

1 **FEDERAL ELECTION COMMISSION**

2
3 **FIRST GENERAL COUNSEL'S REPORT**

4
5 MUR: 7390

6 DATE COMPLAINT FILED: 05/21/2018

7 DATE OF NOTIFICATION: 05/29/2018

8 LAST RESPONSE RECEIVED: 07/11/2018

9 DATE ACTIVATED: 10/26/2018

10
11 ELECTION CYCLE: 2016

12 EXPIRATION OF SOL: 06/27/2022 – 08/25/2022

13
14 **COMPLAINANT:**

Claudia Barber

15
16 **RESPONDENTS:**

Donald J. Trump

17 Make America Great Again PAC f/k/a Donald J.

18 Trump for President and Bradley T. Crate

19 in his official capacity as treasurer¹

20 Republican National Committee and Ronald C.

21 Kaufman in his official capacity as treasurer

22
23 **RELEVANT STATUTES**
24 **AND REGULATIONS:**

52 U.S.C. § 30114(b)

52 U.S.C. § 30116(a)(2)(A)

52 U.S.C. § 30116(a)(9)(C)

52 U.S.C. § 30116(f)

11 C.F.R. § 113.1(g)

11 C.F.R. § 113.2(e)

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31 **INTERNAL REPORTS CHECKED:**

Disclosure Reports

32
33 **FEDERAL AGENCIES CHECKED:**

None

34 **I. INTRODUCTION**

35 Make America Great Again PAC f/k/a Donald J. Trump for President and Bradley T.

36 Crate in his official capacity as treasurer (the “Trump Committee”) was the principal campaign

¹ Though identified in the Complaint as Donald J. Trump for President, after the 2020 election, the committee changed its name to Make America Great Again PAC. Trump Comm., Amend. Statement of Org. (Feb. 27, 2021).

1 committee for Donald J. Trump's 2016 and 2020 presidential campaigns.² The Complaint
2 alleges that the Trump Committee engaged in "misuse of campaign funds" by paying attorneys
3 to represent the Trump Committee and Trump's son, Donald Trump, Jr., in connection with the
4 Department of Justice ("DOJ") investigation into Russian interference with the 2016 election.³
5 The Complaint further alleges that the Republican National Committee and Ronald C. Kaufman
6 in his official capacity as treasurer ("RNC"), a national party committee, also engaged in misuse
7 of committee funds by paying attorneys who represented Trump and Trump Jr. in connection
8 with the Russia investigation. The Complaint cites to Maryland state law, asserting that
9 "campaign funds cannot be used for expenses arising from criminal investigations, or for any
10 expenses that arise after the campaign is over."⁴ Though the Complaint does not directly cite to
11 the Federal Election Campaign Act of 1971, as amended, (the "Act"), its factual substance raises
12 allegations concerning the conversion of campaign funds to personal use and the use of the
13 RNC's segregated fund to defray legal expenses for Trump and Trump Jr.

14 The responses submitted in this matter raise procedural arguments regarding the
15 sufficiency of the complaint and, with respect to the merits, argue that all of the payments were
16 permissible. The Trump Committee argues that the complaint fails to state facts that raise a
17 violation of the Act or Commission regulations.⁵ The RNC argues that its payments were
18 permissible under 52 U.S.C. § 30116(a)(9)(C), which governs the use of a separate segregated

² Trump Comm., Misc. Text (Form 99) (Jan. 20, 2017); Trump, Amend. Statement of Candidacy (July 29, 2016).

³ Compl. at 1-2 (May 21, 2018).

⁴ *Id.* ¶ 7; *see id.* at 2-3 (arguing that charges involving misconduct "are not campaign-related" and therefore any related payments should be "disallowed").

⁵ Trump Comm. Resp. (July 5, 2018).

1 account by national party committees to “defray expenses incurred with respect to the
2 preparation for and the conduct of election recounts and contests and other legal proceedings.”⁶

3 As discussed below, it appears that the Trump Committee was permitted to make the
4 payments for legal expenses relating to DOJ and Congressional investigations of Russian
5 election interference raised by the Complaint because these payments were for expenses that
6 would not exist irrespective of campaign activities and thus did not result in the conversion of
7 campaign funds to personal use. The RNC appears to have improperly used funds from its
8 segregated account to pay attorneys representing Trump and Trump Jr. in connection with the
9 Russia investigation. Nevertheless, we recommend that the Commission decline to pursue
10 enforcement for this violation — while applying the below analysis prospectively — because the
11 RNC’s use of its segregated account implicates novel and complex legal issues regarding
12 relatively-new statutory text for which the Commission has yet to provide guidance.

13 Therefore, we recommend that the Commission: (1) find no reason to believe that the
14 Trump Committee and Trump violated 52 U.S.C. § 30114(b) and 11 C.F.R. § 113.2(e) by
15 converting campaign funds to personal use; and (2) dismiss as a matter of prosecutorial
16 discretion the RNC’s apparent violation of 52 U.S.C. § 30116(f) by making improper
17 expenditures from its segregated account.

18 **II. FACTUAL BACKGROUND**

19 The payments at issue in this matter were reportedly for legal expenses incurred by the
20 Trump Committee, Trump, and Trump Jr. in connection with DOJ’s investigation into Russian
21 interference with the 2016 presidential election and related congressional investigations. The

⁶ RNC Resp. at 2 (July 11, 2018) (quoting 52 U.S.C. § 30116(a)(9)(C)).

