \$1.71 million to Now or Never PAC. ACU would have had insufficient funds to make this contribution without the funds it received from GI LLC earlier that same day.

9. As evidenced by contemporaneous emails to and from Thomas, Now or Never PAC's political consultants, and Keller, GI LLC contributed \$1.8 million from GI LLC to ACU, and later ACU contributed \$1.71 million to Now or Never PAC. For example, shortly after receiving confirmation of the wire transfer from GI LLC to ACU, Keller wrote to Thomas and Now or Never PAC's political consultants to state, "[w]ill take action immediately upon receipt." Keller authorized the contribution from ACU to Now or Never PAC once ACU received the GI LLC funds.

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Conciliation Agreement
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10. After Thomas confirmed that Now or Never PAC received ACU's transfer, Keller wrote to ACU's then-National Finance Director, Louisa Imperiale, to state, "FYI. We have the 90k." Imperiale replied, "Well done!!!!"

11. On December 6, 2012, Now or Never PAC filed its post-general election report, signed by Thomas, which reported receiving a \$1.71 million contribution from ACU on October 31, 2012.

12. In May 2014, after an independent auditor reviewed its 2012 finances, ACU filed an Amended 2012 IRS Form 990 that disclosed the \$1.71 million contribution to Now or Never PAC as "a political contribution received by the Organization and promptly and directly delivered to a separate political organization."

13. Thomas contends that he first learned that ACU considered itself a "pass through" for the funds when he received a copy of the complaint in this matter, which was based on ACU's amended tax filing.

V. The pertinent law in this matter is as follows:

1. The Federal Election Campaign Act of 1971, as amended ("Act"), prohibits any 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. 52 U.S.C. § 30122.

2. The Act also requires committee treasurers to file reports of receipts and disbursements. 52 U.S.C. § 30104(b). These reports must include, *inter alia*, the identification of each person who makes a contribution or contributions that have an aggregate amount or value in

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MUR 6920 (Global Conciliation)
Conciliation Agreement
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excess of \$200 during an election cycle, in the case of an authorized committee of a federal candidate, together with the date and amount of any such contribution. *Id.* § 30104(b)(3)(A)

VI. For the purpose of settling this matter and to avoid the expense of litigation, without admitting liability in this proceeding or with respect to any other proceeding, Respondents agree not to further contest in Commission proceedings that:

1. Government Integrity, LLC violated 52 U.S.C. § 30122.
2. American Conservative Union violated 52 U.S.C. § 30122.
3. Now or Never PAC and James C. Thomas, III, in his official capacity as treasurer, violated 52 U.S.C. §§ 30122 and 30104(b)(3)(A).
4. James C. Thomas, III violated 52 U.S.C. §§ 30122 and 30104(b)(3)(A).

VII. Respondents will take the following actions:

1. Respondents will pay a civil penalty to the Federal Election Commission in the amount of Three Hundred and Fifty Thousand Dollars (\$350,000), pursuant to 52 U.S.C. § 30109(a)(5)(A).
2. Respondents will cease and desist from violating 52 U.S.C. § 30122 and 30104(b)(3)(A).

VIII. The Commission, on request of anyone filing a complaint under 52 U.S.C. § 30109(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

IX. This agreement shall become effective as of the date that all parties hereto have

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MUR 6920 (Global Conciliation)
Conciliation Agreement
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executed the same and the Commission has approved the entire agreement.

X. Respondents shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

XI. This conciliation agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or oral, made by either party or by agents of either party, that is not contained within this written agreement shall be enforceable.

