APPENDIX B

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August 29, 2019

BY HAND DELIVERY

The Honorable Theodore E. Deutch, Chairman
The Honorable Kenny Marchant, Ranking Member
Committee on Ethics
United States House of Representatives
Washington, DC 20515

Re: OCE Review No. 19-4114

Dear Chairman Deutch and Ranking Member Marchant:

By and through her counsel, Representative Rashida Tlaib submits this response to the Report and Findings of the Office of Congressional Ethics ("OCE") in Review No. 19-4114. Representative Tlaib respectfully requests the House Committee on Ethics (the "Committee") to dismiss the matter and take no further action.

I. INTRODUCTION

This matter is about two payroll checks Representative Tlaib received, before she became a Member, under a Federal Election Commission ("FEC") rule that allows non-incumbent candidates to receive salaries from their campaigns to replace lost income while running for office. Representative Tlaib is a single mother with limited means. When she ran for Congress for the first time in 2018, she had to curtail her work as a public interest attorney serving low income workers, while continuing to support her thirteen-year-old and seven-year-old sons. After consulting an election law attorney, and deliberating with her campaign advisors, she accepted a salary from her campaign committee, Rashida Tlaib for Congress (the "Campaign"). Representative Tlaib's total salary stayed well below the limit set by the FEC.

Soon after Representative Tlaib was sworn into Congress, OCE began an investigation into whether FEC rules permitted the Campaign's two final payments to Representative Tlaib, which were issued in November and December to make up for amounts unpaid before the date of the election. This investigation was unprecedented. The public record shows no other referral by OCE of conduct occurring entirely before the subject was even a Member. The Congresswoman cooperated with OCE's request for information, but raised jurisdictional and prudential concerns, which OCE refused to address.

The Committee should close Review No. 19-4114. OCE's recommendation of further investigation is plainly not merited. In its findings OCE admits that the salary payments fell within the FEC limit, acknowledges that the timing of the final two payments did not in itself violate FEC rules, and disregards evidence of Representative Tlaib's good faith compliance. If the OCE report and findings form an accepted basis to initiate an investigation, it would invite an

unprecedented use of the ethics process to litigate the innumerable routine FEC questions with which every campaign must deal.

Without evidence of bad faith noncompliance on the candidate's part, the Committee best serves the House by deferring to the agency that has the statutory responsibility and expertise to resolve technical issues of campaign finance law. This is particularly true in matters like this one, where the allegation hinges on a fact-specific interpretation of a seldom-applied regulation.

Because OCE's referral presents no violation of House Rules by Representative Tlaib, because the undisputed facts show her good-faith efforts to comply with the applicable law, and because the matter falls outside the jurisdiction of OCE, Representative Tlaib respectfully requests the Committee to dismiss the matter.

II. STATEMENT OF FACTS

The conduct at issue in this review occurred entirely in 2018, before Representative Tlaib became a Member of Congress serving Michigan's Thirteenth District. She was a first-time Federal candidate, and the mother of two young boys. Before she ran for Congress, she supported her family as a full-time employee at the Sugar Law Center for Economic & Social Justice ("Sugar Law Center") and received a community organizing fellowship. Once she began to run, she realized that the demands and schedule of a successful campaign would not permit her to keep a full-time job. Accordingly, she terminated her fellowship at the end of 2017, and on May 1, 2018, she cut her employment at the Sugar Law Center by 85 percent, reducing her total income to about $200 per week.

FEC regulations permit campaigns to pay limited salary to candidates who curtail outside employment to focus on their campaigns.[1] This rule was promulgated in recognition that "persons of average means need a salary in order to pay expenses while running for office."[2] Initially, Representative Tlaib did not seek to avail herself of this allowance. At the time she did not realize how quickly financial burdens would mount once she drastically reduced her income. On April 4, the Congresswoman emailed her campaign manager, Andrew Goddeeris, and consultant, Steve Tobocman, confessing that she was "struggling financially" and that between "rent and mortgage," she was "sinking."[3] Several weeks later, she told them: "I am just not going to make it through the campaign." As an emergency measure, she requested "$2,000 per two weeks . . . going toward much needed expenses due to campaigning that includes car maintenance, child care and other necessities."[4] In late April, Mr. Tobocman sought advice from the Campaign's counsel, Mark Brewer, who confirmed that a candidate could receive a salary under certain conditions, and referred the Campaign to the FEC Campaign Guide for Congressional Candidates and Committees.[5]