1 order that outlines the scope of DOJ's investigation provides that "to ensure a full and thorough
2 investigation of the Russian government's efforts to interfere in the 2016 presidential election,"
3 the Special Counsel shall be appointed to investigate "any links and/or coordination between the
4 Russian government and individuals associated with the campaign of President Donald Trump"
5 as well as "any matters that arose or may arise directly from the investigation."⁷ The Complaint
6 attaches a *Reuters* article, dated September 19, 2017 ("Reuters article"), which states that the
7 Special Counsel extended the investigation beyond the 2016 campaign and into the issue of
8 whether Trump, as President, obstructed justice by firing former FBI Director James Comey,
9 among other things.⁸ In addition, several committees of the U.S. House of Representatives and
10 U.S. Senate examined similar activity to that examined by DOJ and sought interviews with or
11 documents from Trump and Trump Jr.⁹ The congressional and DOJ investigations explored,
12 among other activity, Trump and Trump Jr.'s involvement in a meeting with Russians on June 9,

⁷ Office of the Deputy Att'y Gen., Order No. 3915-2017: Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters ¶¶ (a), (b)(i)-(ii) (May 17, 2017), <https://www.justice.gov/archives/opa/press-release/file/967231/download> ("Special Counsel Order").

⁸ Karen Freifeld and Ginger Gibson, *Trump Using Campaign, RNC Funds to Pay Legal Bills From Russia Probe: Sources*, REUTERS (Sept. 19, 2017), <https://www.reuters.com/article/us-usa-trump-lawyers-exclusive/trump-using-campaign-rnc-funds-to-pay-legal-bills-from-russia-probe-sources-idUSKCN1BU2OS> ("Reuters Article"), Compl., Attach. On April 18, 2019, DOJ publicly released a redacted version of the Special Counsel's final report. Robert S. Mueller, III, Special Counsel, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* ("Special Counsel Report") (Mar. 2019), <https://www.justice.gov/storage/report.pdf>.

⁹ *See, e.g.*, U.S. SENATE SELECT COMM. ON INTELLIGENCE, RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION, VOL 5: COUNTERINTELLIGENCE THREATS AND VULNERABILITIES at 4 (Aug. 18, 2020) ("Senate Intelligence Comm. Report"), https://www.intelligence.senate.gov/sites/default/files/documents/report_volume5.pdf (explaining that the committee approached the activity with a counterintelligence, rather than criminal, focus); U.S. HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, RUSSIAN ACTIVE MEASURES (Mar. 22, 2018) ("House Intelligence Comm. Report"), https://docs.house.gov/meetings/IG/IG00/20180322/108023/HRPT-115-1_1-p1-U3.pdf; Minority Members of the House Permanent Select Comm. on Intelligence, MINORITY VIEWS TO THE MAJORITY-PRODUCED "REPORT ON RUSSIAN ACTIVE MEASURES" (Mar. 26, 2018), <https://intelligence.house.gov/uploadedfiles/minorityviews.pdf>; Letter from Elijah Cummings, Ranking Member, U.S. House Comm. on Oversight and Gov't Reform, to Donald J. Trump, Jr., *et al.* (July 11, 2017), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2017-07-11.EEC%20to%20Donald%20Jr%20et%20al_0.pdf.

1 2016, at Trump Tower in order to obtain negative information on Trump's election opponent
2 Hillary Clinton.¹⁰ As discussed below, costs paid for by the Trump Committee and the RNC in
3 connection with representing Trump and Trump Jr. in these congressional investigations are also
4 raised by the Complaint in this matter.

5 **A. Trump Campaign Payments**

6 According to the Reuters article, as of September 2017, the Trump Committee had paid
7 \$4 million to the Jones Day law firm, "mostly for routine campaign legal expenses," but also for
8 responding to "Russia-related inquiries on behalf of the campaign by, for example, providing
9 documents to Congress," according to "people familiar with the matter."¹¹ The Complaint also
10 points to a \$50,000 payment the Trump Committee reported making on June 27, 2017, to the
11 Law Offices of Alan S. Futerfas, an attorney reportedly representing Trump Jr. in connection
12 with the Russia-related investigations.¹² The Trump Committee reported additional payments to
13 Futerfas on July 14, 2017 (\$89,259), and August 2, 2017 (\$148,665), that are not specifically
14 referenced by the Complaint or the Reuters article.¹³ Publicly available transcripts show that
15 Futerfas appeared as counsel for Trump Jr. at his interviews with the Senate Judiciary Committee

¹⁰ Senate Intelligence Comm. Report at 322-371; House Intelligence Comm. Report Volume I at 79-83; Special Counsel Report Volume I at 110-123.

¹¹ Compl. ¶ 5; Reuters Article. The Trump Committee reported that between the Special Counsel's appointment and the end of 2018, it paid Jones Day approximately \$4 million for "Legal Consulting." Trump Comm. Disbursements, https://www.fec.gov/data/disbursements/?committee_id=C00580100&data_type=processed&recipient_name=jones+day&min_date=05%2F17%2F2017&max_date=12%2F31%2F2018.

¹² Compl. ¶ 8; Reuters Article; Trump Comm. Amend. 2017 July Quarterly Rpt. at 4,341 (July 15, 2018) (for "Legal Consulting").

¹³ Trump Comm. Amend. 2017 Oct. Quarterly Rpt. at 10,817 (Dec. 11, 2017) (for "Legal Consulting").

