



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary ^{VFV}

DATE: August 30, 2022

SUBJECT: AOR 2022-15 (Rouda) Comment

**Attached is a comment on AOR 2022-15 (Rouda) from
Campaign Legal Center ("CLC").**

Attachment

RECEIVED

By Office of the Commission Secretary at 10:15 am, Aug 30, 2022



August 30, 2022

Danita Alberico, Esq.
Federal Election Commission
1050 First Street NE
Washington, DC 20463
ao@fec.gov

RE: Advisory Opinion Request 2022-15 (Rouda)

Dear Ms. Alberico,

Campaign Legal Center (“CLC”) respectfully submits this comment urging the Commission to make clear that the conduct proposed in Advisory Opinion Request 2022-15 (Rouda) would be illegal. The requestor purports to rely on the recent Supreme Court decision in *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638 (2022), and a variety of inapposite Commission advisory opinions to claim a legal right to reinstate campaign loans he forgave long ago. But neither the holding nor the reasoning of *Cruz* requires such a result, and no statute or Commission regulation authorizes it.

Background

During the 2018 election cycle, federal candidate Harley Rouda loaned \$1,625,000 to his authorized campaign committee, Harley Rouda for Congress (“the Committee”) in connection with the 2018 primary election. Within twenty days after the 2018 primary election, the Committee repaid Rouda \$472,127.93, and repaid an additional \$250,000 in 2018 and 2019 as permitted under Commission regulations. Rouda forgave the remaining loan balance of \$907,872.07 pursuant to the loan repayment limits of the Federal Election Campaign Act (“FECA”) and Commission regulations as they stood at the time. Now, following the Supreme Court’s decision in *Cruz*, Rouda and the Committee ask the Commission to declare that it would be legal for the requestors to revive the loan balance that Rouda forgave years ago. According to the AOR, reviving the loan would allow Rouda to personally withdraw funds

from the Committee—either existing campaign funds or new contributions raised for this purpose of personally repaying Rouda.

The Conduct Proposed in the Request Is Not Lawful.

The Supreme Court’s decision in *Cruz* permits the use of post-election campaign contributions to repay outstanding candidate loans. But that is not the situation presented in this advisory opinion request, where the requestor has no loans outstanding. Indeed, the question here is not about the legality of the proposed loan repayment at all. Rather, the AOR presents a much simpler question: does campaign finance law permit Rouda to reinstate an already forgiven loan?

It would be exceptionally odd for the Commission to read *Cruz* as requiring the legal fiction of retroactively un-forgiving a loan. The Supreme Court’s holding in that case turned on the impermissible burden that the prior repayment regime imposed *at the time a candidate decided* whether and how much money to loan to their campaign. *See Cruz*, slip op. at 1 (“This limit on the use of post-election funds . . . inhibit[s] candidates from making such loans in the first place.”). Specifically, the Court held that the loan repayment restriction was unconstitutional because it would cause some candidates to limit their self-funding via loans, without the restriction advancing sufficient anti-corruption interests to justify that burden. *See id.* at 11, 13.

Both on its face and as a matter of logic, the Court’s reasoning does not mean that a candidate who made a choice multiple elections ago about how much to loan his campaign under the prior regime has any legal right to reclaim that money. To state what should be obvious: it is impossible for Rouda to make a different choice in 2022 about how much money he loaned his campaign in 2018. Perhaps Rouda would have chosen to loan his campaign more in 2018 under the post-*Cruz* rules, and perhaps he wouldn’t; either way, there is nothing the Commission can do now to relieve him of any First Amendment burden he faced in making that decision years ago. *Cruz*, therefore, cannot be read to suggest that Rouda is currently experiencing any First Amendment harms. Accordingly, *Cruz* does not support Rouda’s request.

In the absence of a Court mandate, the only question that remains for the Commission in evaluating the advisory opinion request is whether the proposed conduct is consistent with FECA and the Commission’s regulations. This is not a difficult question: FECA prohibits Rouda from personally withdrawing contributions from his campaign, *see* 52 U.S.C. 30114(b), and Commission regulations permit post-election fundraising only to repay outstanding debts, *see* 11 C.F.R. 110.1(b)(3), of which Rouda’s 2018 campaign has none. That should be the end of the inquiry.

Draft A cites a smattering of advisory opinions in which the Commission permitted campaigns to correct transactions that had been unintentionally mis-reported. *See* Advisory Opinion 1990-27 (Conn. Republican Party) (permitting amendment to correct “honest clerical mistake”); Advisory Opinion 2007-07 (Craig) (permitting amendment of reports to include loans that had been inadvertently mis-reported as contributions); Advisory Opinion 2006-37 (Kissin for Congress) (same); Advisory Opinion 1997-04 (Firebaugh) (permitting amendment of reports where transactions were “intended as advances, but were mistakenly reported as simply an in-kind contribution”). These conclusions are unremarkable: the Commission has an extensive amendment process to allow for—indeed, to encourage—committees to correct mistakes in their reports, and in each of these opinions the requestors provided conclusive, sworn documentation showing that the original reports had been erroneous. For the same reasons, these advisory opinions are also irrelevant to the request at hand, where the requestor is not seeking to correct a factual error, but rather to retroactively change the legally operative nature of a transaction he conducted and correctly reported years ago. Nothing in the advisory opinions cited in Draft A speaks to such a change.¹

* * *

The Commission must act as directed by law, not pursuant to a vague sense of equities. *See, e.g., Interpretive Statement of Chairman Allen Dickerson Concerning 11 C.F.R. § 103.3 and the Disgorgement of Unlawful Contributions*, at 1 (Apr. 22, 2022) (noting that “however laudable our intentions,” the Commission cannot adopt an “approach [that] lacks legal support” or “violates the clear text of our regulations”). But to the extent the Commission is now considering whether to disregard the law in favor of extra-legal considerations, the Commission must also weigh countervailing equities. In particular, as the comments to this request demonstrate, Rouda is not alone: to allow Rouda to reinstate a long-ago forgiven loan and seek campaign repayment would allow any former candidate from the last two decades—including current officeholders, *see Cruz*, slip op. at 20 (noting that one-third of winning candidates who made loans did not receive full repayment)—to reinstate

¹ Draft A also cites Advisory Opinion 2008-20 (National Right to Life Comm.), in which the requestor sought to reimburse funds that its separate segregated fund (“SSF”) had spent on ads while awaiting an FEC advisory opinion on whether the ads could be paid for using its general treasury funds. The only reason the SSF had spent the money in the first place was because the Commission had failed to promptly issue the first advisory opinion. *See* Advisory Opinion Request 2008-20 at 2 (noting that opinion did not issue until more than one month after meeting at which five Commissioners agreed on result, during which time requestor was required to pay for its advertising). That unusual confluence of timing is not present here. Furthermore, in approving the general treasury reimbursement in Advisory Opinion 2008-20, the Commission noted as a material fact that the ads could have been made out of the general treasury in the first place. Advisory Opinion 2008-20 at 3. In contrast, Rouda undisputedly could not have left his loans outstanding in 2018.

previously forgiven loans and solicit campaign contributions for the sole purpose of paying themselves. Such a widespread, retroactive cash-grab (which, as noted previously, is not compelled by the *Cruz* decision) would hardly serve the interests of voters or otherwise advance FECA's goal of limiting corruption and the appearance of corruption.

For the foregoing reasons, we respectfully urge the Commission to reject Rouda's request, and we thank the Commission for the opportunity to submit this comment.

Sincerely,

/s/ Saurav Ghosh

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