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[1] *See* 11 C.F.R. § 113.1(g)(1)(i)(I) (2018).
[2] 67 Fed. Reg. 76,962, 76,972 (Dec. 13, 2002).
[3] RT 000109 (OCE Exhibit 2). The citations here and below correspond to Bates numbers on documents produced to OCE.
[4] RT 000036 (OCE Exhibit 3).
[5] *Cf.* FEC Campaign Guide for Congressional Candidates and Committees 53-54 (2014), https://www.fec.gov/resources/cms-content/documents/candgui.pdf. Another consultant, Ryan Lomonaco, drafted an email outlining the rules, noting that, "If Rashida wins the primary election, payments can continue until the date

Having not yet decided whether to accept a salary, on May 7, Representative Tlaib informed campaign staff that she would have to substantially increase her work at the Sugar Law Center, curtailing her campaign activities until noon each day. She explained, "This is my livelihood. Doesn't just impact me, but my kids."[6] Mr. Goddeeris informed Representative Tlaib that under rules set out in the FEC Campaign Guide, she was allowed to receive about $7,900 per month from the campaign committee, but that she might face political retribution for allegedly "using her campaign funds to enrich herself." On the other hand, Mr. Goddeeris reasoned, if she was forced to dedicate large portion of each day to outside employment, it "would significantly impact campaign activities."[7]

Shortly thereafter, the Campaign made the politically difficult decision to pay the permitted salary to Representative Tlaib, while understanding that the salary would fall below the maximum amount permitted, would be paid only according to availability of resources, and would be disclosed on its FEC reports. Thus, she received a salary for the remainder of the campaign, but never the full amount permitted.

As the FEC reports show, and the documents produced to OCE verify, the Campaign made two disbursements to its staff after Election Day, on November 16, 2018 and December 1, 2018.[8] The Campaign included Representative Tlaib in those disbursements to make up some of the difference between what she was entitled to receive for her service through Election Day, November 6, 2018, and what the Campaign had previously paid her for services rendered through that date. The Campaign has made no further salary payments to Representative Tlaib, up to and beyond the date on which she became a Member of Congress, January 3, 2019.

Fewer than 100 days after Representative Tlaib was sworn in, on April 12, OCE opened an investigation into the salary payments made during the campaign.[9] The thirty-day preliminary review began on April 13, which OCE did not disclose to Representative Tlaib until April 15.[10] The statement of the nature of the review provided little notice of the alleged violation, saying simply that Representative Tlaib might have converted campaign funds to personal use, and that her Campaign might have expended funds not attributable to bona fide campaign or political purposes. On May 3, the Congresswoman responded to OCE's requests, producing 140 pages of documents. Representative Tlaib also presented jurisdictional and prudential objections to the review, contending that H. Res. 895 did not give OCE authority to review her conduct before she became a Member, and that its review violated the FEC's exclusive civil jurisdiction over questions of campaign finance law.

From the documents Representative Tlaib produced, and from the Campaign's FEC reports, OCE found that FEC rules generally permitted the payment of salary to her, and that the amount the Campaign paid her was well within the limit set forth by the rules.[11] OCE also acknowledged

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of the general election." RT 000020 (OCE Exhibit 6). The rules, in fact, permit payment after the date of the general election, for services previously performed. *See* Findings of Facts and Citations to Law, OCE ¶ 15 n.10.

[6] RT 000022A (OCE Exhibit 1).

[7] *Id.*

[8] *See* RT 000056 (OCE Exhibit 9).; FEC Form 3, Year-End Report, Rashida Tlaib for Congress (Jan. 22, 2019).

[9] Findings of Facts and Citations to Law, OCE ¶ 5.

[10] Initiation of Preliminary Review, OCE (Apr. 15, 2019); Request for Information, OCE (Apr. 15, 2019).

[11] *See* Findings of Facts and Citations to Law, OCE ¶¶ 18-20, 27.

that salary payments made after Election Day did not prima facie violate the rule.[12] Finally, OCE received evidence from Representative Tlaib of her good-faith efforts to comply with the rule.[13] The Findings lack any basis for concluding that the November 16, 2018 and December 1, 2018 payments were made for any reason other than to cover the difference between what the Campaign would have paid before Election Day, and the resources that were available. Still, OCE continued to press for additional disclosures. When she and her staff declined to be interviewed because of OCE's failure to respond to the jurisdictional and prudential concerns she had raised, OCE threatened her with "a negative inference" and a determination of non-cooperation.