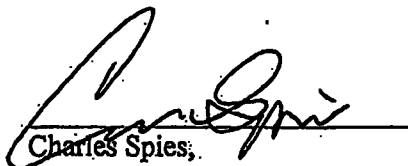
FOR THE COMMISSION:

BY: Kathleen M. Guith
Kathleen M. Guith
Associate General Counsel
for Enforcement

10/31/17
Date

MUR 6920 (Global Conciliation)
Conciliation Agreement
Page 7 of 7

FOR THE RESPONDENTS:


Charles Spies,
Counsel for American Conservative Union

10/23/17
Date

Elliot Berke, Counsel for Government Integrity, LLC

Date

Chris Gober, Counsel for Now or Never PAC

Date

Kory Langhofer, Counsel for James C. Thomas, III

Date

1-NOV-2017 10:00 AM

MUR 6920 (Global Conciliation)
Conciliation Agreement
Page 7 of 7

FOR THE RESPONDENTS:

Charles Spies,
Counsel for American Conservative Union

Date

Elliot Berke, Counsel for Government Integrity, LLC

10/23/17
Date

Chris Gober, Counsel for Now or Never PAC

Date

Kory Langhofer, Counsel for James C. Thomas, III

Date

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MUR 6920 (Global Conciliation)
Conciliation Agreement
Page 7 of 7


FOR THE RESPONDENTS:

Charles Spies,
Counsel for American Conservative Union

Date

Elliot Berke, Counsel for Government Integrity, LLC

Date



Chris Gober, Counsel for Now or Never PAC

10/20/2017
Date

Kory Langhofer, Counsel for James C. Thomas, III

Date

1704443476

FOR THE RESPONDENTS:

Date _____

Date _____

Date _____

10/20/17
Date

Exhibit 4



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 20, 2017

Note: Two names and associated identifying information have been temporarily redacted from the following document in the public file for FEC Matter Under Review 6920. This information is the subject of litigation and will remain redacted pending the resolution of the litigation or further order of the Court. *See Doe v. FEC*, No. 17-02694 (D.D.C.).

FILED
FEDERAL ELECTION COMMISSION
SEP 21 2017

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BEFORE THE FEDERAL ELECTION COMMISSION

CELA

In the Matter of)
) MUR 6920
American Conservative Union, et al.)

CERTIFICATION

I, Dayna C. Brown, recording secretary of the Federal Election Commission executive session, do hereby certify that on September 20, 2017, the Commission took the following actions in the above-captioned matter:

1. Failed by a vote of 2-3 to:

- a. Find probable cause to believe that American Conservative Union violated 52 § U.S.C. 30122 and 11 C.F.R. § 110.4(b)(1)(ii).
- b. Approve the conciliation agreement with American Conservative Union, as recommended in the Memorandum from the Acting General Counsel dated September 15, 2017.
- c. Approve the appropriate letter.
- d. Find reason to believe that _____ and _____ as trustee, violated 52 U.S.C. § 30122 by making a contribution in the name of another or by assisting in the making of a contribution in the name of another.
- e. Authorize the Office of the General Counsel to file a subpoena enforcement suit in United States District Court against _____ and _____ as trustee.
- f. Approve the Factual and Legal Analysis as recommended in the Third General Counsel's dated September 15, 2017, as amended at the Table.
- g. Approve the appropriate letters.

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Federal Election Commission
Certification MUR 6920
September 20, 2017

Page 2

- h. Approve the use of compulsory process as necessary.
- i. Deny Keller's motion to quash.
- j. Approve the appropriate letter.
- k. Grant the Office of General Counsel authority to file suit to enforce the subpoenas to submit written answers and appear for a deposition directed to Gregg Keller if Keller fails to sit for a deposition within 7 days of receiving notice of the Commission's ruling on his motion to quash and the Office of General Counsel deems it necessary to seek enforcement.
- l. Approve a global conciliation effort based on the draft conciliation circulated by the Office General Counsel on September 19, 2017.

Commissioners Walther and Weintraub voted affirmatively for the motion.

Commissioners Goodman, Hunter, and Petersen dissented.

