RECEIVED
By OGC/CELA at 12:06 pm, Apr 19, 2023

BEFORE THE FEDERAL ELECTION COMMISSION

)
) **MUR 8099**
)

RESPONSE OF CONGRESSIONAL LEADERSHIP FUND AND CALEB CROSBY, AS TREASURER

By and through undersigned counsel, Congressional Leadership Fund and Treasurer Caleb Crosby (collectively, "CLF") hereby respond to the complaint in the above-captioned Matter Under Review ("MUR"). For the reasons set forth below, we respectfully request that the Federal Election Commission ("FEC" or "Commission") find that there is no "reason to believe" that a violation of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act") or FEC regulations has occurred and thus dismiss the complaint and close the file in this MUR. 52 U.S.C. § 30109(a)(2).

BACKGROUND

This matter arises from a complaint alleging that Speaker of the House Kevin McCarthy violated the "soft money" prohibitions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") applicable to federal candidates and officeholders, 52 U.S.C. § 30125(e)(1)(A), by purportedly "directing the political spending decisions of" CLF, a hybrid committee, "as part of his bid to become the next Speaker of U.S. House of Representatives." Compl. 1. The complaint premises this claim solely on a joint press release issued by CLF and the Club for Growth on January 4, 2023, more than two days before the 118th Congress elected Rep. McCarthy as its Speaker. *Id.* at 2–3.

The joint press release announced that CLF and the Club for Growth had "reached agreement on support for Speaker Kevin McCarthy." Press Release, Congressional Leadership Fund & The Club for Growth, *CLF & Club for Growth Come to Key Agreement in Support of*

Kevin McCarthy for Speaker (Jan. 4, 2023), https://congressionalleadershipfund.org/clf-club-for-growth-come-to-key-agreement-in-support-of-kevin-mccarthy-for-speaker. Under this agreement, the release added, "CLF will not spend in any open-seat primaries in safe Republican districts and CLF will not grant resources to other super PAC[s] to do so." *Id.* The release explained that "[o]pen safe-seat primaries are districts where there is no incumbent (example: retirement) and a Republican is essentially guaranteed victory after the primary." *Id.*

CLF hoped that Rep. McCarthy would be elected the next Speaker of the House for CLF's own strategic reasons, as the press release specifically highlighted: "'Kevin McCarthy has effectively led House Republicans from the Minority to the Majority and we want to see him continue to lead the party so we can pick up seats for the third cycle in a row.'" *Id.* CLF's agreement with the Club for Growth, moreover, was not a major operational concession for CLF to make. Nathaniel Rakich, *One Major Concession from the Speaker Election isn't as Major as it Seems*, FiveThirtyEight (Jan. 17, 2023), https://fivethirtyeight.com/features/one-major-concession-from-the-speaker-election-isnt-as-major-as-it-seems. In fact, "if this arrangement had been in place in 2022, it would have prevented [CLF] from interfering in only two primaries that accounted for just 7 percent of its primary spending." *Id.*

By the time CLF and the Club for Growth announced their agreement, it had been publicly reported for nearly a month that CLF's perceived activity in primary elections was among the top concerns of some of the members of the House Freedom Caucus holding up the Speaker election. For example, *The Hill* had reported that on December 8, 2022, seven members of Congress had penned a letter to House colleagues asserting that the new "GOP Speaker candidate must make clear he or she will advance rules, policies, and an organizational structure that will result in the values listed below," including a bar on committee' involvement in primary elections. Emily

Brooks, *Seven Hard-line House Republicans lay out Speaker Demands Amid McCarthy Opposition*, The Hill (Dec. 9, 2022), https://thehill.com/homenews/house/3768571-seven-hardline-house-republicans-lay-out-speaker-demands-amid-mccarthy-opposition. Indeed, the Members' letter—which *The Hill* reporter tweeted out—specifically cited CLF's expenditures in 2022 Republican primaries. @emilybrooksnews, Twitter (Dec. 8, 2022, 8:11 PM), https://twitter.com/emilybrooksnews/status/1601021741824110592. And on January 1, 2023, *The Hill* reported that Freedom Caucus Members had voiced concerns that there had been no effort to address their demand with respect to such primary election involvement. Emily Brooks, *McCarthy Offers Concessions to Detractors with House Rules Package*, The Hill (Jan. 1, 2023), https://thehill.com/homenews/house/3795223-mccarthy-offers-concessions-to-detractors-with-house-rules-package. Rep. Scott Perry also had been vocal on the issue. *See, e.g.*, Mark Moore, *Rep. Scott Perry Presses Kevin McCarthy Before House Speaker Vote* (Jan. 3, 2023), https://nypost.com/2023/01/03/perry-presses-mccarthy-on-freedom-caucus-demands-before-house-vote.

