



5 March 2023

PDF via email: cela@fec.gov

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

Re: *Response to MUR 8080 inquiry.*

Dear Mr. Keys,

Please accept this response to Mr. Roy Q. Luckett's letter, dated October 21, 2022, regarding Matter Under Review 8080. I am responding on behalf of For Colorado's Future (the "Committee") and its treasurer, Mr. Paul Kilgore.

Mr. Luckett's letter states that the Complaint giving rise to MUR 8080 "indicates For Colorado's Future and you [Paul Kilgore] in your official capacity as treasurer may have violated the Federal Election Campaign Act of 1971. . ." A review of the letter and applicable law, however, refutes this assertion.

52 U.S.C. § 30119, contains two prohibitions with respect to federal contractors. First, subsection (a)(1) makes it unlawful for a federal contractor to contribute to a political committee. Second, subsection (a)(2) law makes it unlawful for a committee "knowingly to solicit any such contribution" from a federal contractor. The Commission's regulations mimic this framework: 11 CFR § 115.2(a) makes it unlawful for a federal contractor to make political contributions, and section 115.2(c) makes it "unlawful for any person knowingly to solicit any such contribution."

The Complaint in MUR 8080 focuses solely on the first prohibition – that federal contractors may not contribute to a political committee. To that end, the Complaint contains only one claim -- that "Pericle Communications Company violated the Contractor Contribution ban."¹ The Complaint does not allege that the Committee violated any federal law or regulation.

¹ Complaint at ¶ 18.



Consistent with its narrow focus on Pericle, the Complaint does not allege facts necessary to support a finding that the Committee violated federal law. Indeed, the entirety of the Complaint’s factual allegations are contained in paragraphs three through six, and nineteen. Not one of those paragraphs (or any other paragraph, for that matter), alleges that the Committee or its treasurer solicited a contribution from Pericle. And nothing in the Complaint alleges that the Committee “knowingly” solicited a contribution from Pericle Communications Company.

In short, there is no indication in the Complaint that the Committee violated 52 U.S.C. § 30119.

As a practical matter, the Committee’s reports also indicate that it never knowingly solicited a contractor. First, the Committee learned of the Complaint shortly before the 2022 general election, when the complainant publicized his complaint in an effort to influence the outcome of the 2022 election. Upon learning that Pericle was a federal contractor when it contributed to the Committee on June 24, 2022, the Committee promptly refunded the contribution on November 2, 2022.² This behavior demonstrates that the Committee itself did not know that Pericles was a federal contractor at the time it contributed, and that the Committee sought to minimize any liability that Pericles might face.

Second, on October 10, 2022, Mr. Jay Jacobsmeyer, the owner of Pericles Communications Company, personally contributed \$25,000 to the Committee. This demonstrates that the Committee solicited Mr. Jacobsmeyer for a contribution in his personal capacity.

With respect to Mr. Kilgore’s potential liability, in addition to the points raise above, Mr. Kilgore was not the Committee’s treasurer when the Committee received the allegedly illegal contribution in June 2021. This can be seen from the report filed July 13, 2022, which was signed by Mr. Mike McCauley.³ Mr. Kilgore did not serve as treasurer until after the Committee received the contribution, and he was uninvolved with the Committee’s operations during the time period that the Committee received the contribution.

Lastly, I note that a prohibition on contributions from federal contractors to political committees is unconstitutional as applied to the contribution from Pericle Communications Company to For Colorado’s Future. As authority for the federal contractor ban, the

² See Report of Receipts and Disbursements, FEC Filing No. 1668294 (October 10, 2022 to November 28, 2022).

³ See Report of Receipts and Disbursements, FEC Filing No. 1610129 (July 2022 Quarterly Report).



Complaint cites prior Commission interpretation, along with *Wagner v. Federal Election Commission*.⁴ To be sure, the Commission has previously rejected arguments challenging the constitutionality of the ban on federal contractor contributions to committees that make independent expenditures only. But that interpretation is contrary to applicable caselaw.