1 and the House Intelligence Committee in those committees' 2017 investigations of Russian
2 interference with the 2016 election.¹⁴

3 **B. RNC Payments**

4 The Complaint also cites to and relies upon the Reuters article regarding a set of
5 payments by the RNC to attorneys reportedly serving as counsel for Trump in connection with
6 the Russia investigations. On August 25, 2017, the RNC reportedly paid \$100,000 to John
7 Dowd and \$131,250 to The Constitutional Litigation & Advocacy Group, P.C., identified by the
8 article as the law firm where Jay Sekulow is a partner.¹⁵ Various news reports indicate that
9 Dowd and Sekulow represented Trump in connection with DOJ's Russia investigation.¹⁶
10 Further, according to news reports, the RNC also made payments to attorneys reportedly serving
11 as counsel for Trump Jr. in connection with the Russia investigations. On September 18, 2017,
12 the RNC reported paying \$166,526.50 to Alan S. Futerfas and \$30,102.90 to the law firm
13 Williams & Jensen.¹⁷ As described above, Futerfas appeared on behalf of Trump Jr. at his

¹⁴ Trans. of Interview with Trump Jr. by H. Intelligence Comm. at 3 (Dec. 6, 2017), <https://intelligence.house.gov/uploadedfiles/dt55.pdf>; Trans. of Interview with Trump Jr. by S. Judiciary Comm. at 3:9 (Sept. 7, 2017), https://www.judiciary.senate.gov/imo/media/doc/Trump%20Jr%20Transcript_redacted.pdf.

¹⁵ Compl. ¶¶ 2-3; Reuters Article (reporting that these RNC payments covered “some of Trump’s legal fees related to the probe” of “alleged Russian interference in the U.S. election”); RNC Amend. 2017 Sept. Monthly Rpt. at 6,172 (Dec. 29, 2017).

¹⁶ *E.g.*, Rosalind S. Helderman, *In Secret Memo, Trump’s Lawyers Argued He Has Complete Power over Justice Investigations and Could not Have Committed Obstruction*, WASH. POST (June 2, 2018), https://www.washingtonpost.com/politics/in-secret-memo-trumps-lawyers-argued-he-has-complete-power-over-justice-investigations-and-could-not-have-committed-obstruction/2018/06/02/f609dc4a-6697-11e8-a768-ed043e33f1dc_story.html; Michael S. Schmidt and Maggie Haberman, *Trump’s Lawyer Resigns as President Adopts Aggressive Approach in Russia Inquiry*, N.Y. TIMES (Mar. 22, 2018), <https://www.nytimes.com/2018/03/22/us/politics/john-dowd-resigns-trump-lawyer.html>.

¹⁷ RNC Amend. 2017 Oct. Monthly Rpt. at 12,280 (Nov. 20, 2017); Jeremy Diamond, *RNC Covering More than \$230,000 in Trump Legal Fees*, CNN (Sept. 19, 2017), <https://www.cnn.com/2017/09/19/politics/donald-trump-legal-fees-rnc/index.html> (reporting that these payments were for “Trump Jr.’s legal bills related to the Russia investigation”) (“CNN Article”). The CNN article followed up on initial reporting by *Reuters* and is directly referenced by the second *Reuters* article attached to the Complaint. *Reuters* Article.

1 interview with the Senate Judiciary and House Intelligence Committees on matters related to
2 Russian interference with the 2016 election. Karina Lynch of Williams & Jensen also appeared
3 on behalf of Trump Jr. before both committees.¹⁸

4 The RNC reported each of the disbursements to Dowd, The Constitutional Litigation &
5 Advocacy Group, Futerfas, and Williams & Jensen, allegedly on behalf of Trump and Trump Jr.,
6 as expenditures for “Legal and Compliance Services” coming from the RNC’s “Legal
7 Proceedings Account.”¹⁹ The RNC did not report the disbursements as coordinated party
8 expenditures, nor did the Trump Committee report the transactions on its own FEC reports as in-
9 kind contributions.

10 C. The Complaint and Responses

11 Based on the reporting in the Reuters news article it attaches, the Complaint alleges that
12 the foregoing use of campaign funds for legal fees was improper. The Complaint contends that,
13 under Maryland law, “investigations or charges involving misconduct are NOT campaign-
14 related, even if the charges first come to light as a result of the individual’s decision to run for
15 elected office,” and argues that “[t]hese campaign expenditures should be disallowed and a
16 notice given to these political campaigns that if the monies are not reimbursed, the cases will be
17 referred to state prosecutors and federal prosecutors.”²⁰

18 The Trump Committee and the RNC each filed responses. The Trump Committee’s one-
19 paragraph Response argues that the Complaint should be dismissed because its reliance on

¹⁸ Trans. of Interview with Trump Jr. by H. Intelligence Comm. at 4; Trans. of Interview with Trump Jr. by S. Judiciary Comm. at 3:10.

¹⁹ RNC Amend. 2017 Sept. Monthly Rpt. at 6,172 (Dec. 29, 2017) (John Dowd and the Constitutional Litigation & Advocacy Group); RNC Amend. 2017 Oct. Monthly Rpt. at 12,280 (Nov. 20, 2017) (Futerfas).

²⁰ Compl. at 2-3.

