

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
 3 In the Matter of)
 4)
 5 Ted Cruz for Senate and Bradley)
 6 Scott Knippa in his official capacity) MUR 7897
 7 as treasurer)
 8 Rafael Edward “Ted” Cruz)
 9)

10 **SECOND GENERAL COUNSEL’S REPORT**

11 **I. ACTIONS RECOMMENDED**

12 We recommend that the Commission: (1) take no further action as to the allegation that
 13 Rafael Edward “Ted” Cruz and Ted Cruz for Senate and Bradley Scott Knippa in his official
 14 capacity as treasurer (the “Committee”) violated 52 U.S.C. § 30114(b) by converting \$13,900 in
 15 campaign funds to personal use by purchasing Facebook ads promoting sales of Cruz’s book;
 16 (2) approve the appropriate letters; and (3) close the file.

17 **II. BACKGROUND**

18 The Complaint in this matter alleged that Cruz and the Committee violated the Federal
 19 Election Campaign Act of 1971, as amended (the “Act”), by converting campaign funds to
 20 personal use when in the Fall of 2020 the Committee purchased between \$13,900 and \$20,748 in
 21 Facebook advertisements to promote Cruz’s book, *One Vote Away*.¹ On April 12, 2023, the
 22 Commission found reason to believe regarding that allegation, and authorized the Office of
 23 General Counsel (“OGC”) to engage in pre-probable cause conciliation with Cruz and the
 24 Committee.² In response to the reason-to-believe (“RTB”) notification, which included the
 25 Commission’s Factual and Legal Analysis and a proposed Conciliation Agreement,

¹ Compl. ¶¶ 16-22 (Apr. 7, 2021).

² Certification (“Cert.”) ¶¶ 1, 4 (Apr. 12, 2023). The Commission also found no reason to believe with respect to the Complaint’s allegation that Cruz and the Committee converted campaign funds to personal use in the form of \$154,356 in campaign funds used to purchase copies of Cruz’s book for campaign supporters. *Id.* ¶ 2.

1 Respondents' counsel informed OGC that Cruz and the Committee would not engage in pre-
2 probable cause conciliation and stated that they would submit a filing asking the Commission to
3 reconsider its reason-to-believe finding.³ On May 5, 2023, Cruz and the Committee submitted
4 an RTB Response to the Commission's finding.⁴

5 In the RTB Response and an accompanying affidavit from Cruz, Respondents rely on
6 Cruz's attestations that Cruz has directed his literary agent to donate all past and future royalties to
7 charity, and that neither Cruz nor any member of his family has received any financial benefit
8 from sales of the book or taken any tax deductions from the subsequent charitable donations.⁵
9 According to the affidavit, Cruz's original publishing agreement provided that "all royalties
10 earned on sales of *One Vote Away* beyond the book advance would be distributed to" Cruz's
11 literary agent, who would "disburse the royalty amounts to [Cruz] . . . [a]fter deducting its
12 commission."⁶ However, Cruz asserts that at the end of 2021, when *One Vote Away* first
13 generated royalties beyond the book advance, he directed his literary agent to "donate the entire
14 amount directly to ACE Scholarships Houston, a Section 501(c)(3) charity."⁷ Cruz attests that he
15 made the same request at the end of 2022, that "[n]either [he] nor any of [his] family members
16 receive or have received any compensation or personal benefit from Ace Scholarships Houston,"
17 and that he "did not take any deduction on [his] personal income taxes for 2021 and 2022 on the

³ RTB Notif. Letter (Apr. 13, 2023); Email from Eric Wang, Partner, The Gober Group, to Justine A. di Giovanni, Attorney, FEC (Apr. 25, 2023, 12:16 PM).

⁴ RTB Resp. (May 5, 2023).

⁵ *Id.*, Ex. C (Affidavit of Ted Cruz) [hereinafter Cruz Aff.]; *see also* RTB Resp. at 9-10. The RTB Response also attaches an exhibit highlighting the Facebook ads in which the Committee made campaign solicitations (Exhibit A) and an affidavit from a consultant to the Committee, Nick Maddux (Exhibit B).

⁶ Cruz Aff. ¶ 3.

⁷ *Id.* ¶ 5.