2. Decided by a vote of 5-0 to:

- a. Find probable cause to believe that American Conservative Union violated 52 § U.S.C. 30122 and 11 C.F.R. § 110.4(b)(1)(ii).
- b. Authorize the Office General Counsel to pursue conciliation during the required 30-day period, subject to the edited global conciliation agreement.
- c. If it is the decision of the Office of General Counsel to issue a probable cause brief to Government Integrity, LLC, pursuant to 52 U.S.C. § 30109(a)(3), that it do so forthwith.
- d. Authorize the Office of General Counsel to engage in pre-probable cause conciliation with Government Integrity, LLC, subject to the edited global conciliation agreement.
- e. If it is the decision of the Office of General Counsel to issue a probable cause brief to Now or Never PAC, pursuant to 52 U.S.C. § 30109(a)(3), that it do so forthwith.
- f. Authorize the Office of General Counsel to engage in pre-probable cause conciliation with Now or Never PAC, subject to the edited global conciliation agreement.

Federal Election Commission
Certification MUR 6920
September 20, 2017

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- g. If it is the decision of the Office of General Counsel to issue a probable cause brief to James C. Thomas, III, pursuant to 52 U.S.C. § 30109(a)(3), that it do so forthwith.
- h. Authorize the Office of General Counsel to engage in pre-probable cause conciliation with James C. Thomas, III, subject to the edited global conciliation agreement.
- i. Approve the conciliation agreement with American Conservative Union, as recommended in the Memorandum from the Acting General Counsel dated September 15, 2017.
- j. Deny Mr. Keller's motion to quash the subpoena.
- k. Take no action at this time on the remaining recommendations of the Office of General Counsel.

Commissioners Goodman, Hunter, Petersen, Walther, and Weintraub voted affirmatively for the decision.

September 21, 2017
Date

Attest:



Dayna C. Brown
Secretary and Clerk of the Commission

Exhibit 5



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
American Conservative Union, *et al.*) MUR 6920
)

**STATEMENT OF REASONS OF
VICE CHAIR CAROLINE C. HUNTER AND
COMMISSIONER LEE E. GOODMAN**

The Commission found reason to believe that Respondents American Conservative Union (“ACU”), Now and Never PAC, and Government Integrity, LLC (“GI, LLC”) violated section 30122 of the Federal Election Campaign Act of 1971, as amended (“the Act”), conducted an investigation, voted unanimously to find probable cause that ACU violated the Act, and entered into a conciliation agreement that required the Respondents to pay a civil penalty in the amount of \$350,000.

The Commission voted unanimously, on January 24, 2017, to find reason to believe that ACU and Now or Never PAC violated the Act. The Commission also voted unanimously to find reason to believe against an “Unknown Respondent.”¹ Nine months later, on September 19, 2017, the Commission’s Office of General Counsel (“OGC”) submitted a report to the Commission recommending that the Commission find reason to believe two non-respondents, (“ ”) and an individual associated with , violated the Act by making a contribution to Now or Never PAC in the name of ACU.² We voted to proceed to enforce the Act against three Respondents—ACU, Now or Never PAC, and GI, LLC—but not to add the fourth organization, ,³ as a Respondent for the following reasons.

¹ Commission Certification, MUR 6920 (Jan. 24, 2017). On July 11, 2017, the Commission voted unanimously to substitute GI, LLC in place of “Unknown Respondent” and voted unanimously to find reason to believe GI, LLC violated the Act. See Commission Certification, MUR 6920 (July 11, 2017).

² OGC did not recommend substituting as an Unknown Respondent. That was irregular. The Commission typically would vote to add a person or organization and then vote to find reason to believe. We believe that parties added to a matter are entitled to formal notice of a complaint pursuant to 52 U.S.C. § 30109(a)(1), and a right to respond to the complaint, before the Commission votes to find reason to believe that party has violated the Act.

³ References herein to incorporate an individual associated with

A. The Legal Theory of Legal Responsibility Was Unclear

The legal theory on which OGC based its recommendation to make a reason to believe finding as to was unprecedented and unclear.⁴ OGC argued that violated the Act by , which in turn donated funds to a non-profit corporation, which in turn contributed the funds to the Super PAC. Whether violated the Act by making a contribution in the name of an LLC was, and remains, an unclear legal issue. We have previously explained our reluctance to punish citizens for novel theories of violations, in cases of first impression, where the law is evolving, and citizens did not have fair notice. We applied that reluctance in cases involving LLC contributions as recently as February 2016.⁵ Our action in those matters is under judicial review at this time and we have been awaiting judicial clarification of our decision in those cases.⁶ It would have been unfair and possibly inefficient to pursue enforcement against for engaging in similar conduct where the issue was not clear, we had dismissed similar legal theories against other persons, and a federal court is currently reviewing the reasonableness of our action. Furthermore, there is scant legal precedent applying 52 U.S.C. § 30122's "true source" rule to funders three or four layers behind the reportable contribution to a Super PAC. These issues were likely to be contested and litigated.