Wagner upheld the constitutionality of the federal contractor ban only as it applied to contributions to candidates. The *Wagner* plaintiffs challenged only the constitutionality of the prohibition on federal contractor contributions “insofar as it ban[ned] campaign contributions by individual contractors to candidates, parties, or traditional PACs that make contributions to candidates and parties.”⁵ The challenges to the ban as it applied to traditional PACS were later dismissed as moot, meaning that the *Wagner* ruling only applied to federal contractor contributions to candidates and political parties.⁶

The reasoning in *Wagner* nonetheless persuasively demonstrates that the federal contractor ban, as applied to Super PACS that do not contribute to candidates (like the Committee) cannot withstand constitutional scrutiny. *Wagner* articulated two state interests that justified the federal contractor ban; “(1) protection against *quid pro quo* corruption and its appearance, and (2) protection against interference with merit-based public administration.”⁷

The first justification does not apply, as it directly contradicts U.S. Supreme Court jurisprudence. In *Citizens United*, the U.S. Supreme Court stated that organizations making independent expenditures could receive unlimited contributions, because “independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption.”⁸ Relying upon *Citizens United*, in *SpeechNow v. FEC*, the District of Columbia Court of Appeals struck down contribution limits to committees that did not make contributions to candidates, holding that “contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption . . . the government has no anti-corruption interest in limiting contributions to an independent expenditure group such as *SpeechNow*.”⁹

⁴ *Wagner v. Federal Election Commission*, 793 F.3d 1 (D.C. Cir. 2015).

⁵ *Wagner*, 793 F.3d at 4.

⁶ *Id.* at 5.

⁷ *Id.* at 8.

⁸ *Citizens United v. Federal Election Commission*, 558 U.S. 310, 360 (2010).

⁹ *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686, 694-95 (2010).



Because the Committee does not make contributions to candidates, the state interest of “protection against *quid pro quo* corruption” does not apply. And the ruling in *SpeechNow* is so broad that the district court in *Wagner* questioned whether *SpeechNow* effectively voided the ban on federal contractor contributions to Super PAC’s, opining “*SpeechNow* creates substantial doubt about the constitutionality of any limits on Super PAC contributions - including [the] ban on contributions by federal contractors.”¹⁰

The Commission has nonetheless claimed that *SpeechNow* does not apply to the federal contractor ban, but it has never squarely confronted the reasoning in *Citizens United* or *SpeechNow*. For example, in MUR 6403 -- cited by the Complainant – the Commission simply did not analyze a constitutional challenge to a federal contractor ban, instead limiting its analysis to the statutory language banning “contributions” from federal contractors.¹¹

The second governmental interest also cannot justify the federal contractor ban to the Committee. The *Wagner* court stated that merit-based public administration meant efficiency in government operations (ensuring that poorly-performing employees do not hold government positions because of political contributions), fairness (ensuring that government programs are administered – and perceived to be administered – fairly), and protection of government employees (ensuring they are free from improper influence).¹²

As noted above the Committee, because it operates independently from any candidate or officeholder, exercises no discretion or influence over the administration of government operations. It cannot retain poorly performing employees, it has no ability to influence whether government programs are administered fairly, and it cannot influence or retaliate against government employees. In short, the *Citizens United* and *SpeechNow* framework governs with respect to the second justification articulated in *Wagner*.

Likewise, the second justification cannot independently apply to Pericle. Under its contract with the Department of Commerce, Pericle sold the Department “radio and television broadcasting and wireless communications equipment.”¹³ It did not provide services, and a contract for readily-available goods did not allow it to exercise any type of

¹⁰ *Wagner v. Federal Election Commission*, 901 F. Supp. 2d 101, 107 (D.D.C. 2012).

¹¹ MUR 6403 (*Alaskans Standing Together*), *Notification with Factual and Legal Analysis to Abtnq Inc. and NANA Regional Corporation, Inc.* at 9 (Nov. 10, 2011).