1 donations that were made by [his literary agent] from the royalty amounts.”⁸ Cruz further swears in
2 his affidavit that it was “always [his] intention that any additional royalties earned from sales of
3 *One Vote Away* in the future would be donated to charity in the same manner.”⁹ Cruz attests that
4 it was his “understanding was that there was no legal requirement to make any explicit statement
5 to that effect” and continues: “Regardless, I am more than happy to make it explicit and
6 unequivocal: I commit that 100% of future royalties from *One Vote Away* will be given to
7 charity, and that I will never personally receive even a single penny of royalty payments from
8 sales of the book.”¹⁰

9 The RTB Response makes several additional arguments. First, it states that “more than
10 half the ads [the Committee placed regarding *One Vote Away*] were fundraising solicitations”
11 that were campaign-related and therefore not personal use.¹¹ Second, it also argues that all the
12 ads, including those that promoted the book without any fundraising solicitation, had a
13 campaign-related purpose because they discussed Ted Cruz’s position as a senator and the
14 importance of nominating judges to the Supreme Court.¹² Third, the RTB Response asserts that
15 a personal use violation requires the candidate to receive a financial benefit, and that, as a result,
16 the Factual and Legal Analysis does not satisfy the reason-to-believe standard because Cruz had
17 not yet received any royalties, so, according to Respondents, no violation “had occurred or was
18 about to occur.”¹³ Fourth and finally, the RTB Response argues that the Commission is applying

⁸ *Id.* ¶¶ 6-8.

⁹ *Id.* ¶ 9.

¹⁰ *Id.* ¶ 10.

¹¹ RTB Resp. at 2-3.

¹² *Id.* at 3-4.

¹³ *Id.* at 4-8.

1 a new regulatory standard without going through necessary notice-and-comment rulemaking.¹⁴
2 On these bases, Cruz and the Committee request that the Commission “reconsider and rescind its
3 RTB finding in this matter” or terminate the matter in another fashion without further pursuing
4 liability against Respondents.¹⁵

5 **III. ANALYSIS**

6 In its Factual and Legal Analysis, the Commission found that there was reason to believe
7 that Cruz and the Committee had converted campaign funds to personal use by advertising
8 Cruz’s book, *One Vote Away*, on its Facebook page beyond a *de minimis* amount.¹⁶ Crucially,
9 the Commission distinguished the facts presented here from those in Advisory Opinion 2006-18
10 (Granger) (“AO 2006-18”), where the Commission determined that proposed non-*de minimis*
11 disbursements for promoting the candidate’s book would not constitute personal use because the
12 requester had a contract with her publisher that assigned all future royalties to two charitable
13 organizations, so it was impossible for any increased sales resulting from her committee’s
14 promotion of her book to result in any personal financial gain by the candidate.¹⁷ At the time of
15 the Complaint and initial Response in this matter, the available information indicated that Cruz
16 had received no royalties for *One Vote Away*, and while that Response indicated that “any copies
17 of the book purchased by the Committee would have to be excluded from royalty calculations in

¹⁴ *Id.* at 10-11.

¹⁵ *Id.* at 11 (“Barring that, the Office of General Counsel should prepare a Second General Counsel’s Report in light of the arguments and evidence Respondents have presented above and recommend that the Commission find ‘no probable cause to believe’ that the Committee’s promotion of *One Vote Away* violated 52 U.S.C. § 30114(b), and the Commission should adopt such a recommendation and immediately close the file in this matter.”).

¹⁶ Factual & Legal Analysis (“F&LA”) at 9-12; *accord* Resp. at 3 (May 25, 2021) (“The situation in the instant matter is no different: . . . like the Granger Committee, Ted Cruz for Senate spent more than a *de minimis* amount of campaign funds to promote a book through social media advertising . . .”).

¹⁷ F&LA at 11-12.

1 compliance with the Act and Regulations,”¹⁸ it did not address any specific plans for future
2 royalty payments that might accrue, particularly in connection with copies sold as a result of the
3 Facebook advertisements.¹⁹ Accordingly, based on the available information which indicated
4 that Cruz would begin receiving royalties from sales of *One Vote Away* once the book recouped
5 Cruz’s advance, the Commission found reason to believe that a violation had occurred.²⁰

6 In the RTB Response, however, Cruz resolves the factual issue of financial benefit head
7 on, attesting that he has never and will never receive a personal financial benefit from sales of his
8 book. He states “explicit[ly] and unequivocal[ly]” that “100% of future royalties from *One Vote*
9 *Away* will be given to charity, and that I will never personally receive even a single penny of
10 royalty payments from sales of the book.”²¹ From the facts available in the record, it is unclear
11 when Cruz made his decision to donate the proceeds of his book to charity, though his recently
12 submitted affidavit asserts that “it was always [his] intention that any additional royalties earned
13 from sales of *One Vote Away* in the future would be donated to charity in the same manner.”²²
14 Critically, this assertion is supported by Cruz’s express statement, under oath, that he directed
15 that such royalties be sent to charity in 2021 and 2022,²³ prior to issuance of the Commission’s
16 reason-to-believe finding in this matter, facts credibly supporting Respondents’ positions.
17 Accordingly, based on the new information provided in the RTB Response and these assertions
18 in particular, it now appears that the circumstances this matter presents are analogous to those of

¹⁸ Resp. at 3.