1 Maryland state law is misguided and “fails to recognize that the Committee operates under
2 federal law and that the Doctrine of Preemption applies.”²¹ The RNC’s Response argues that the
3 Complaint should be dismissed because it is only partially sworn²² and, similar to the Trump
4 Committee, argues that the Complaint’s reliance on state law makes it deficient.²³ As to the
5 merits of the RNC’s use of funds from its segregated account, the RNC argues that “the
6 Commission repeatedly has approved the use of campaign funds to pay legal fees incurred in
7 connection with” investigations by law enforcement and grand jury investigations, as well as
8 “legal proceedings arising out of such investigations, where the allegations relate to the
9 candidate’s campaign or duties as a federal officeholder, and where the legal fees would not have
10 been incurred but for the candidate’s campaign or duties as a federal officeholder.”²⁴ Because
11 the legal fees at issue arose out of an investigation, the RNC argues that no violation occurred
12 and the Complaint should be dismissed.²⁵

13 **III. LEGAL ANALYSIS**

14 **A. The Commission Should Find No Reason to Believe that Trump or the** 15 **Trump Committee Converted Campaign Funds to Personal Use by Paying** 16 **the Identified Legal Expenses**

17 Candidates and their authorized committees are permitted to use campaign funds for a
18 variety of specific purposes, including otherwise-authorized expenditures in connection with the

²¹ Trump Comm. Resp. at 1.

²² RNC Resp. at 1. With respect to the RNC’s argument that unsworn legal analysis in the Complaint should not be considered, for the purposes of the analysis and recommendations below, this report considers only the sworn numbered paragraphs setting forth the factual basis for the Complaint, as well as the attached news article, which contain sufficient factual allegations upon which to analyze the potential violations at issue.

²³ *Id.* at 1-2.

²⁴ *Id.* at 2 (citing Commission advisory opinions).

²⁵ *Id.*

1 candidate's campaign for federal office, ordinary and necessary expenses incurred in connection
2 with the duties of a federal officeholder, and "any other lawful purpose," but the Act prohibits
3 any person from converting campaign funds to "personal use."²⁶ Conversion to personal use
4 occurs when campaign funds are used to fulfill any commitment, obligation, or expense of any
5 person "that would exist irrespective of the candidate's election campaign or individual's duties
6 as a holder of Federal office."²⁷ The Act and Commission regulations provide a non-exhaustive
7 list of uses of campaign funds that are *per se* personal use, including rent, home mortgage,
8 household food items, and tuition.²⁸ For other uses of campaign funds, including payments for
9 legal expenses, the Commission determines on a "case-by-case basis" whether the use is a
10 prohibited personal use, that is, whether the expenses would exist irrespective of the candidate's
11 campaign or federal officeholder duties.²⁹

12 The Commission has explained that "campaign funds may be used to pay for legal
13 expenses incurred in proceedings that directly relate to the candidate's campaign activities or
14 officeholder duties."³⁰ Legal fees and expenses, however, "will not be treated as though they
15 are campaign or officeholder related merely because the underlying proceedings have some
16 impact on the campaign or the officeholder's status."³¹ In a number of advisory opinions, the

²⁶ 52 U.S.C. § 30114(a)-(b); 11 C.F.R. §§ 113.1(g), 113.2; *see also* Expenditures; Reports by Political Committees; Personal Use of Campaign Funds ("Personal Use E&J"), 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995) (explaining that "candidates have wide discretion over the use of campaign funds").

²⁷ 52 U.S.C. § 30114(b)(2); *see* 11 C.F.R. § 113.1(g).

²⁸ 52 U.S.C. § 30114(b)(2)(A)-(I); 11 C.F.R. § 113.1(g)(1)(i)(A)-(J).

²⁹ 11 C.F.R. § 113.1(g)(1)(ii)(A); Advisory Op. 2018-09 (Clements) at 2-3 ("AO 2018-09").

³⁰ AO 2018-09 at 3 (quoting Advisory Op. 2013-11 (Citizens for Joe Miller) at 3 ("AO 2013-11")).

³¹ Personal Use E&J, 60 Fed. Reg. at 7868; *see also* *FEC v. Craig for US Senate*, 933 F. Supp. 2d 111, 119 (D.D.C. 2013) (finding that the Commission plausibly alleged that legal expenses related to "actions undertaken in

1 Commission has addressed legal fees incurred in criminal and congressional investigations and
2 concluded that the use of campaign funds for such legal fees and expenses does not constitute
3 personal use when the legal proceedings involve allegations directly relating to the candidate's
4 campaign activities or duties as a Federal officeholder.³²

5 The Commission has recognized that legal proceedings involving political campaigns
6 “are often litigated after the election, and . . . has never barred the use of campaign funds . . . on
7 this temporal ground.”³³ The Commission has applied the same rule to the use of campaign
8 funds to pay for the legal expenses of campaign staff and consultants. For example, it has
9 approved using campaign funds to pay legal expenses of a campaign consultant defending a
10 lawsuit alleging that the consultant defamed a member of the opposing candidate's staff³⁴ as well
11 as the legal expenses of former congressional staffers in connection with a federal investigation
12 regarding campaign contributions.³⁵

13 To the extent that a portion of the Trump Committee's payments to Jones Day — the
14 committee's primary compliance law firm — and its \$50,000 payment to The Law Offices of
15 Alan S. Futerfas — the law firm representing Trump Jr. — were for representation of Trump or
16 Trump Jr. in connection with congressional and DOJ investigations as alleged in the Complaint,

the privacy and anonymity of a restroom stall” while traveling from home state to Washington, D.C., did not implicate defendant's officeholder duties).

