



BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Mike Braun;)
Mike Braun for Indiana;)
Travis Kabrick,)
in his official capacity as Treasurer.)

INTRODUCTION

Through counsel, Mike Braun, Mike Braun for Indiana, and Travis Kabrick, in his official capacity as Treasurer, (collectively, "Filer") are seeking the Commissioners' consideration of genuine material questions of law pursuant to the Federal Election Commission's ("FEC" or "Commission") Permanent Program for Requesting Consideration of Legal Questions by the Commission established by the Commission in 76 Fed. Reg. 45798 (August 1, 2011). Specifically, the Filer requests the Commissioners' guidance regarding two questions:

- 1. Are the proceeds from Mr. Braun's personal lines of credit, pursuant to the facts provided herein, "personal loans" to Mike Braun for Indiana under 11 C.F.R. § 116.11(a)?
- 2. Is the \$250,000 post-election loan-repayment limitation, which was codified by Congress in 52 U.S.C. § 30116(j) and interpreted by the Commission in 11 C.F.R. § 116.11, a constitutional and enforceable limitation given the U.S. Supreme Court's precedential holdings and reasoning in *Davis v. Federal Election Commission*, *Citizens United v. Federal Election Commission*, and *McCutcheon v. Federal Election Commission*?

BACKGROUND

Mike Braun was elected to the U.S. Senate in 2018, and Mike Braun for Indiana is his authorized candidate committee. Prior to becoming a candidate for federal office, Mr. Braun obtained personal lines of credit from three commercial lending institutions that did not require a security interest or a guarantor.

During the 2018 election cycle, Mr. Braun utilized the personal lines of credit for the purpose of using the proceeds in connection with his candidacy. It is the undersigned counsel's understanding that the various banks were notified at this time that Mr. Braun intended to use the funds in connection with his candidacy. Pursuant to the Commission's

guidance and previous precedents, such as the Audit Division Recommendation Memorandum on Ted Cruz for Senate, the lines of credit do not constitute Mr. Braun's "personal funds" because the funds were borrowed from commercial lenders. Mike Braun for Indiana then itemized these lines of credit on its subsequent campaign-finance reports and provided all required transaction details in accordance with the Federal Election Campaign Act of 1971, as amended, ("the "Act"), and FEC regulations.

On December 25, 2018, the FEC's Reports and Analysis Division sent the Filer a series of Requests for Additional Information ("RFAIs"), which presumptively assumed that the lines of credit were "personal loans" subject to the \$250,000 post-election loan-repayment limitation. The Filer, through counsel, subsequently conveyed its belief that the proceeds from the lines of credit should *not* be considered "personal loans," as that term is plainly defined in 11 C.F.R. § 116.11(a), because they were neither (i) "made by [the] candidate" nor (ii) "made by other persons to the authorized committees that are endorsed or guaranteed by the candidate or that are secured by the personal funds of the candidate."

On or about April 2, 2019, the Filer's counsel spoke with an attorney in the FEC's Office of General Counsel ("OGC") via telephone. During that conversation, the OGC attorney conveyed OGC's position that the lines of credit were "secured" by Mr. Braun because they were approved by the banks in light of Mr. Braun's extensive credit history with them. This position led OGC to conclude that there was at least a *de facto* personal guarantee of the loans. The OGC attorney then informed the Filer's counsel that the Filer had 15 business days (i.e., April 23, 2019) to seek the Commissioners' consideration of legal questions pursuant to 76 Fed. Reg. 45798 (August 1, 2011).

QUESTIONS PRESENTED

- 1. Are the proceeds from Mr. Braun's personal lines of credit, pursuant to the facts provided herein, "personal loans" to Mike Braun for Indiana under 11 C.F.R. § 116.11(a)?**

The Filer's belief that the proceeds from the lines of credit should *not* be considered "personal loans" is based on a plain reading of 11 C.F.R. § 116.11(a), entitled "Restriction on an authorized committee's repayment of personal loans exceeding \$250,000 made by the candidate to the authorized committee." That regulation states:

For purposes of this part, personal loans mean a loan or loans, including advances, made by a candidate, using personal funds, as defined in 11 CFR 100.33, to his or her authorized committee where the proceeds of the loan were used in connection with the candidate's campaign for election. Personal loans also include loans made to a candidate's authorized committee that are endorsed or guaranteed by the candidate or that are secured by the candidate's personal funds.

