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June 12, 2023

Via E-mail

Mr. Roy Q. Luckett
Acting Assistant General Counsel
Office of Complaints Examination & Legal Administration
Federal Election Commission
Attn: Christal Dennis, Paralegal
1050 First Street, NE
Washington, DC 20463

Re: MUR 8123 – Response of Patricia Brandmaier

Dear Mr. Luckett:

On behalf of our client, Patricia Brandmaier, this letter is in timely response¹ to the Complaint filed by Donald J. Trump in the above-captioned matter under review. Armed with no legal theory, no substantive facts, and nothing but conclusory statements, Mr. Trump has not demonstrated “reason to believe”² Ms. Brandmaier has violated the Federal Election Campaign Act (“FECA”), and the Federal Election Commission (“Commission”) should dismiss the Complaint against Ms. Brandmaier in its entirety.

The Complaint claims, with no factual or legal support, that Ms. Brandmaier, alongside 50 other former U.S. intelligence officials, made an in-kind election contribution by co-signing the October 19, 2020 “Public Statement on the Hunter Biden Emails”³ (“Statement”). The Statement expressed concerns regarding press reporting of Hunter Biden’s emails and suggested that the story “has all the classic earmarks of a Russian information operation.”⁴ Warning the American people of the source of a story of public interest was not for the purposes of influencing an election.

¹ On April 27, 2023, the Office of General Counsel granted Ms. Brandmaier’s request for an extension to respond to the Complaint. Ms. Brandmaier’s response is due by the close of business on June 12, 2023.

² 52 U.S.C. § 30109(a)(2).

³ See Jim Clapper *et al.*, *Public Statement on the Hunter Biden Emails* (Oct. 19, 2020) [*hereinafter* “Statement”], available at <https://www.politico.com/f/?id=00000175-4393-d7aa-af77-579f9b330000> (last visited June 9, 2023).

⁴ *Id.* at 1.

Federal Election Commission

June 12, 2023

Page 2

Mr. Trump—without citing to Advisory Opinions or case law—makes vast leaps to allege that these 51 former intelligence officials have violated the FECA. Mr. Trump wrongly labels Ms. Brandmaier a federal contractor and states that she was forbidden from making campaign contributions by virtue of a non-disclosure agreement (“NDA”). Mr. Trump also asserts that the Statement is a campaign “contribution.” Both of these assertions are flatly wrong.

The Complaint has no legal support upon which the Commission could justify finding a violation. Not only do Mr. Trump’s arguments lack merit, but finding a violation against Ms. Brandmaier serves no deterrent effect as Ms. Brandmaier has since passed away from Stage IV Pancreatic Cancer. Consistent with the lack of legal basis and supported by principles of equity, the Commission should dismiss the Complaint against Ms. Brandmaier.

I. Ms. Brandmaier Is Not a Federal Contractor

Mr. Trump incorrectly alleges that the 51 individuals who co-signed the Statement, including Ms. Brandmaier, are federal contractors by virtue of NDAs each signed upon their departure from government employment to protect classified information gained from their prior federal employment. This claim is utterly incorrect and without support in any legal precedent.

A federal contractor is one who has an agreement with the United States for the “rendition of personal services,” “furnishing any material, supplies, or equipment,” or “selling land or buildings,” *if* at least part of the *payment* for such services is appropriated by Congress.⁵ Being classified as a federal contractor requires an individual to be engaged in one of these three types of agreements *and* requires that person to receive money from Congressional appropriations. The Commission has agreed that a person must be paid to be a federal contractor.⁶ Necessarily, the analysis ends there: Ms. Brandmaier was not paid by virtue of an NDA.

Signing an NDA does not make a former federal employee a federal contractor. Ms. Brandmaier signed a standard NDA governing the disclosure of classified information once she left her government position. Nothing in the substance of the agreement nor applicable statutes or regulations would make Ms. Brandmaier a federal contractor. These NDAs did not require “personal service,” nor did Ms. Brandmaier receive payment for her compliance therewith. Indeed, the Commission has been clear in its prior holdings that a federal contractor must be *paid*, at least in part, by *Congress* by virtue of the terms of the agreement to so qualify.⁷

II. The Statement Is Not a “Contribution”

Mr. Trump’s allegation that the Statement is a campaign “contribution” similarly finds no basis in law. The FECA defines a “contribution” as “any gift, subscription, loan, advance, or deposit of money or anything of value” made “for the purpose of influencing any election for

⁵ 52 U.S.C. § 30109(a); 11 C.F.R. § 115(a)(1).