The Commission already was proceeding in an area of law that was contested by three Respondents. There was no direct, established precedent holding that non-profit corporations, all of which accept donations from other persons, violate 52 U.S.C. § 30122 when they make a contribution to a Super PAC with funds received from another donor. Non-profit corporate contributions to Super PACs are still a relatively new phenomenon under the Act, authorized in 2010 by two court decisions recognizing constitutional protections for such activity, *Citizens United* and *SpeechNow*.⁷ The Commission has not defined the circumstances under which a non-profit corporation's contribution of funds it received from another person constitutes that person's contribution under section 30122 of the Act. Already pursuing a contested legal theory in a case of first impression, we believed adding a novel question – the responsibility of a funder of a LLC donor to a non-profit contributor to a Super PAC – would distract from and thereby complicate our efforts to establish a clear precedent in the case of the three Respondents that directly transacted the contribution.

In addition to complicating the legal theory, the facts establishing potential legal liability were unclear. Historically, the Act's giving-in-the-name-of-another prohibition focused

⁴ See *Heckler v. Chaney*, 470 U.S. 821, 824-25 (1985) (noting FDA Commissioner had refused to take enforcement action because of his conclusion that FDA jurisdiction in the area was unclear).

⁵ See Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman in the Matters of MURs 6485 (W Spann LLC, *et al.*), 6487 & 6488 (F8, LLC, *et al.*), 6711 (Specialty Investments Group, Inc. *et al.*), and 6930 (SPM Holdings LLC, *et al.*).

⁶ See *Campaign Legal Center, et al. v. FEC*, No. 16-cv-0072 (filed Apr. 22, 2016).

⁷ See *Citizens United v. FEC*, 558 U.S. 310 (2010); *SpeechNOW v. FEC*, 559 F.3d 686 (D.C. Cir. 2010).

on the "true source" of a contribution and whether a person passed funds through a straw donor for the intended purpose of making a contribution. All contributions by non-profits have an original source, a donor, but defining each contribution by a non-profit as a contribution in the name of two or three original donors as the "true source" of the contribution is wholly new terrain under 52 U.S.C. § 30122. As to _____, any investigation would have been required to focus on whether the funds used to make a contribution were intentionally funneled through GI, LLC for the purpose of making a contribution that evades the Act's reporting requirements. The Commission had circumstantial evidence but no direct evidence of

GI, LLC.⁸ In other words, evidence as to _____ intent required further factual development as to _____ during a period when time was running out.⁹

B. Risk of Statute of Limitations Expiring

Second, had the Commission added _____ as a Respondent at its September 19, 2017 executive session, and provided _____ notice of the Complaint and notice that it had been substituted as a named Respondent, and afforded _____ an opportunity to respond,¹⁰ that process would have significantly delayed enforcement against the other Respondents and diverted valuable agency resources. The case was already facing a statute of limitations deadline¹¹ and we were more concerned with focusing Commission resources on successful enforcement against the principal Respondents, ACU, Now or Never PAC, and GI, LLC. The investigation into the activities of these organizations was advanced and there was substantial factual development. We were concerned that adding _____ at that late date, and delaying the case to allow time for a response, would delay enforcement efforts against them. Moreover, had _____ filed a response, OGC would have first reviewed the response and provided the Commission with its recommendation, a process which would have taken additional weeks. At least a month to two months would have been added to the case, delaying conciliation efforts with the three principal Respondents.

