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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

MEMORANDUM

TO: The Commission

May 23, 2019

FROM: Neven Stipanovic *NFS*
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Policy Division

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SUBJECT: Request for Consideration of Legal Questions submitted by Mike Braun for Indiana (LRA 1096)

Mike Braun for Indiana, the principal campaign committee of Senator Mike Braun, (“Committee”), filed a Request for Consideration of Legal Questions addressing a determination by the Reports Analysis Division that the Committee may not repay Braun’s loans exceeding \$250,000 more than 20 days after the primary election.¹ Attachment. We recommend that the Commission should similarly conclude here that the Committee may not repay Braun in excess of \$250,000 more than 20 days after an election because the loans were Braun’s personal loans.

The Committee disclosed Braun as the source of \$4,584,800 in loans to the Committee and reported that Braun had borrowed those funds from three commercial lending institutions

¹ The Reports Analysis Division’s determination was based on informal advice from the Office of General Counsel. The Committee subsequently submitted this request according to a Commission policy that allows persons and entities to have a legal question considered by the Commission in the report review process and the audit process. See Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 81 Fed. Reg. 29861 (May 13, 2016). At least two Commissioners agreed to consider this request as required by this policy. *Id.*

based on his credit worthiness and net worth. The Committee repaid Braun \$1,064,639, but it did so more than 20 days after the primary election.

The Committee contends that the repayment was permissible because Braun used proceeds from personal lines of credit that did not require a security interest or a guarantor. Thus, according to the Committee, the line of credit proceeds were not Braun's "personal loans" under 11 C.F.R. § 116.11(a). *Id.* The Committee also contends that the statutory and regulatory requirement that committees must repay candidates exceeding \$250,000 within 20 days of an election is unconstitutional because the requirements significantly impede a candidate's ability to use personal assets to pursue a political campaign and severely burden a candidate's First Amendment rights. Attachment at 5.² As described below, the Commission should reject both of these arguments.

I. THE COMMISSION SHOULD CONCLUDE THAT THE LOANS ARE BRAUN'S "PERSONAL LOANS" AND THUS ARE SUBJECT TO THE REPAYMENT PROVISIONS AT 11 C.F.R. 116.11(a)

The Federal Election Campaign Act of 1971, as amended ("FECA"), prohibits an authorized committee from using contributions made after the date of the election to repay any amount of a candidate's personal loan over \$250,000. 52 U.S.C. § 30116(j). Commission regulations further provide that authorized committees must repay personal loans of a candidate that exceed \$250,000 within 20 days of the election. 11 C.F.R. § 116.11(c)(1). A personal loan includes "advances, made by a candidate, using personal funds, as defined in 11 C.F.R. § 100.33," and loans that are "endorsed or guaranteed by the candidate or that are secured by the candidate's personal funds." *Id.* The Commission explained that "[t]his 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 C.F.R. § 116.11." 68 Fed. Reg. 3970, 3973 (Jan. 27, 2003). Thus, a bank loan for which the candidate is "personally liable" would be a "personal loan" for purposes of this regulation.

The Committee acknowledges that Braun was "the borrower" on the loans, *see* Attachment at 4, and the Committee reported that the basis on which the loans were made and "on which it assures repayment" was Braun's own credit worthiness and net worth. Mike Braun for Indiana, July 2018 Quarterly, Schedule C-1. These facts demonstrate that Braun was personally liable for their repayment.

² Commission policy allows OGC to seek informal resolution of requests for legal consideration "in situations where the information related to or generated in the request reveals information that could potentially result in the informal resolution of the matter, without using additional Commission resources to submit the request formally through the entire Program." *See* Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 81 Fed. Reg. 29861 (May 13, 2016). Because the Committee challenges the constitutionality of the candidate loan repayment requirements, no new information is likely to be revealed. OGC accordingly has declined to seek an informal resolution with the Committee.

The Committee argues that Braun did not endorse, guarantee, or secure those lines of credit.³ Attachment at 4. More specifically, in arguing that Braun did not guarantee the loans, the Committee relies on a business dictionary definition of a “guarantor” that implies liability of a person in a three-party agreement. *Id.* Commission regulation 11 C.F.R. § 116.11, however, applies specifically to loans “guaranteed by the candidate.” A “guarantee” is defined in Black’s Law Dictionary simply as “[t]he assurance that a contract or legal act will be duly carried out.” *Guarantee*, BLACK’S LAW DICTIONARY (9th ed. 2009). Here, the loans were reportedly obtained on the basis of assurances provided by Braun that the contractual obligation to repay the loans will be duly carried out. On the basis of these assurances, Braun was personally liable for the loans.

Because Braun was personally liable for the loans, the Commission should treat the loans as “personal loans” of the candidate under 11 C.F.R. § 116.11. As such, the Commission should also conclude that the Committee may not repay Braun in excess of \$250,000 more than 20 days after the primary election.