Furthermore, the FEC's 2003 Explanation and Justification¹ for this particular regulation states:

The interim final rules define "personal loans" in paragraph (a) of 11 CFR 116.11. The definition includes not only loans made by candidates to their authorized committees, but also loans made by other persons to the authorized committees that are endorsed or guaranteed by the candidate or that are secured by the personal funds of the candidate. This definition ensures that loans to authorized committees that are used in connection with the candidate's campaign for election, for which the candidate is personally liable, are subject to the provisions of 11 CFR 116.11. It is important to note that new 11 CFR 116.11 applies to all loans made, endorsed, or guaranteed by candidates regardless of whether the other provisions of the Millionaires' Amendment are triggered, i.e., the increased contribution limits.

Therefore, if loans are neither (i) "made by [the] candidate" nor (ii) "made by other persons to the authorized committees that are endorsed or guaranteed by the candidate or that are secured by the personal funds of the candidate," then the loans do not constitute "personal funds" under a plain reading of the regulation.

It is important to recognize that the terms "secured," "guarantor," and "endorser" are not separately defined by the Act or Commission regulations; however, they are universally understood terms of art in the legal and business professions. For example:

- Black's Law Dictionary defines "secured" as "a credit, obligation of loan that is guaranteed by a pledge of an item of greater or equal value on liquidation."
- BusinessDictionary.com similarly defines "secured" as any "credit, loan, or obligation whose full payment or satisfaction is guaranteed by the pledge of something of equal or greater liquidation value."
- Black's Law Dictionary defines "guarantor" as "he who makes a guaranty." A "guaranty" is defined by Black's as "to undertake collaterally to answer for the payment of another's debtor the performance of another's duty, liability, or obligation; to assume the responsibility of a guarantor; to warrant."
- Gilbert's Law Dictionary defines "guarantor" as "a person who gives a guaranty. A person who is secondarily liable for another's obligation or debt as established by contract." A "guaranty" is defined by Gilbert's as "a promise or pledge to fulfill another's obligation in case of that person's default upon that obligation; an agreement to be secondarily liable for the debt(s) of another upon that person's default on that debt."

¹ https://www.fec.gov/resources/legal-resources/rulemakings/nprm/millionaire_amend/fr68n017p03969.pdf

- BusinessDictionary.com similarly defines “guarantor” as a “person or firm that endorses a three-party agreement to guarantee that promises made by the first party (the principal) to the second party (client or lender) will be fulfilled, and assumes liability if the principal fails to fulfill them (defaults).”
- Gilbert’s Law Dictionary defines “endorsement” as an “act of signing the back of a negotiable instrument to transfer it entirely to another person,” so an “endorser” is presumably a person who make an endorsement.
- BusinessDictionary.com similarly defines “endorser” as a “person or firm who, by signing a negotiable instrument, transfers the title of the instrument (or the property named therein) to another.”

To be clear, in the instant case, Mr. Braun was simply the borrower. He did not secure the lines of credit, did not guarantee the lines of credit, and did not endorse the lines of credit as any of those three terms are generally understood.

Notwithstanding the foregoing, OGC has taken the position that the lines of credit were “secured” by Mr. Braun because they were approved by the banks in light of Mr. Braun’s extensive credit history with them, which led OGC to conclude that there was at least a de facto personal guarantee of the loans. While the Filer might ordinarily defer to OGC’s interpretation of the Commission’s regulations, this far-reaching interpretation—which apparently requires the Commission to guess what a commercial lender’s state of mind was—is not supported by (i) the universally understood definitions of “secured” or “guarantor,” (ii) the plain language of 11 C.F.R. § 116.11(a), which was adopted pursuant to the Administrative Procedures Act, or (iii) the detailed analysis contained in the FEC’s 2003 Explanation and Justification for this regulation.

Such regulations are adopted pursuant to the Administrative Procedures Act (“APA”) with the following purposes in mind:

- To require agencies to keep the public informed of their organization, procedures, and rules;
- To provide for public participation in the rulemaking process (e.g., through public commenting);
- To establish uniform standards for the conduct of formal rulemaking and adjudication; and
- To define the scope of judicial review.

The Commissioners’ adoption of OGC’s far-reaching position in this matter would seemingly violate the APA, as it requires the Commission to ignore the universally

understood definitions of “secured” and/or “guarantor,” as well as the plain language of 11 C.F.R. § 116.11(a), to create a new “de facto” category of secured loans that is based, at least in part, on speculation of the commercial lender’s intent. Furthermore, finding that the Filer violated the \$250,000 post-election loan-repayment limit because the Commission has introduced a new definition of “secured” or “guarantor” would certainly violate the Filer’s due process rights.