⁸ In a separate statement our colleague has publicly prejudged _____ guilt, characterizing unknown persons as "key players in a scheme" and asserting they are guilty of "engineering an intricate plot to defeat the public's interest" and "trying to influence the election." See Cover Letter to the Statement of Commissioner Ellen L. Weintraub in MUR 6920 (American Conservative Union) (Dec. 19, 2017). Our colleague goes on to conclude (without citing any statement by _____) that persons unknown "got away with it." Our colleague has presupposed facts and intent without investigation or consideration of a response. See Statement of Commissioner Ellen L. Weintraub at 1, MUR 6920 (ACU) ("[W]hocver concocted this elaborate scheme . . . succeeded in hiding their identity"). Such prejudgment raises serious due process concerns, heightened in this matter where the non-respondent has challenged Commission action in a pending lawsuit. See, e.g., 52 U.S.C. § 30109(a)(3) (mandating each respondent be given a copy of probable cause brief and an opportunity to respond).

⁹ Further complicating any future investigation of _____ is the fact that Christopher W. Byrd, GI, LLC's sole manager and officer, died in 2014.

¹⁰ The Commission by statute must allow Respondents fifteen (15) days to respond to a complaint. 52 U.S.C. § 30109(a)(1). Even after finding reason to believe a respondent has violated the law, the Commission's standard practice is to afford the respondent an opportunity to respond to the reason to believe finding, which is articulated in a factual and legal analysis.

¹¹ The statute of limitations would have run as to _____ on October 31, 2017. See Third Gen. Counsel's Rpt. at 1 n.1 (Sept. 15, 2017), MUR 6920 (ACU).

However, even if the Commission had dispensed with formal notice and the right to respond and proceeded directly to enforcement of its reason to believe finding, it would have forced yet another series of precious time consuming procedures. OGC's post-investigation recommendation to find probable cause would have been sent to and would have fifteen (15) more days to respond to that recommendation.¹² Even if the Commission voted to find probable cause, would have had a minimum of thirty (30) days to conciliate.¹³

Thus, the Commission was aware that the time remaining on the five-year statute of limitations to conclude enforcement was imminent. The statute of limitations would run on or about October 31, 2017, five years after the date ACU contributed to Now or Never PAC.¹⁴ A majority of Commissioners expressed concerns about concluding the case before the statute of limitations ran, and we believed the most efficient prosecutorial path forward was to finalize the case against the three Respondents as efficiently and expeditiously as possible, whether by conciliation or civil action.

Moreover, we were confident that a global conciliation with the Respondents could be achieved, absent the procedural, legal, and investigative complexities presented by involvement.

Yet OGC had declined to pursue conciliation with the three named Respondents for several months while it devoted time and resources to investigating a potential violation by . We were concerned that OGC had already lost several months of the statute of limitations in this process. We did not want to lose additional time or lose the realistic opportunity to resolve the matter effectively. Furthermore, we believed time would not accommodate the remaining enforcement steps, required by statute, and thus any finding would be academic. We have declined to issue purely academic findings.¹⁵

C. Commission's Decision Was Reasonable under *Heckler*

In sum, we concluded the prudent and preferred course was to conciliate with the named Respondents. The Commission was well within its discretion to take the safer course.

¹² 52 U.S.C. § 30109(a)(3).

¹³ 52 U.S.C. § 30109(a)(4).

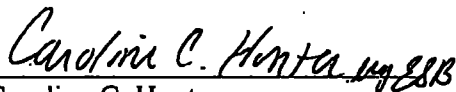
¹⁴ See Third Gen. Counsel's Rpt. at 1 n.1 (Sept. 15, 2017), MUR 6920 (ACU, *et al.*); 28 U.S.C. § 2462 (statute of limitations for civil penalties). See also *FEC v. Nat'l Right to Work Comm.*, 916 F. Supp. 10 (D.D.C. 1996); *FEC v. NRSC*, 877 F. Supp. 15 (D.D.C. 1995).