II. THE COMMISSION SHOULD REJECT THE COMMITTEE’S ARGUMENT THAT THE LOAN REPAYMENT REQUIREMENTS ARE UNCONSTITUTIONAL

The Committee asks the Commission to determine whether the candidate loan repayment requirements at 52 U.S.C. § 30116(j) and 11 C.F.R. § 116.11 are constitutional and enforceable given the U.S. Supreme Court’s holdings and reasoning in *Davis v. Federal Election Commission*, 554 U.S. 724 (2008). Attachment at 1. The Committee contends that the statute and Commission regulation are unconstitutional and unenforceable because, in their view, they significantly restrict Braun’s use of his personal assets in support of his campaign and thus impose a severe burden on his First Amendment rights. *Id.* at 5. The Committee argues that *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), supports its contentions

³ The Committee suggests that a candidate’s personal line of credit with a commercial lender is not subject to section 116.11 because such lines of credit are not “personal funds” of a candidate as defined in 11 C.F.R. § 100.33. See Attachment at 2 (citing to the Audit Division Recommendation Memorandum on Ted Cruz for Senate (2012) (“Cruz Audit”). Section 116.11, however, defines “personal loans” more broadly to include advances using candidate’s “personal funds” under section 100.33 and loans “that are endorsed or guaranteed by the candidate or that are secured by the candidate’s personal funds.” The Committee’s reliance on the Cruz Audit on this point is misguided. That audit considered how candidate loans must be reported under 11 C.F.R. § 104.3(d), and concluded that the personal line of credit should be reported separately from other “personal funds.” See Final Audit Report of the Commission on Ted Cruz for Senate (Jun. 22. 2017). The Commission, however, did not conclude, as a legal matter, that the proceeds from the lines of credit could not be used as source for “personal loans” under 11 C.F.R. § 116.11(a). Indeed, the Commission found that the Cruz Committee failed to comply with 11 C.F.R. § 116.11(c) because it failed to convert the outstanding balance of the candidate’s personal loan to a contribution from the candidate although the original source of the candidate’s personal loan was proceeds from a line of credit. Final Audit Report of the Commission on Ted Cruz for Senate (Jun. 22. 2017); see Memorandum from Office of General Counsel to Audit Division on Resubmitted Draft Final Audit Report on Ted Cruz for Senate (January 17, 2017) (explaining that Senator Cruz’s line of credit could be a source for a personal loan under 11 C.F.R. § 116.11(a) as long as the candidate is personally liable for the line for credit); see also MUR 7455 (Cruz For Senate) (enforcement matter arising, in part, out of referral from audit report).

because the Supreme Court's holding reiterated that burdens on the First Amendment should not depend on the speaker's personal wealth and invalidated the differential treatment of corporations. *Id.* The Committee suggests that the integrity of federal elections could be maintained by adopting less burdensome disclosure requirements as noted in *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014).⁴ *Id.* at 6.

The Commission should reject the Committee's constitutional argument. The provision at 52 U.S.C. § 30116(j) is a duly enacted law of Congress and no court has undermined or otherwise questioned the legal validity of section 30116(j) or its application to issues presented here. In the absence of a court decision finding section 30116(j) unconstitutional, the Commission lacks the authority to make an administrative determination premised on an act of Congress being considered unconstitutional. *See Johnson v. Robinson*, 415 U.S. 361, 368 (1974) (adjudication of constitutionality is generally outside an administrative agency's authority); *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995) (noting, in the context of the Commission's administrative enforcement process, that "[i]t was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional"); Advisory Opinion 2018-07 (Mace) at 5. As the Commission has previously recognized in other contexts, "[b]ecause no court has invalidated the [statutory] limitation ... on constitutional grounds, we are required to give the [] provision [] full force." Advisory Opinion 2012-32 (Tea Party Leadership Fund *et al.*) at 3; *cf.* Advisory Opinion 2011-12 (Majority PAC *et al.*) at 4 (declining to interpret the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), as a basis for not applying statutory contribution limits that were not considered in that case).

The Committee inquires about the constitutionality of not only the statutory limitation on repayment of personal loans, but also the Commission's interpretation of it at 11 C.F.R. § 116.11. The Commission previously considered the issue and retained the regulation after concluding that *Davis* did not invalidate the personal loan provision. The Commission should reach a similar conclusion here. Section 116.11 was promulgated as part of rules implementing sections 304 and 319 of the Bipartisan Campaign Reform Act of 2002, known as the "Millionaires' Amendment." While *Davis v. Federal Election Commission* held that the Millionaires' Amendment was unconstitutional, the Commission concluded that 11 C.F.R. § 116.11 was not invalidated because the Court in *Davis* did not address the validity of the personal loan provision and because the provision has wider application than, and "can operate effectively without," the Millionaires' Amendment. *See* Repeal of Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates, 73 *Fed. Reg.* 79597, 79600 (Dec. 30, 2008); *see also* Advisory Opinion 2008-09 (Lautenberg) (concluding that section 116.11 applied to the proposed personal loan repayment because *Davis* did not address the constitutionality of 116.11). For the same reasons, the Commission should conclude that 11 C.F.R. § 116.11 remains constitutional and enforceable.

⁴ Similar contentions have been raised in *Cruz, et. al v. Federal Election Commission*, Civil Action No. 19-908 (U.S. District Court for the District of Columbia) (filed Apr. 1, 2019). We note that the litigation does not arise out of any determination or finding that the Commission made in the Ted Cruz for Senate Final Audit Report or MUR 7455.

III. RECOMMENDATIONS

We recommend that the Commission conclude that the Committee may not repay the Candidate in excess of \$250,000 more than 20 days after the primary election. We also recommend that the Commission reject the Committee's argument that the candidate loan repayment requirements are unconstitutional.

Attachment:

Request for Legal Consideration from Mike Braun for Indiana, *et. al*, dated April 23, 2019



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

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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