⁶ See, e.g., AO 1987–33 (Lawyers for Better Government Fund-Federal) (“Any person who enters into a personal services contract with the United States or one of its agencies is a government contractor *if compensation is paid from funds appropriated by Congress.*”) (emphasis added).

⁷ See *id.*

Federal Election Commission

June 12, 2023

Page 3

Federal office.”⁸ In-kind contributions include goods or services “offered free or at less than the usual charge.”⁹ In-kind contributions do not include unpaid volunteer services. Applicable Commission regulations specifically exempt any services from an uncompensated volunteer.¹⁰ Making public statements has been interpreted by the Commission to be uncompensated volunteer activity.¹¹

The unpaid Statement cannot constitute a “contribution.” The Complaint made no allegation that Ms. Brandmaier received any payment for her co-signing the Statement, and she in fact did not. Consistent with this, in prior situations, the Commission has not found a violation when an unpaid individual writes an op-ed addressing candidates for an election.¹² By signing the Statement, which received no funding, and not receiving payment for signing the Statement, Ms. Brandmaier, at most, was an uncompensated volunteer whose actions do not constitute a violation of the FECA.

III. The Commission Should Dismiss The Complaint Against Ms. Brandmaier In The Interest of Equity

Ms. Brandmaier passed away on March 24, 2023, from Stage IV Pancreatic Cancer. She spent 32 years of her life as a dedicated civil servant, starting from an entry-level analyst to become a member of the CIA’s senior executive leadership team. She remained dedicated to the protection of the United States, and that same motivation to protect the United States from outside invaders compelled her to co-sign the Statement. Ms. Brandmaier—having had no communications with any campaign—sought not to make a political statement or influence an election, but instead to inform the American people on a matter of public interest—*i.e.*, that some of the press reporting on the Hunter Biden emails had the hallmarks of a Russian information operation.¹³

Regardless of the Commission’s ultimate findings in this matter, in any event, the Commission, needless to say, would not be able to impose and enforce a sanction against a deceased person. Nor would it be able to levy a sanction against Ms. Brandmaier’s estate. The FECA allows the Commission to assess a civil penalty for violations of the Act.¹⁴ The Commission would only be able to make a claim against Ms. Brandmaier’s estate if the penalty is remedial, not penal, in nature.¹⁵ The key question is “whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual.”¹⁶ While the FECA technically labels the penalty “civil,”

⁸ 11 C.F.R. §§ 100.52(a).

⁹ See *How to Report: In-kind Contributions*, Fed. Election Comm’n, <https://www.fec.gov/help-candidates-and-committees/filing-reports/in-kind-contributions/> (last visited June 9, 2023).

¹⁰ 52 U.S.C. § 30101(8)(B)(i); 11 C.F.R. § 100.74.

¹¹ See MUR 7863 (Astrid Silva, *et al.*), Factual & Legal Analysis at 9-11 (July 6, 2021).

¹² See MUR 5853 (Michael Grace), Factual and Legal Analysis at 4-5 (Sept. 4, 2007).

¹³ See *Statement*, *supra* note 3, at 1.

¹⁴ 52 U.S.C. § 30109(a)(5)-(6).

¹⁵ See, e.g., *Huntington v. Attrill*, 146 U.S. 657, 668 (1892); *Ex Parte Schreiber*, 110 U.S. 76, 80 (1884); *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 85, 876 (11th Cir. 1986); *United States v. Green*, 457 F. Supp. 3d 1262 (S.D. Fla. 2020).

¹⁶ *Huntington*, 146 U.S. at 668; *Kokesh v. SEC*, 581 U.S. 455, 461 (2017) (holding that an order for disgorgement in an SEC enforcement action under § 2462 is a penalty).

Federal Election Commission

June 12, 2023

Page 4

courts examine the economic reality of the penalty when assessing the nature of a government-imposed sanction in this context. The court examines (1) whether a sanction redresses a wrong to the public or the individual and (2) whether the sanction is “for the purpose of punishment, and to deter others from offending in like manner.”¹⁷

Considering these principles, a sanction for violating the FECA would be a penalty because the “wrong” is a violation of public law.¹⁸ The remedy for such a violation is paid to the United States, and the Government itself would enforce any right to collect.¹⁹ The factors a district court should consider in levying a civil penalty under the FECA include “the injury to the *public*.”²⁰ The inclusion of such factor necessitates a finding that such a sanction is a public wrong. Second, the purpose of issuing a monetary sanction for committing a campaign violation is punishment. The FEC itself has admitted that a penalty in the FECA context “is necessary to deter similar violations and to punish defendants.”²¹ Any civil penalty imposed here could therefore not be enforced against Ms. Brandmaier’s estate, thereby rendering the Complaint against Ms. Brandmaier one without an available remedy.