On January 2, 2023, in the midst of all the media coverage and as the Speaker vote lingered, CLF's leadership sought authorization from CLF's seven-member board of independent directors to reach a potential agreement on future primary spending. In correspondence to the board of directors, CLF's leadership explained that CLF's "involvement in primaries continues to be a concern for some freedom caucus members as evidenced by their continued statements in the press." CLF's leadership thus requested, and received, the board's authority to agree not to engage in safe open-seat primaries and proactively "take the issue off the table." Two days later, CLF and the Club for Growth announced the agreement at issue in the complaint.

ARGUMENT

The Commission must dismiss the complaint and close the file in this MUR because the complaint is procedurally defective and legally deficient to establish "reason to believe." *First*, as a threshold matter, the complaint relies on pure speculation and faulty inferences contradicted by the record, which the Commission has consistently made clear cannot form the basis for a reason-to-believe finding. *Second*, no matter how favorably read, the complaint fails to describe a violation of federal campaign-finance law, under any theory. The Commission should dismiss the complaint on either or both of these bases.

I. THE COMPLAINT MUST BE DISMISSED AS DEFECTIVE.

The Commission must dismiss the complaint because it rests on "'[p]urely speculative charges," which the Commission repeatedly has declared "'do not form the adequate basis to find reason to believe that a violation of [law] has occurred.'" MUR 5467 (Michael Moore), First General Counsel's Report at 5 (quoting MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee), Statement of Reasons of Comm'rs Mason, Sandstrom, Smith & Thomas at 3); *accord* MUR 5845 (Citizens for Truth), Factual & Legal Analysis at 6 n.8 ("Unwarranted legal conclusions from asserted facts or mere speculation … will not be accepted as true."). Indeed, "the [reason-to-believe] standard does not permit a complainant to present mere allegations that the Act has been violated and request that the Commission undertake an investigation to determine whether there are facts to support the charges." MUR 6056 (Protect Colorado Jobs, Inc.), Statement of Reasons of Comm'rs Petersen, Hunter & McGahn at 2. Yet the complaint looks to do just that here.

Moreover, the record contradicts the complaint's flawed inferences against Speaker McCarthy. CLF's leadership is certainly able to follow the news, and like the rest of the general

public following the Speaker election, CLF knew, from a month's worth of media reporting and public statements by Freedom Caucus Members, that its minimal spending in safe-seat open primaries was among the issues purportedly standing in the way of Rep. McCarthy becoming Speaker—an outcome CLF desired for its own strategic reasons. *See* MUR 8003 (Kistner for Congress), Statement of Reasons of Commr's Cooksey, Dickerson & Trainor at 3, n.14 ("If the record contains, or respondents provide, facts or information that credibly contradict an allegation contained in a complaint, the Commission must weigh this information in deciding whether to proceed with enforcement."); *accord* MUR 7901 (Ethan Owens), Statement of Reasons of Comm'rs Cooksey, Dickerson & Trainor at 5, n.25 ("We are not required to accept all the allegations in a complaint as true; if the record contains or respondents provide facts or information that credibly contradict an allegation contained in a complaint, we must weigh this information in deciding whether to proceed with enforcement."). As noted, this press coverage motivated CLF's leadership to seek authority from the board of directors to enter into an agreement regarding primary spending on January 2, 2023. Whether CLF could enter into any such agreement rested solely in its independent leadership's discretion.

For all these reasons, the complaint cannot establish reason to believe and must be dismissed immediately on this basis alone.

II. THE COMPLAINT MUST ALSO BE DISMISSED BECAUSE ITS ALLEGATIONS DO NOT DESCRIBE ANY VIOLATION OF LAW.

In any event, the Commission also must dismiss the complaint because, under even the most favorable of readings, the complaint fails to "describe a violation of statute or regulation over which the Commission has jurisdiction" and thus must be dismissed. 11 C.F.R. § 111.4(d)(3). The Commission has made clear that it only "may find reason to believe if a complaint *sets forth sufficient specific facts which, if proven true, would constitute a violation of the Act.*" MUR 5845

(Citizens for Truth), Factual & Legal Analysis at 6, 6 n.8 (emphasis added); *see also* MUR 6554 (Friends of Weiner), Factual & Legal Analysis at 5 ("The Complaint and other available information in the record do not provide information sufficient to establish" a violation of FECA). The complaint in this MUR hits nowhere close to that mark, under any viable legal theory.