¹² *Wagner*, 793 F.3d at 9.

¹³ Purchase order ID 1333ND21PNB670447, available at: https://www.usaspending.gov/award/CONT_AWD_1333ND21PNB670447_1341_-NONE_-NONE-
[gesslerblue.com](https://www.gesslerblue.com)



discretion. In contrast to Pericle's contract for goods, the *Wagner* decision relied heavily on the similarities between contractors and employees, finding that "the nature of the work performed by an individual rarely varied depending on whether the person was an employee or a contractor, and that in almost every respect his relationship to his agency and supervisor is identical to that of an employee."¹⁴ This similarity simply does not apply to Pericle. Pericle is a company, not an individual. Pericle does not provide services that allow it to exercise any form of discretion. And relatedly, Pericle sold products to the government; products are things that cannot be manipulated or altered, unlike services that implicate the efficiency or fairness of governmental administration. Regardless of the Commission's prior interpretation, the federal government cannot justify a ban on Pericle's contribution to the Committee.

To conclude, the Complaint simply does not name For Colorado's Future as a committee that violated federal law, nor does the Complaint allege any facts indicating that the Committee knowingly solicited a contribution from a federal contractor. The Committee's own reports and behavior show that it did not knowingly solicit a federal contractor. And even if the Commission pursues a new claim that the Committee violated the ban on federal contractor contributions, federal courts will likely find any enforcement action to be unconstitutional.

Sincerely,

GESSLER BLUE LLC

A handwritten signature in blue ink, appearing to read 'Scott E. Gessler'.

Scott E. Gessler

¹⁴ *Wagner*, 793 F.3d at 7 (internal quotation omitted).



FEDERAL ELECTION COMMISSION
1050 First Street, NE
Washington, DC 20463

STATEMENT OF DESIGNATION OF COUNSEL

Provide one form for each Respondent/Witness

E-MAIL: cela@fec.gov

AR/MUR/RR/P-MUR# _____

Name of Counsel: _____

Firm: _____

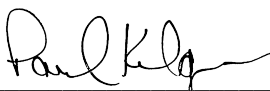
Address: _____

Office#: _____ Fax#: _____

Mobile#: [REDACTED] _____

E-mail: _____

The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

		
Date	(Signature - Respondent/Agent/Treasurer)	Title

(Name – Please Print)

RESPONDENT: _____
(Please print Committee Name/ Company Name/Individual Named in Notification Letter)

Mailing Address: _____
(Please Print)

Home#: _____ Mobile#: _____

Office#: _____ Fax#: _____

E-mail: _____

This form relates to a Federal Election Commission matter that is subject to the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A). This section prohibits making public any notification or investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.



FEDERAL ELECTION COMMISSION
1050 First Street, NE
Washington, DC 20463

STATEMENT OF DESIGNATION OF COUNSEL

Provide one form for each Respondent/Witness

E-MAIL: cela@fec.gov

AR/MUR/RR/P-MUR# 8080

Name of Counsel: Scott E Gessler

Firm: Gessler Blue LLC

Address: 7350 E. Progress Pl.

Suite 100

Office#: _____ Fax#: _____

Mobile#: [REDACTED]

E-mail: sgessler@gesslerblue.com

The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

March 1, 202
Date

(Signature - Respondent/Agent/Treasurer)

PAC Agent
Title

Ivan DuBois
(Name - Please Print)

RESPONDENT: For Colorado's Future
(Please print Committee Name/ Company Name/Individual Named in Notification Letter)

Mailing Address: 824 S. Milledge Ave. Suite 101
(Please Print)

Athens, Georgia 30605

Home#: _____ Mobile#: [REDACTED]

Office#: _____ Fax#: _____

E-mail: ivandub@gmail.com

This form relates to a Federal Election Commission matter that is subject to the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A). This section prohibits making public any notification or investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.