The OCE Board informed Representative Tlaib that it would vote on her matter on August 9—during the district work period. Unable to attend personally, Representative Tlaib sent a statement through her counsel. OCE rejected the statement, saying that it was "not a statement from the subject." The following day, Representative Tlaib sent a letter to OCE adopting the her counsel's statement. On August 16, OCE informed Representative Tlaib that the Board had referred Review 19-4114 to the Committee on Ethics for further review. At no point during the review did OCE specify the nature of allegations against the Congresswoman or fully address her repeated jurisdictional and prudential objections.

III. ARGUMENT

A. OCE Fails to Present Any Violation by Representative Tlaib, Who Received the Salary Payments in Accordance With FEC Rules

FEC rules expressly permit "[s]alary payments by a candidate's principal campaign to a candidate" when certain conditions are met.[14] Each payment made by the Campaign to Representative Tlaib complied with the prescribed conditions:

First, the candidate's salary must be made from the candidate's principal campaign committee.[15] Each payment to Representative Tlaib met this condition, in that they were made by her principal campaign committee, Rashida Tlaib for Congress.

Second, the salary payments must fall within certain limits.[16] They may not exceed the lesser of: the minimum salary paid to a Federal officeholder holding the Federal office that the candidate seeks, or the earned income that the candidate received during the year prior to becoming a candidate.[17] The payments to Representative Tlaib complied with this condition as well. In 2017, the year prior to becoming a candidate, she received earned income totaling $129,357,[18] or

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[12] *See* Findings of Facts and Citations to Law, OCE ¶ 15 n.10.
[13] *See, e.g.*, Findings of Facts and Citations to Law, OCE ¶¶ 23-26 (evidencing the Campaign's consultation with counsel).
[14] 11 C.F.R. § 113.1(g)(1)(i)(I).
[15] 11 C.F.R. § 113.1(g)(1)(i)(I); 67 Fed. Reg. at 76,972.
[16] 11 C.F.R. § 113.1(g)(1)(i)(I); 67 Fed. Reg. at 76,972.
[17] 11 C.F.R. § 113.1(g)(1)(i)(I); 67 Fed. Reg. at 76,972.
[18] United States House of Representatives Financial Disclosure Statement for Rashida Tlaib, Congressional Candidate (filed Dec. 7, 2018).

$44,643 less than a freshman Member of Congress.[19] Her income during the campaign was well below this level. While she was permitted to earn salary payments of nearly $5,000 per two-week period based on her previous income, she was never paid more than 60 percent of this—well below the candidate salary limit.

Third, a campaign committee must provide income tax records and other evidence of earned income upon request by the FEC.[20] Representative Tlaib has received no such request from the FEC. Nevertheless, as evidence of her preparedness to comply, she produced to OCE copies of her 2018 Form W-2 and Form 1099, and made her 2018 tax return available for inspection by OCE.

Fourth, payments made to the candidate must be computed on a pro-rata basis.[21] This means that the campaign cannot pay the candidate the entire minimum annual salary for the Federal office sought, unless she has been a candidate for at least one year.[22] Here, too, Representative Tlaib complied with the rule. The aggregate amount paid to her falls well below pro rata and approached neither her previous annual income nor the annual income of freshman Member of Congress.

Fifth, "an incumbent Federal officeholder . . . must not receive salary payments as a candidate from campaign funds. Otherwise, of course, such an incumbent officeholder would be receiving two salaries, one from his or her campaign, and one for his or her official duties."[23] Again, Representative Tlaib clearly complied with this condition. The Campaign's last payment of accrued salary was made to her on December 1, 2018, well before she was sworn in as a Member of Congress and thus eligible to earn a salary from the House.

Sixth, the salary payments must fall within specified timeframes. A salary may not be paid before the filing deadline for access to the primary election ballot.[24] If the candidate wins the primary