First, contrary to the complaint's threadbare assertions, the facts alleged in the complaint do not describe Speaker McCarthy as having engaged in "directing" or "spending" non-federal funds in violation of 52 U.S.C. § 30125(e)(1)(A). To begin with, the complaint's invocation of the concept of "directing" soft money makes no sense. "Directing" is a soft-money fundraising—not spending—concept under BCRA. *See* 52 U.S.C. 30125(a) (prohibiting national committees from "direct[ing] to another person a contribution, donation, or transfer of funds or any other thing of value"); *see also Definitions of "Solicit" and "Direct*," 71 Fed. Reg. 13,926, 13,932 (Mar. 20, 2006) ("'[T]o direct' encompasses situations where a person has already expressed an intent *to make a contribution or donation*, but lacks the identity of an appropriate candidate, political committee or organization to which to make that contribution or donation." (emphasis added)). The Commission's regulations, in fact, specifically define the term in that fashion: "'to direct' means to guide, directly or indirectly, a person who has expressed an intent to make a contribution, donation, transfer of funds, or otherwise provide anything of value, by identifying a candidate, political committee or organization, *for the receipt of such funds, or things of value*." 11 C.F.R. § 300.2(n) (emphasis added). The complaint in no way describes anyone purporting "to direct" any non-federal funds to CLF, or any other entity.

Nor does it describe the "spending" of non-federal funds in violation of BCRA's soft-money ban. BCRA was purportedly "designed to purge national politics of what was conceived to be the pernicious influence of "big money" campaign contributions." *McConnell v. FEC*, 540 U.S.

93, 115 (2003) (quotation marks omitted). "The solicitation, transfer, and *use* of soft money," Congress determined, had "enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections." *Id.* at 126 (emphasis added). The agreement between CLF and the Club for Growth, however, involves no use of non-federal funds at all. The exact opposite is true: the announced agreement was a pact to *not spend* soft money in connection with some federal races. Claiming a BCRA violation based on a decision to *forego* spending non-federal funds in federal elections turns BCRA on its head—not to mention Congress's sole interest for imposing BCRA or any other campaign-finance restriction. Indeed, there plainly could never be a risk of corruption or its appearance when someone chooses not to spend money in federal elections.

Second, the complaint never alleges (for good reason) that CLF is an entity acting on behalf of or "directly or indirectly established, financed, maintained or controlled" by Speaker McCarthy and thus prohibited from raising non-federal funds under 52 U.S.C. § 30125(e)(1)(A). To determine whether an entity is "established, financed, maintained or controlled by" a person, the Commission considers ten non-exhaustive factors "in the context of the overall relationship" between the person and the entity. *See* 11 C.F.R. § 300.2(c)(2); *Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49,064, 49,084 (July 29, 2002). The complaint, however, does not discuss, let alone provide any factual support for, any one of the ten factors—and none of them could be met here: CLF was established 12 years ago, is in no way "financed" by Speaker McCarthy or his committees, and Speaker McCarthy has no formal control over CLF under its corporate bylaws. To the contrary, CLF is solely managed by its board of independent directors and its President—none of whom has overlapping authority on any of Speaker McCarthy's political committees. *See* MUR 7340 (America First Action), First General

Counsel's Report at 15–16 ("Here, formal control under the bylaws of AF Policies and AF Action, including the authority to 'hire, appoint, demote, or otherwise control the officers or other decision-making employees,' rests with the Board of Directors and the president of the organization."). In fact, the Commission has rejected similar allegations made against CLF in the past. *See* MUR 7070 (Congressional Leadership Fund), Factual & Legal Analysis at 5.

Third, and finally, the facts alleged in the complaint could not plausibly describe the making of an in-kind contribution, or coordinated expenditure, from CLF to Speaker McCarthy, as a federal candidate, or his campaign committee. For there to be an in-kind contribution, by its express terms, there must be some ascertainable "expenditure" made to defray a cost that would otherwise be borne by a candidate or his committee "for the purpose of influencing" the candidate's federal election. *See, e.g.*, 52 U.S.C. §§ 30101(8), (9), 30116(a)(7)(B)(i); *see also* 11 C.F.R. §§ 100.52(d), 109.20, 109.21(a)(1). A committee agreeing to *not* spend money in unknown future primary elections—and, for that matter, on races involving different, unidentified candidates—is, by any definition, neither an "expenditure" nor a "contribution" under the Act and regulations.

Accordingly, no matter how favorably read, the complaint fails to establish reason to believe because it does not describe any violation of federal campaign-finance law. The complaint, therefore, must be dismissed on this basis as well.

CONCLUSION

For all of the foregoing reasons, the Commission should find no reason to believe, dismiss the complaint, and close the file in this MUR.

Respectfully,

E. Stewart Crosland
Megan Sowards Newton

Counsel to Congressional Leadership Fund and Caleb Crosby, Treasurer