³² See, e.g., Advisory Op. 2009-20 (Visclosky for Congress) (“AO 2009-20”); Advisory Op. 2009-12 (Coleman); Advisory Op. 2009-10 (Visclosky I); Advisory Op. 2008-07 (Vitter); Advisory Op. 2006-35 (Kolbe); Advisory Op. 2005-11 (Cunningham); Advisory Op. 2003-17 (Treffinger); Advisory Op. 1997-12 (Costello); *cf.* Advisory Op. 2000-40 (McDermott) at 4 (“AO 2000-40”).

³³ AO 2013-11 at 4.

³⁴ Advisory Op. 2011-07 (Fleischmann for Congress) at 2 (“AO 2011-07”).

³⁵ AO 2009-20 at 4.

1 it appears that such payments would not exist irrespective of Trump's 2016 presidential
2 campaign activity and Trump's duties as a federal officeholder.³⁶ Although we do not know the
3 exact scope of Jones Day's and Futerfas's representation of Trump and Trump Jr., respectively,
4 in the DOJ investigation, the main focus of the DOJ investigation, by its stated terms, concerned
5 alleged coordination between the Russian government and "individuals associated with the
6 *campaign* of President Donald Trump."³⁷ Congressional transcripts show that Futerfas
7 represented Trump Jr. in investigations concerning the meeting with Russians on June 9, 2016, at
8 Trump Tower in order to obtain negative information on Hillary Clinton.³⁸ The investigation of
9 this activity by both Congress and DOJ is similar to activity the Commission has considered in
10 Advisory Opinion 2000-40 (McDermott), in which the Commission concluded that use of
11 campaign funds for legal fees to defend a House member in a civil suit alleging illegal conduct
12 related to his role in the House Ethics Committee would not constitute personal use.³⁹

³⁶ To the extent the Complaint alleges that all of the Trump Committee's payments to Jones Day, including those for compliance with the Act, represent a conversion of campaign funds to personal use, such an allegation is speculative and unsupported. *See* Reuters Article (reporting that the \$4 million paid to Jones Day was "mostly" for campaign-related expenses such as ballot access disputes, vendor contracts, human resources, and compliance, but also for "Russia-related inquiries," though not specifying the amount of the Russia-related payments); Advisory Op. 1995-23 (Shays) (concluding that the payment of legal fees for compliance with the Act does not constitute personal use).

³⁷ Special Counsel Order (emphasis added). The Complaint does not allege with any specificity that the Trump Committee's payments to Jones Day concerned representation of Trump in connection with his officeholder duties, such as, for example, by representing Trump in DOJ's investigation of the firing of FBI Director James Comey. *See* Reuters Article (noting that Jones Day provided documents to Congress, not to DOJ); Special Counsel Report Volume II at 62-77. To the extent that the Trump Committee paid Jones Day for representing Trump in DOJ or congressional investigations into alleged abuse of his duties as a federal officeholder, such a payment would not constitute personal use. *See* AO 2000-40 (concluding that use of campaign funds for legal fees concerning alleged wrongdoing in the conducting of officeholder duties would be permissible because it would entail the use of campaign funds for an expense that would not exist irrespective of duties as a federal officeholder).

³⁸ *Supra* n.14; *see also* Trans. of Interview of Trump Jr. by S. Judiciary Comm. at 14, 21 (generally explaining Trump Jr.'s work for Trump's campaign).

³⁹ AO 2000-40 at 4-5 (concluding that donation of campaign funds to legal defense fund to defend civil suit concerning officeholder's alleged disclosure of phone call involving another congressman was permissible because such conduct "resulted directly" from activities relating to his position on the House Ethics Committee).

1 Accordingly, to the extent the legal fee payments were made to the attorneys representing
2 Trump and Trump Jr. in connection with congressional and DOJ investigations as alleged in the
3 Complaint, it appears that such payments directly related to investigations of campaign activity
4 and thus would not exist irrespective of the campaign.⁴⁰ We therefore recommend that the
5 Commission find no reason to believe that Trump or the Trump Committee violated 52 U.S.C.
6 § 30114(b) and 11 C.F.R. § 113.2(e) by converting campaign funds to personal use.⁴¹

7 **B. The Commission Should Dismiss, as a Matter of Prosecutorial Discretion, the**
8 **Allegation that the RNC Misused Funds in an Account Limited to Expenses**
9 **Concerning Election Recounts and Contests**

10 The Consolidated and Further Continuing Appropriations Act of 2015 amended the part
11 of the Act codified at 52 U.S.C. § 30116 to allow national party committees to create a
12 segregated account “to defray expenses incurred with respect to the preparation for and the
13 conduct of election recounts and contests and other legal proceedings.”⁴² Such accounts are in
14 addition to any other federal accounts maintained by a national party committee and are subject
15 to contribution limits equal to 300% of the otherwise-applicable contribution limit to national
16 party committees.⁴³ As relevant here, the question presented is whether the phrase “other legal
17 proceedings” includes the DOJ and related congressional investigations such that the RNC could

⁴⁰ *See, e.g.*, Interview of Trump Jr. by S. Judiciary Comm. at 14, 21 (Sept. 7, 2017) (generally explaining Trump Jr.’s work for Trump’s campaign). The Commission has approved the use of campaign funds to pay for legal expenses on behalf of individuals other than the candidate or officeholder relating to their work for the candidate or officeholder. *E.g.*, AO 2011-07 at 4 (campaign consultant); AO 2009-20 at 4 (current and former congressional staffers).

⁴¹ We note that, as a national party committee, the RNC is not subject to the personal use restrictions at 52 U.S.C. § 30114(b) and 11 C.F.R. § 113.2(e) because those restrictions apply only to candidate committees.