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[19] *See* Salaries of Members of Congress: Recent Actions and Historical Tables, Congressional Research Service (May 17, 2019), https://crsreports.congress.gov/product/pdf/RS/97-1011.
[20] 11 C.F.R. § 113.1(g)(1)(i)(I); 67 Fed. Reg. at 76,972.
[21] 11 C.F.R. § 113.1(g)(1)(i)(I); 67 Fed. Reg. at 76,972.
[22] 11 C.F.R. § 113.1(g)(1)(i)(I); 67 Fed. Reg. at 76,972.
[23] 11 C.F.R. § 113.1(g)(1)(i)(I); 67 Fed. Reg. at 76,972.
[24] 11 C.F.R. § 113.1(g)(1)(i)(I); 67 Fed. Reg. at 76,972. OCE's Findings of Facts and Citations to Law question whether payments, made on May 7, 2018 and May 16, 2018, comply with the rule because they appear to be compensation for work performed prior to April 24, 2018—the filing deadline for access to the primary election ballot in Michigan. Findings of Facts and Citations to Law, OCE ¶ 35, n.44. However, the FEC's explanation for the candidate salary rule states explicitly: "the first payment of a salary from campaign funds to a candidate *must be made no earlier* than the filing deadline for access to the primary election ballot for Federal candidates." 67 Fed. Reg. at 76,972 (emphasis added). OCE's speculation that the FEC "has not authoritatively addressed" the permissibility of such payments is wrong and irrelevant. The explanation makes clear that the rule prohibits only *payments* made before the filing deadline; it says nothing about when salary accrual may begin. OCE also notes that Representative Tlaib failed to report these initial payments on her Candidate Financial Disclosure Reports. The omissions were inadvertent and were corrected, without prompting, when Representative Tlaib filed her first Financial Disclosure Report as a Member of Congress. *See* United States House of Representatives Financial Disclosure Report for Hon. Rashida Tlaib (filed Aug. 12, 2019). Representative Tlaib and the Campaign were forthright about the candidate salary payments from the beginning, disclosing them on FEC reports during the campaign. *See, e.g.*, FEC Form 3, October Quarterly Report, Rashida Tlaib for Congress (Oct. 15, 2018); FEC Form 3, Pre-General Report, Rashida Tlaib for Congress (Oct. 25, 2018). The error was inadvertent and corrected quickly

election, the candidate may only be paid "through the date of the general election, up to and including the date of any general election runoff."[25]

In determining when salary payments must terminate, the FEC looks to the date on which the salary is *accrued,* not the date on which it is *paid.*[26] Thus, a campaign committee may pay its candidate her salary after Election Day, for services performed on or before Election Day. The FEC faced this situation in MUR 7068, which involved a candidate who continued to receive a salary from his campaign after the date of the general election. The Commission found that post-election salary payments for services rendered through Election Day were permissible, while payments for services rendered after the election were prohibited. This is consistent with the House's own approach to calculating earned income from outside employment by Members and senior staff: "[o]utside earned income is attributed to the year in which the Member's, officer's or employee's right to receive it becomes certain (*i.e.*, under the accrual method) rather than to the year of receipt."[27]

The schedule of payments to Representative Tlaib complied fully with the rule. The Campaign made two payments to Representative Tlaib after the date of the election: a payment on November 16, 2018, covering the period through the November 6 general election, and a payment on December 1, 2018, to catch up on the salary which she had accrued, but had theretofore been withheld. These payments of accrued salary were disbursed on the same schedule as final salary payments to the campaign staff.

In its findings, OCE points to certain documents relating to the November 16, 2018 and December 1, 2018 payments,[28] and claims "Rep. Tlaib was paid $2,000.00 on November 16, 2018 *for work performed* between November 1, 2018 and November 15, 2018, and was thereafter paid $15,500.00 on December 1, 2018 *for work performed* (or to be performed) between November 16, 2018 and December 31, 2018."[29] However, OCE overlooked the fact that the spreadsheets cited for this conclusion were standardized to reflect payments to every individual on the Campaign's payroll. With few exceptions, the recipients of payments listed on each record are grouped into standard pay periods. The spreadsheets do not say one way or the other when the underlying work was actually performed.

OCE's findings refer to only one document explaining the organization of pay periods. On November 29, 2018, the Campaign treasurer emailed members of the staff to explain their final paychecks. OCE highlights the treasurer's statement that "The December 1st checks will be covering for the time period through December 31, 2018."[30] However, the second sentence of the treasurer's email explains that "For most of us, the pay period covered would be from Nov. 16,

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and voluntarily, and thus requires no further consideration by the Committee. *See, e.g.*, In the Matter of Allegations Relating to Representative Vernon G. Buchanan, H.R. Rep. No. 112-588 at 2, 5 (2d Sess. 2012).

[25] 11 C.F.R. § 113.1(g)(1)(i)(I); 67 Fed. Reg. at 76,972.

[26] *See* MUR 7068, Mowrer for Iowa, Dec. 5, 2016; *accord* Findings of Facts and Citations to Law, OCE ¶ 15 n.10.

[27] House Ethics Manual at 229 (2008) (citing House Select Comm. on Ethics, *Advisory Opinion No. 13* (Oct. 1978)).