Finally, the Commission cannot ignore the chilling effect on the freedom of speech sought by Mr. Trump’s Complaint. The First Amendment guarantees the right to free speech. Ms. Brandmaier was not under any continuing obligation of her past employment except for maintaining the confidentiality of classified information. By finding that former federal employees such as Ms. Brandmaier cannot speak to non-confidential issues of public concern regarding matters adjacent to an election, the Commission would effectively chill a significant volume of speech by *former* federal employees.²² The FECA was not written to prevent all election-related speech, and instead excludes former federal employees from its reach, allowing them to speak freely *and* contribute to federal elections should they choose.²³ Mr. Trump’s true purpose in submitting this Complaint is evident as he spends fifteen paragraphs of his Complaint rehashing his grievances against social media companies such as Facebook and Twitter—complaints

¹⁷ *Kokesh*, 581 U.S. at 461-62.

¹⁸ *See id.* at 463.

¹⁹ *See id.*

²⁰ *Fed. Election Comm’n v. Furgatch*, 869 F.2d 1256, 1258 (9th Cir. 1989) (emphasis added).

²¹ *Fed. Election Comm’n v. Craig for U.S. Senate*, 70 F. Supp. 3d 82, 99-100 (D.D.C. 2014) (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)) (“[T]he purpose of a civil penalty is ‘to punish culpable individuals,’ not just to ‘restore the status quo.’”).

²² *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)) (“The First Amendment affords the broadest protection to such political expression in order ‘to assure [the] unfettered interchange of ideas for the brining about of political and social changes desired by the people.’”). Executive Order 13526 requires any individual with access to classified information sign a non-disclosure agreement. Executive Order 13526, § 4.1(a)(2). Mr. Trump’s assertion that signing an NDA with the United States deems the signor a federal contractor would result in no individual having had a security clearance participating in the political process from that moment on. This result is in complete opposition to the values of our democracy.

²³ *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 197 (2014) (“The primary purpose of FECA was to limit *quid pro quo* corruption and its appearance.”) (emphasis in original); *see also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 423 (2010) (Stevens, J., concurring in part) (“And we have consistently approved laws that bar Government employees, *but not others*, from contributing to or participating in political activities.”) (emphasis added).

Federal Election Commission

June 12, 2023

Page 5

regarding which the Commission has already dismissed without action.²⁴ The Commission should similarly dismiss this Complaint, as the grievances set forth therein “are not, at their core, campaign finance issues.”²⁵

IV. Conclusion

The Commission finds itself acting as yet another forum for Mr. Trump to rehash his baseless grievances. These grievances, founded in the aftermath of an election lost, find no basis in law or fact. And regardless of its merits, the Complaint poses no prospect of an enforceable remedy against Ms. Brandmaier’s estate, and if permitted to continue would only exact an unnecessary distraction and waste of resources on a family who should be permitted to focus their attention on their own grieving process and attending to the other affairs their loved one has left behind. The Commission should promptly dismiss the Complaint for the above-stated reasons without further action.

Respectfully submitted,



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²⁴ See MURs 7821, 7827, & 7868 (Twitter, Inc., *et al.*), Factual and Legal Analysis at 13-16 (Aug. 16, 2021); MURs 7812, 7825, & 7869 (Facebook, *et al.*), Factual and Legal Analysis at 14-17 (Aug. 18, 2021).

²⁵ MURs 7821, 7827, & 7868 (Twitter, Inc., *et al.*), Statement of Reasons of Vice Chair Dickerson and Comm’r Trainor at 4 (Sept. 13, 2021).



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# 8123

Name of Counsel: Patrick F. Linehan & Kane T. Smith

Firm: Step toe & Johnson LLP

Address: 1330 Connecticut Ave, NW

Washington, DC 20036

Office#: (202) 429-3000

Fax#: _____

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E-mail: plinehan@step toe.com; kasmith@step toe.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.

8 June 2023

Date

Michael A. LeFever

(Signature - Respondent/Agent/Treasurer)

Surviving Spouse/Executor of Will

Title

Michael A. LeFever

(Name - Please Print)

RESPONDENT: Patricia Brandmaier

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

Mailing Address:
(Please Print)

[REDACTED]

Mercer Island, WA 98040

Home#: [REDACTED]

Mobile#: [REDACTED]

Office#: _____

Fax#: _____

E-mail: [REDACTED]

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.