⁴² Pub. L. No. 113-235, 101, 128 Stat. 2130, 2772-73 (2014) (codified at 52 U.S.C. § 30116(a)(9)(C)). In addition, disbursements from such accounts are not subject to coordinated party expenditure limits. 52 U.S.C. § 30116(d)(5); *see also* 11 C.F.R. §§ 109.30, 109.32(a)(1).

⁴³ 52 U.S.C. § 30116(a)(1)(B), (2)(B).

1 permissibly spend funds from its segregated account established to defray costs of “election
2 recounts and contests and other legal proceedings” for legal fees incurred by Trump and Trump
3 Jr. as a result of those investigations. Based on Commission precedent and Congress’s 2015
4 amendments to section 30116, it appears that the phrase “other legal proceedings” does not
5 encompass such investigations, and thus that the RNC’s segregated account was improperly used
6 to pay for legal proceedings that were related to campaign activity. This, in turn, means that the
7 RNC apparently made improper expenditures from its segregated account in violation of
8 52 U.S.C. § 30116(f), which prohibits “political committee[s from] . . . knowingly . . . mak[ing]
9 any expenditure in violation of the provisions of this section.”⁴⁴ Nevertheless, because this is a
10 novel and complex issue involving a relatively new provision of the Act for which the
11 Commission has yet to issue guidance, we recommend that the Commission exercise
12 prosecutorial discretion and dismiss this allegation while applying this analysis prospectively.

13 The segregated account used by the RNC in this instance is rooted in the history of the
14 Commission’s interpretations of the Act, which Congress codified through the 2015 amendments
15 to section 30116. Since the 1970s, the Commission has recognized that recounts are not
16 themselves elections and funds received for them are not “contributions.”⁴⁵ In promulgating
17 these exemptions, the Commission explained that recounts and election contests “though they are

⁴⁴ 52 U.S.C. § 30116(f); *see id.* § 30101(9)(A)(i) (defining an expenditure as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office”).

⁴⁵ *See* 11 C.F.R. § 100.91 (“A gift, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election, is not a contribution except that the prohibitions of 11 CFR 110.20 and part 114 apply.”); *see also* Advisory Op. 1978-92 (Miller) at 2 (explaining that Commission regulations provide that “gifts, or loans or payments of money or anything of value that are made solely for the purpose of defraying the expenses of a Federal election recount are not contributions or expenditures under the Act and Commission regulations” and are therefore not subject to the contribution limits).

1 related to elections, are not Federal elections as defined by the Act.”⁴⁶ After the enactment of the
2 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (“BCRA”),
3 the Commission concluded that the prohibition on the use of non-federal funds by national
4 parties, federal candidates, and officeholders “in connection with” an election for federal office
5 “applies to funds raised or spent on recounts of Federal elections.”⁴⁷ However, the Commission
6 explained, because BCRA “does not convert the donations into ‘contributions’ . . . , donations to
7 a Federal candidate’s recount fund will not be aggregated with contributions from those persons
8 to the Federal candidate for the general election.”⁴⁸ In a series of advisory opinions, the
9 Commission further explained that a national party committee “may establish a recount fund,
10 separate from its other accounts and subject to a separate limit on amounts received, and use that
11 fund to pay expenses incurred in connection with recounts and election contests of Federal
12 elections.”⁴⁹ The Commission made clear that funds in such recount accounts cannot “be used
13 for campaign activities” and that “recount activities paid for by the recount fund must have no
14 relation to campaign activities.”⁵⁰

⁴⁶ 1977 Amendments to Federal Election Campaign Act of 1971, H.R. Doc. No. 95-44, at 40 (Jan. 12, 1977). As a result, “the Act’s [then-existent] prohibitions on corporations, labor organizations, national banks, and foreign nationals making contributions or donations ‘in connection with’ Federal elections” still applied. Advisory Op. 2006-24 (Republican and Democratic Senatorial Committees) at 5 (“AO 2006-24”).

⁴⁷ AO 2006-24 at 5-6.

⁴⁸ *Id.* at 6.

⁴⁹ Advisory Op. 2009-04 (Franken/DSCC) at 2-3 (“AO 2009-04”) (citing Advisory Op. 2006-24 (National Republican Senatorial Committee and Democratic Senatorial Campaign Committee)).

⁵⁰ Advisory Op. 2010-14 (DSCC) at 3, 5 (citing AO 1978-92 (“[I]n view of the special treatment and exemption accorded funds received and spent for recount purposes, any resulting surplus of funds may not be used in any manner that would constitute a contribution or expenditure under the Act or regulations.”)). Thereafter, in one instance, the Commission further permitted national party committees to use funds in their recount accounts to pay for litigation seeking the disgorgement of primarily soft-money contributions that had been made prior to the enactment of BCRA. Advisory Op. 2011-03 (DSCC, RNC, NRCC, DCCC, and NRSC) at 3-4.