Therefore, for the foregoing reasons, the Filer is seeking the Commissioners’ consideration, pursuant to 76 Fed. Reg. 45798 (August 1, 2011), of whether the proceeds from Mr. Braun’s personal lines of credit, pursuant to the facts provided herein, constitute “personal loans” to Mike Braun for Indiana under 11 C.F.R. § 116.11(a).

2. Is the \$250,000 post-election loan-repayment limitation, which was codified by Congress in 52 U.S.C. § 30116(j) and interpreted by the Commission in 11 C.F.R. § 116.11, a constitutional and enforceable limitation given the U.S. Supreme Court’s precedential holdings and reasoning in *Davis v. Federal Election Commission*, *Citizens United v. Federal Election Commission*, and *McCutcheon v. Federal Election Commission*?

Alongside the so-called “Millionaire’s Amendment,” the \$250,000 post-election loan-repayment limitation was enacted through the Bipartisan Campaign Finance Reform Act of 2002 (“BCRA”) as means of limiting the influence of a candidate’s personal wealth in federal campaigns. Of course, the overarching aim of the Millionaire’s Amendment was flatly rejected by the U.S. Supreme Court in *Davis v. Fed. Election Comm’n*, 554 U.S. 724 (2008).

The Commission subsequently noted that the \$250,000 post-election loan-repayment limitation was not at issue in *Davis*, and it seemingly defended this provision on the basis that the restriction applies to all candidates. See FEC Advisory Opinion 2008-09 (Lautenberg). While the Commission is correct that the *Davis* Court was not presented with a direct question regarding the legality of the \$250,000 post-election loan-repayment limitation, the applicability of the Court’s reasoning still presents significant questions about the constitutionality of this provision. In fact, the undersigned counsel represents plaintiffs in a pending lawsuit, captioned *Cruz, et al. v. FEC*, challenging its constitutionality.

In its reasoning, the *Davis* Court noted that a statute significantly impeding the ability to use personal assets to pursue a political campaign severely burdens that individual’s exercise of First Amendment fundamental rights and must be justified by a compelling state interest. See *Davis* at 740, Footnote 8. Not only did the Millionaire’s Amendment not serve the anti-corruption interest first identified by the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court noted that encouraging candidates to use their own personal wealth may actually *reduce* the threat of actual or apparent quid-pro-quo corruption. *Davis*, 554 U.S. at 741.

In the wake of *Davis*, the Supreme Court has not wavered in its commitment to the underlying principles espoused in that decision. In *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 317-318 (2010), the Court again reiterated that additional burdens on the First

Amendment should not depend on a speaker's personal wealth. The Court invalidated differential treatment of corporations as impossible to affirm under the weight of the First Amendment. Instead, as the Court later noted in *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 190 (2014), the disclosure requirements of BCRA represented a far less burdensome protection of the integrity of federal elections.

Despite the Commission's best efforts to distinguish the \$250,000 post-election loan-repayment limitation from the Millionaire's Amendment, the provisions of 11 C.F.R. § 116.11 are akin to the framework rejected by the Supreme Court because they both create a statutorily imposed choice for a candidate seeking to exercise their First Amendment right. And despite the Commission's argument that the \$250,000 post-election loan-repayment limitation does not differentiate, the fact remains that the limitation does not apply to authorized campaign committees that obtain commercial loans.

Therefore, for the foregoing reasons, the Filer is seeking the Commissioners' consideration, pursuant to 76 Fed. Reg. 45798 (August 1, 2011), of whether the \$250,000 post-election loan-repayment limitation, which was codified by Congress in 52 U.S.C. § 30116(j) and interpreted by the Commission in 11 C.F.R. § 116.11, is a constitutional and enforceable limitation given the U.S. Supreme Court's precedential holdings and reasoning in *Davis v. Federal Election Commission*, *Citizens United v. Federal Election Commission*, and *McCutcheon v. Federal Election Commission*.

CONCLUSION

Thank you in advance for your consideration of these questions of law, which are being submitted pursuant to the Commission's Permanent Program for Requesting Consideration of Legal Questions, and for your clarification and guidance based on the facts presented.

Sincerely,



Chris K. Gober
Counsel to Mike Braun, Braun for Indiana and
Travis Kabrick, in his official capacity as Treasurer