¹⁹ See F&LA at 11-12 (“Respondents have provided no information explaining how Cruz received no financial benefit from [sales of *One Vote Away* obtained via advertisements on the Committee’s Facebook page].”).

²⁰ *Id.* at 12.

²¹ Cruz Aff. ¶ 10.

²² *Id.* ¶ 9.

²³ *Id.*

1 AO 2006-18,²⁴ as Respondents contend, and on this basis we recommend that the Commission
2 take no further action as to the personal use allegations here at issue.

3 For reasons briefly summarized as follows, Respondents' additional arguments in support
4 of their request that the Commission rescind its finding of reason to believe do not materially
5 affect our analysis.²⁵ Respondents' claim that "more than half the ads [the Committee placed
6 regarding *One Vote Away*] were fundraising solicitations" that were campaign-related and not
7 personal use²⁶ is incorrect. The advertisements that the RTB Response identifies were not
8 included in the Commission's personal use analysis because the Commission's analysis accepted
9 the notion that those advertisements were campaign-related.²⁷ Respondents' argument that all
10 the ads had a campaign-related purpose because they discussed Ted Cruz's position as a senator
11 and the importance of nominating judges to the Supreme Court²⁸ likewise does not change the
12 personal use analysis. The Factual and Legal Analysis reasoned that "the nexus [of the ads] to

²⁴ AO 2006-18 does not address whether the Act or Commission regulations require a formal agreement between the candidate and her publisher regarding donation of royalties to charity; instead, the Opinion states only that the proposed course of action is permissible because the candidate has "arranged" to donate all royalties to charity. AO 2006-18 at 3. Here, given Cruz's sworn statement that "100% of future royalties from *One Vote Away* will be given to charity," he has similarly "arranged."

²⁵ Neither the Act nor Commission regulations provide a procedure by which respondents can submit a request for reconsideration, and Cruz and the Committee cite no precedent for their request that the Commission rescind its finding of reason to believe. *C.f.*, 11 C.F.R. § 111.15 (setting forth procedures only for motions to quash or modify a subpoena); *see, e.g.*, Letter from Anne B. Robinson, Att'y, FEC, to Marc E. Elias, Couns. for DNC Servs. Corp. & Hillary for Am. (Dec. 6, 2019), MURs 7291, 7449 (DNC, *et al.*) (stating in response to request for reconsideration "that the [Act], and its implementing regulations contain no provision for the Commission to consider such a request"); Letter from Elena Paoli, FEC, to James E. Tyrrell III, Couns. for Lee Zeldin & Zeldin for Senate (Aug. 15, 2017), MUR 6985 (Zeldin for Senate) (stating that neither the Act nor Commission regulations contain a provision for the Commission to consider a Request to Rescind Reason to Believe Finding and Dismiss); Letter from Roy Q. Lockett, FEC, to James Bopp, Jr. & Barry A. Bostrom, Couns. for Nat'l Right to Life PAC (May 21, 2009), MUR 6133 (Nat'l Right to Life PAC) (stating that the Commission concluded that a Motion to Dismiss with Admonishment presented an inadequate basis for taking no further action).

²⁶ RTB Resp. at 2-3.

²⁷ F&LA at 6 n.13 (stating that, "[o]f the 64 advertisements relating to *One Vote Away*, 12 refer to a giveaway of the book in exchange for campaign contributions; these advertisements have been excluded from the figures provided above").

²⁸ RTB Resp. at 3-4.