1 Statements by House and Senate leaders indicate that, in revising section 30116 in 2015,
2 Congress intended to codify these advisory opinions concerning the financing of recounts and
3 that the amendment is “not intended to modify Federal Election Commission precedent
4 permitting the raising and spending of funds by campaign or state or national party
5 committees.”⁵¹ Congressional leaders further explained that payments made from the “recount
6 and legal proceeding expenses [accounts] are not for the purpose of influencing Federal
7 elections.”⁵² Subsequent to the 2015 amendment, the Commission reaffirmed that funds raised
8 by a candidate to pay for recounts and “lawsuits directly related to the counting and recounting
9 of ballots” are subject to the Act’s limitations, prohibitions, and reporting requirements but are
10 not aggregated with contributions for the general election and “must have no relation to
11 campaign activities” and “may not be used in any manner that would constitute a contribution or
12 expenditure under the Act or regulations.”⁵³

13 As revised by Congress in 2015, section 30116 allows national party committees to create
14 a segregated account to defray expenses incurred with respect to “the preparation for and the
15 conduct of election recounts and contests and other legal proceedings.”⁵⁴ Because the payments
16 for legal fees at issue were not for the conduct of election recounts or contests, they could be
17 permissible only if they were for “other legal proceedings.” Although the Commission has not
18 adopted implementing regulations for this provision, canons of statutory construction, the
19 legislative history, and the Commission’s longstanding interpretation of the scope of similar

⁵¹ See 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner) (citing AO 2006-24 and AO 2009-04); 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid) (same).

⁵² 160 Cong. Rec. H9286; 160 Cong. Rec. S6814.

⁵³ Advisory Op. 2019-02 (Nelson) at 2-3 (“AO 2019-02”).

⁵⁴ 52 U.S.C. § 30116(a)(9)(C).

1 funds and accounts indicate that the legal fees at issue in this matter were not for “other legal
2 proceedings” as that phrase is used in section 30116.

3 Applying bedrock canons of statutory construction, by its plain meaning, the phrase
4 “other legal proceedings” is limited by the more specific terms that precede it, namely “election
5 recounts and contests.” Under the canon of *ejusdem generis*, where, as here, “a general term
6 follows a specific one, the general term should be understood as a reference to subjects akin to
7 the one with specific enumeration.”⁵⁵ This statutory interpretation principle ensures that “a
8 general word will not render specific words meaningless.”⁵⁶ Applying the principle here, the
9 phrase “other legal proceedings” in section 30116, in the context of the words it follows, means
10 legal proceedings that, like the specifically enumerated “election recounts and contests,” are not
11 related to campaign activities.⁵⁷ Moreover, if “other legal proceedings,” were interpreted to
12 include the full breadth of all possible legal proceedings, it would render the inclusion of
13 “election . . . contests” superfluous because election contests are a type of legal proceeding.⁵⁸

⁵⁵ *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991); *accord Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-16 (2001) (applying *ejusdem generis* to determine scope of an exemption clause in the Federal Arbitration Act); *see also Deal v. United States*, 508 U.S. 129, 132 (1993) (opining that “the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used”).

⁵⁶ *United States v. Mackay*, 757 F.3d 195, 197 (5th Cir. 2014) (quoting *CSX Transp. Inc. v. Ala. Dep’t of Revenue*, 562 U.S. 277, 295 (2011)).

⁵⁷ *Id.* at 197 (“The words ‘other’ or ‘any other’ following an enumeration of particular classes ought to be read as ‘other such like’ and to include only those of like kind or character.”) (quoting *In re Bush Terminal Co.*, 93 F.2d 659, 660 (2d Cir. 1938)) (internal quotation marks removed). The Supreme Court addressed similar statutory language in *Washington Department of Social & Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003). There, the Court evaluated a provision of the Social Security Act that protects social security payments from “execution, levy, attachment, garnishment, or other legal process.” *Id.* at 382. Applying the statutory interpretation canon of *ejusdem generis* — as well as the related canon of *noscitur a sociis*, meaning that words are known “by their companions” — the Court unanimously held that the term “other legal process” did not mean *any* legal process but only a “process much like the processes of execution, levy, attachment, and garnishment.” *Id.* at 384-85.

⁵⁸ *See* 26 Am. Jur. 2d Elections § 381 (2d Ed. 2019) (defining “election contest” as a “suit in which the validity of an election . . . is made the subject matter of litigation” or “a special proceeding . . . to provide a remedy

1 Legislative history regarding the establishment of these segregated accounts, discussed
2 above, further supports this understanding of “other legal proceedings.”⁵⁹ The inclusion of that
3 phrase in the statute dovetails with the language in AO 2006-24, specifically cited in the
4 legislative history, which describes the acceptable use of recount funds as including expenses
5 relating to recounts and election contests, as well as for expenses relating to “*post-election*
6 *litigation*” and “*administrative-proceeding expenses* concerning the casting and counting of
7 ballots during the Federal election,” among other things.⁶⁰ And the same legislative history
8 affirmed that funds from these segregated accounts were not to be used “for the purpose of
9 influencing Federal elections.”⁶¹

10 Here, it appears to be undisputed that the RNC used its segregated account for election
11 recounts and contests and other legal proceedings to make the payments at issue. The payments
12 were itemized on the RNC’s FEC reports with “Legal and Compliance Services” listed as the
13 purpose and “Legal Proceedings Account” listed on the memo line.⁶² Moreover, the Response

for elections tainted by fraud, illegality, or other irregularity”); *see also, e.g., Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (statutes should be read to avoid rendering portions superfluous) (overruled in part on other grounds).

⁵⁹ 160 Cong. Rec. H9286; 160 Cong. Rec. S6814.

⁶⁰ AO 2006-24 at 2-3 (emphasis added); *see also* AO 2009-04 at 2-3 (permitting a committee to “establish a recount fund, separate from its other accounts and subject to a separate limit on amounts received, and use that fund to pay expenses incurred in connection with recounts and election contests of Federal elections”).