¹⁵ See Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, MURs 6391/6471 (Commission on Hope, Growth, and Opportunity). See also *CREW v. FEC*, 236 F. Supp. 3d 378 (D.D.C. 2017), *appeal docketed*, No. 15-2038 (Mar. 21, 2017).

"An agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise."¹⁶ Here, we concluded the unclear state of the law, imminent expiration of the statute of limitations and other legal difficulties weighed in favor of proceeding to conciliation with the named Respondents promptly and without jeopardizing the resolution in hand by adding on more uncertain legal and factual grounds. That decision was reasonable.¹⁷

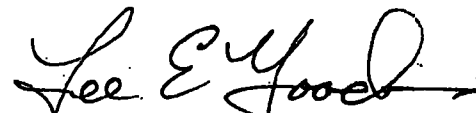
D. The Public Interest was Served By the Commission's Decision

Finally, we believed the public interest would be best served by establishing the legal precedent that the prohibition against contributing in the name of another in section 30122 is violated where Donor 1 donates funds to Non-Profit 2 with specific instructions to contribute those funds to Super PAC 3. The Commission had strong, direct evidence establishing that course of conduct here with respect to three Respondents, but not . In addition to establishing the precedent, we believed the Commission could deter future misconduct by a conciliation agreement requiring a significant civil penalty. These objectives would be complicated by adding two additional Respondents with novel legal and factual defenses. In the end, our effort proved successful. The Conciliation Agreement in this enforcement matter establishes clear precedent, imposed a large \$350,000 civil penalty, and it will deter future misconduct. The Act's disclosure and informational purposes were served. This matter could have gone in a different direction, one that would have delayed any resolution for years. We avoided that.



Caroline C. Hunter
Vice Chair

Dec. 20, 2017
Date



Lee E. Goodman
Commissioner

Dec. 20, 2017
Date

¹⁶ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (Agencies must determine what action, if any, should be taken, depending on numerous factors, including "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all").

¹⁷ See *CREW v. FEC*, 236 F. Supp. 3d 378 (D.D.C. 2017), *appeal docketed*, No. 15-2038 (Mar. 21, 2017). "Under [] established notions of prosecutorial discretion, then, it is hardly incumbent upon the Commission to pursue every additional, alleged violation that occurred against every potential respondent that exists, especially when" the Commission pursued the central respondent. Statement of Reasons of Commissioner David M. Mason at 4, MURs 4568, 4633, 4634, and 4736 (Carolyn Malenick, *et al.*).

Exhibit 6

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 6920
American Conservative Union, et al:)

CERTIFICATION

I, Laura E. Sinram, recording secretary of the Federal Election Commission executive session, do hereby certify that on July 11, 2017, the Commission took the following actions in the above-captioned matter:

1. Decided by a vote of 5-0 to:

- a. Substitute the name Government Integrity LLC in the place of "Unknown Respondent" in the Commission's previous findings that Unknown Respondent violated 52 U.S.C. § 30122 by making a contribution in the name of another.
- b. Find reason to believe that James C. Thomas, III knowingly and willfully violated 52 U.S.C. § 30122 by knowingly helping or assisting in the making of a contribution in the name of another.
- c. Find reason to believe that Now or Never PAC and James C. Thomas, III in his official capacity as treasurer knowingly and willfully violated 52 U.S.C. § 30122 and 52 U.S.C. § 30104(b)(3)(A) by accepting a contribution in the name of another and failing to properly report that contribution.
- d. Find reason to believe that James C. Thomas, III in his personal capacity knowingly and willfully violated 52 U.S.C. § 30122 and 52 U.S.C. § 30104(b)(3)(A) by accepting a contribution in the name of another and failing to properly report that contribution.
- e. Approve the portions of the Factual and Legal Analyses that pertain to items 1(a)-(d) as recommended in the Second General Counsel's Report dated July 5, 2017.

Federal Election Commission
Certification for MUR 6920
July 11, 2017

Page 2

- f. Approve the Subpoenas to Produce Documents and Orders to Submit Written Answers to James C. Thomas, III, American Conservative Union, and Gregg Keller.