1 th[e] election is significantly diminished by the fact that Cruz was not a candidate in 2020
2 election because his senate seat is up for election in 2024.”²⁹ Further, the ads do not mention any
3 2020 presidential candidates.³⁰

4 Likewise, the RTB Response's assertion that the Factual and Legal Analysis does not
5 satisfy the reason-to-believe standard because Cruz had not yet received any royalties, so no
6 violation “had occurred or was about to occur,”³¹ appears to misunderstand the irrespective test
7 that the Commission applied to this matter.³² At time of the reason-to-believe finding, the record
8 included information showing that Cruz *could* receive a financial benefit from the sales of the
9 book and lacked information showing that Cruz had, in fact, received *no* financial benefit from
10 the sales of the book and would not receive any benefit in the future.³³ The available information
11 at that earlier stage suggested that the Facebook ads promoting Cruz's book “increased Cruz's
12 opportunity to receive future royalties”³⁴ and that he could have soon received them based on
13 when and whether the sales recouped Cruz's \$400,000 advance, making the related violation
14 already occurring or “about to occur.”³⁵ And contrary to the RTB Response's claim that the

²⁹ F&LA at 10-11.

³⁰ See META AD LIBRARY, [https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&id=2649652922016535&q=book&view_all_page_id=69983322463&sort_data\[direction\]=desc&sort_data\[mode\]=relevancy_monthly_grouped&start_date\[min\]=2020-09-01&start_date\[max\]=2020-11-01&search_type=page&media_type=all](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&id=2649652922016535&q=book&view_all_page_id=69983322463&sort_data[direction]=desc&sort_data[mode]=relevancy_monthly_grouped&start_date[min]=2020-09-01&start_date[max]=2020-11-01&search_type=page&media_type=all) (last visited June 20, 2023) (showing all ads placed by the Ted Cruz Facebook page between September 1, 2020, and October 31, 2020, with the keyword “book”).

³¹ RTB Resp. at 4-8.

³² Personal use is defined as using funds “to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as holder of Federal office.” 52 U.S.C. § 30114(b); see F&LA at 8-9.

³³ F&LA at 12.

³⁴ *Id.*

³⁵ *Id.*; see 11 C.F.R. § 111.10(a) (“An investigation shall be conducted in any case in which the Commission finds reason to believe that a violation of a statute or regulation over which the Commission has jurisdiction has occurred *or is about to occur.*” (emphasis added)). Though the Commission did not have information at the time of the reason-to-believe finding regarding how much *One Vote Away* had earned, given that the book had been on sale

1 Commission is applying a new regulatory standard without going through notice-and-comment
2 rulemaking,³⁶ the analysis stated in the Commission's Factual and Legal Analysis is grounded in
3 the Act, the Commission's regulations, and its prior advisory opinions.³⁷ It presents no new
4 regulatory standard that would require notice-and-comment rulemaking.

5 Accordingly, consistent with precedent and in light of the new facts provided in the RTB
6 Response, namely because Cruz makes sworn assertions that he has not received and will never
7 receive a financial benefit from sales of *One Vote Away*, we recommend that the Commission
8 take no further action and close the file.³⁸

9 **IV. RECOMMENDATIONS**

- 10 1. Take no further action as to the allegation that Rafael Edward "Ted" Cruz and
11 Ted Cruz for Senate and Bradley Scott Knippa in his official capacity as treasurer
12 violated 52 U.S.C. § 30114(b) by converting at least \$13,900 in campaign funds
13 to personal use by purchasing Facebook ads promoting sales of Cruz's book;
- 14 2. Approve the appropriate letters; and

since September 29, 2020, and given Cruz's public status, it appeared likely that the book would either soon recoup or would have already recouped Cruz's advance. Indeed, the new information provided in the RTB Response indicates that it did generate royalties during calendar year 2021, over a year before the Commission's findings. *See* Cruz Aff. ¶ 5 ("In 2021, sales of *One Vote Away* generated royalties beyond the book advance amount.").

³⁶ RTB Resp. at 10-11.

³⁷ *See* F&LA at 9-12.

³⁸ Though Respondents request that OGC make a recommendation of no probable cause to believe, this is inconsistent with prior Commission action under similar circumstances. *See, e.g.*, Second Gen. Counsel's Rpt., MUR 7987 (Phil Rizzo for Congress) (recommending the Commission take no further action as to the allegation against the respondent when additional information obtained in the course of investigation indicated that the violation for which the Commission had previously found reason to believe had not occurred); Cert. ¶ 1 (May 3, 2023), MUR 7987 (approving OGC's recommendation to take no further action).

1 3. Close the file.

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

Lisa J. Stevenson
Acting General Counsel

Date: July 17, 2023

Charles Kitcher
Charles Kitcher
Associate General Counsel for Enforcement

Ana J. Peña-Wallace by *HLL*
Ana J. Peña-Wallace
Assistant General Counsel

Justine A. di Giovanni
Justine A. di Giovanni
Attorney