⁶¹ 160 Cong. Rec. H9286; 160 Cong. Rec. S6814.

⁶² The Commission released interim reporting guidance indicating that national party committees “should identify these disbursements by entering ‘Recount Account’ in the Purpose of Disbursement field along with the required purpose of the disbursement (*e.g.*, ‘Recount Account – Legal Services’).” Press Release, FEC, *FEC Issues Interim Reporting Guidance for National Party Committee Account* (Feb. 13, 2015). The RNC’s reporting of the challenged payments does not directly match the phrasing presented in the interim guidance, but “Legal Proceedings Account” clearly refers to the RNC account for “election recounts and contests and other legal proceedings,” as opposed to its separate accounts for conventions or headquarter buildings. *See* 52 U.S.C. § 30116(a)(9)(A)-(B) (detailing the two other segregated accounts).

1 filed by the RNC acknowledges that the payments were made from the committee's account for
2 election recounts and contests and other legal proceedings.⁶³

3 The purpose of the payments, according to the available information, however, was
4 related to campaign activities. News reports and other official documents show that the law
5 firms and attorneys in question were paid from the RNC's segregated account for representation
6 of Trump and Trump Jr. in connection with the DOJ and congressional Russia investigations.⁶⁴
7 Furthermore, there is nothing to suggest that, with respect to the payments at issue, either Trump
8 or Trump Jr. were involved in an election recount, contest, or other such proceeding with "no
9 relation to campaign activities."⁶⁵ The Responses do not dispute that the payments were for
10 Trump's and Trump Jr.'s personal attorneys or that the proceedings at issue related to the Russia
11 investigations.⁶⁶ In fact, the RNC argues that it was permitted to pay the legal expenses under
12 the Commission's long history of advisory opinions permitting the payment of legal fees that
13 "would not have been incurred but for the candidate's campaign or duties as a federal
14 officeholder," appearing to concede that the payments were related to campaign activities.⁶⁷

⁶³ See RNC Resp. at 2 (arguing that the payments were legally permitted under 52 U.S.C. § 30116(a)(9)(C)).

⁶⁴ An RNC spokesperson "confirmed" the payments to Dowd and the Constitutional Litigation and Advocacy Group were to Trump's attorneys. Reuters Article. Additionally, "two RNC officials" stated that the payments to Futerfas and Williams & Jensen were to Trump Jr.'s attorneys. CNN Article; *see also supra* nn.35-37 and accompanying text.

⁶⁵ AO 2019-02; *see also* AO 2006-24.

⁶⁶ The RNC argues that the payments were permissible under the "other legal proceedings" language of section 30116(a)(9)(C). RNC Resp. at 2.

⁶⁷ *Id.* (citing several personal use advisory opinions, none of which involve funds from the segregated account established by section 30116(a)(9)(C) or funds otherwise designated for recount purposes). The RNC, as a national party committee rather than a candidate committee, is not subject to the personal use restrictions at 52 U.S.C. § 30114(b) that were analyzed in the advisory opinions it cites and that are discussed in further detail above with respect to the Trump Committee's legal fee payments.

1 Because the RNC apparently used a segregated account limited to expenses concerning
2 election recounts and contests and other legal proceedings unrelated to campaign activities to
3 make payments that did in fact relate to campaign activities, it appears to have made prohibited
4 expenditures.⁶⁸ Nonetheless, the above analysis is complex, and the Commission has yet to
5 provide guidance to the regulated community regarding the scope of “legal proceedings” that
6 may be paid for from such a segregated account. We therefore recommend that the Commission
7 dismiss the allegations in the present matter as a matter of prosecutorial discretion⁶⁹ and enforce
8 the limited scope of permissible legal proceedings discussed above only prospectively.
9 Accordingly, we recommend the Commission dismiss the allegations that the RNC violated
10 52 U.S.C. § 30116(f).⁷⁰

11 **IV. RECOMMENDATIONS**

- 12 1. Find no reason to believe that Make America Great Again PAC f/k/a Donald J.
13 Trump for President and Bradley T. Crate in his official capacity as treasurer and
14 Donald J. Trump violated 52 U.S.C. § 30114(b) and 11 C.F.R. § 113.2(e) by
15 converting campaign funds to personal use;
- 16 2. Dismiss the allegation that the Republican National Committee and Ronald C.
17 Kaufman in his official capacity as treasurer made prohibited expenditures in
18 violation of 52 U.S.C. § 30116(f);
- 19 3. Approve the attached Factual and Legal Analyses;

⁶⁸ See Factual and Legal Analysis at 21-22, MUR 3774 (National Republican Senatorial Committee) (finding that party committee had violated statutory provision now listed at 52 U.S.C. § 30116(f) by making expenditures in violation of the Act).

⁶⁹ See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

⁷⁰ The RNC’s use of its segregated account to pay the legal fees also raises the question of whether such payments constituted unreported excessive contributions from the RNC to the Trump Committee. While payments properly made from the segregated account are not subject to the limits on coordinated party expenditures, the Commission has not issued guidance as to the effect on payments *improperly* made from such accounts. See 52 U.S.C. § 30116(d)(5). Because we recommend dismissing the allegations that the RNC misused its segregated account in making these payments due to lack of notice, we do not address whether the RNC made excessive or unreported contributions through its payment of Trump and Trump Jr.’s legal expenses.


1 4. Approve the appropriate letters; and

2 5. Close the file.


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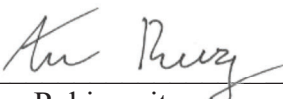
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