Commissioners Goodman, Hunter, Petersen, Walther, and Weintraub voted affirmatively for the decision.

2. Failed by a vote of 2-2 to:

- a. Find reason to believe that Government Integrity LLC knowingly and willfully violated 52 U.S.C. § 30122 by making a contribution in the name of another.
- b. Approve the portions of the Factual and Legal Analyses that pertain to item 2(a) as recommended in the Second General Counsel's Report dated July 5, 2017.

Commissioners Walther and Weintraub voted affirmatively for the motion.

Commissioners Hunter and Petersen dissented. Commissioner Goodman abstained.

3. Decided by a vote of 5-0:

- a. Find reason to believe that Government Integrity LLC violated 52 U.S.C. § 30122 by making a contribution in the name of another.
- b. Approve the Factual and Legal Analyses as recommended in the Second General Counsel's Report dated July 5, 2017,
- c. Approve the appropriate letters.


Commissioners Goodman, Hunter, Petersen, Walther, and Weintraub voted affirmatively for the decision.

Page 3

Attest:

7/12/17

Date _____


Laura E. Sinram

Laura E. Sinram

**Acting Deputy Secretary of the
Commission**

Exhibit 7

BEFORE THE FEDERAL ELECTION COMMISSION

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JAN 27 2017

2017 JAN 27 AM 10:02

In the Matter of)
) MUR 6920
American Conservative Union; Now or)
Never PAC and James C. Thomas III in)
his official capacity as Treasurer;)
Unknown Respondent)

CELA

CERTIFICATION

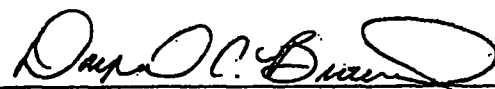
I, Dayna C. Brown, recording secretary for the Federal Election Commission executive session on January 24, 2017, do hereby certify that the Commission decided by a vote of 6-0 to:

1. Find reason to believe that American Conservative Union violated 52 U.S.C. § 30122.
2. Find reason to believe that Unknown Respondent violated 52 U.S.C. § 30122.
3. Take no action at this time as to Now or Never PAC and James C. Thomas III in his official capacity as treasurer.
4. Approve the Factual and Legal Analysis as circulated by the Office of General Counsel on December 7, 2016 at 2:21 P.M. and amended by the Office of Commissioner Goodman on January 23, 2017 at 9:08 P.M.
5. Approve the use of compulsory process as necessary.
6. Approve the appropriate letters.

Commissioners Goodman, Hunter, Petersen, Ravel, Walther, and Weintraub voted affirmatively for the decision.

Attest:

January 24, 2017
Date


Dayna C. Brown
Acting Secretary and Clerk of the Commission

17044434424

Exhibit 8

RECEIVED
FEDERAL ELECTION COMMISSION

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BEFORE THE FEDERAL ELECTION COMMISSION

CELA

In the Matter of)
) MUR 6920
American Conservative Union;)
Government Integrity, LLC; Now or)
Never PAC and James C. Thomas, III,)
in his official capacity as treasurer;)
James C. Thomas, III)

CERTIFICATION

I, Laura E. Sinram, recording secretary for the Federal Election Commission executive session on October 24, 2017, do hereby certify that the Commission decided by a vote of 5-0 to take the following actions:

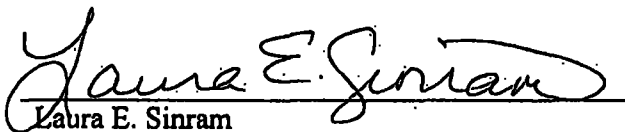
1. Accept the conciliation agreement dated October 23, 2017, with American Conservative Union; Government Integrity, LLC; James C. Thomas, III; and Now or Never PAC and James C. Thomas, III in his official capacity as treasurer.
2. Approve the appropriate letter.
3. Close the file.

Commissioners Goodman, Hunter, Petersen, Walther, and Weintraub voted affirmatively for the decision.

Attest:

10/24/17

Date


Laura E. Sinram

Deputy Secretary of the Commission