[28] Findings of Facts and Citations to Law, OCE ¶¶ 28-34.

[29] Findings of Facts and Citations to Law, OCE ¶ 30 (emphasis added).

[30] Findings of Facts and Citations to Law, OCE ¶ 33.

2018 to December 31, 2018," showing that, although the payments were keyed to standardized periods for accounting purposes, not every recipient fit the pattern.[31]

Thus, OCE's findings show that: (1) FEC rules permitted a non-incumbent candidate like Representative Tlaib to receive a salary; (2) the total amount paid to her fell well within the limits set by FEC's rule; and (3) the issuance of a salary check after Election Day can still be consistent with the rule. The findings show that Representative Tlaib and the Campaign worked in good faith to comply with the rule, and they present no evidence of non-compliance. OCE erred in referring the matter to the Committee, and Representative Tlaib complied with the law.

B. OCE's Referral Exceeded Its Jurisdiction and Breached a Series of Norms Affecting the House Ethics Process

OCE's recommendation for an investigation of Representative Tlaib is most irregular. In its eleven-year history, OCE has never recommended that the Committee investigate an alleged violation that occurred prior to the Member's being elected. The present matter, involving no conscious disregard of any law or regulation, is a poor choice to depart from precedent. The Committee's own precedent shows that OCE should never had initiated the review, and the Committee should now dismiss it.

First, OCE had no jurisdiction to initiate this review. Under H. Res. 895, OCE may only "undertake a preliminary review of any alleged violation by a Member, officer, or employee of the House of any law, rule, regulation, or other standard of conduct applicable to the conduct of such Member, officer, or employee in the furtherance of his duties or the discharge of his responsibilities."[32] OCE's own rules are even more explicit on this point: The Office may only investigate alleged violations of standards "in effect at the time the conduct occurred and applicable to the subject in the performance of his or her duties or the discharge of his or her responsibilities."[33] At the time of the conduct under review, Representative Tlaib was not yet a Member, and therefore not subject to OCE's jurisdiction. Moreover, OCE also seeks to enforce another norm—House Rule 23, clause 6's verification requirement—that did not apply to Representative Tlaib until she was sworn into office, after all of the conduct involved occurred.[34] There is no reported instance in which OCE has referred a matter that entirely involved conduct undertaken when the subject was not yet a Member.

OCE claims authority in this matter, erroneously referring to precedent that "the Committee . . . has jurisdiction over 'misconduct relating to a successful campaign for election to the House.'"[35] This statement confuses OCE's jurisdiction with the Committee's. However broad the Committee's authority may be, there is nothing to indicate that Congress intended to give OCE the authority to open investigations of successful challenger and open-seat candidates solely over

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[31] *Id.*; RT 000017 (OCE Exhibit 11).
[32] H. Res 895, 110th Cong. § 1(c)(1)(A) (2008) (emphasis added).
[33] Office of Congressional Ethics, Rules for the Conduct of Investigations, Rule 1(3).
[34] *See* Findings of Facts and Citations to Law, OCE ¶ 16.
[35] *E.g.*, OCE ¶ 4, n.3 (citing *In the Matter of Allegations Relating to Representative Ruben Kihuen,* H.R. Rep. No. 115-1041, at 22, n.24 (2d Sess. 2018)).

the conduct of their campaigns.[36] And, indeed, OCE appears never to have claimed that authority—until now.[37]

Second, even if OCE had jurisdiction, it still ignored the fact that the Committee rarely takes up allegations of pre-Member conduct or campaign finance violations. Initially, the Committee appeared to disclaim jurisdiction over a Member's candidate conduct altogether. In 1968, Representative Melvin Price, Chairman of the Committee on Standards of Official Conduct explained, "[i]n the case . . . involving a candidate for office . . . we felt we did not have the jurisdiction on that."[38] However, the Committee ultimately reserved the right to "deal with any given act, or accumulation of acts which, in the judgement of the committee, ***are severe enough to reflect discredit on the Congress***."[39] Thus, the Committee has investigated pre-Member candidate conduct only when the issues involved were severe enough potentially to reflect discredit on the House.[40]

Even when matters involve conduct occurring during the Member's tenure, the Committee has recognized that some are inappropriate for the full investigative process: for example, when a Member consulted Committee staff in good faith on a highly fact-specific question,[41] or when a matter involves alleged violations of House Rule V, which restricts the political use of House floor footage, and is frequently the subject of disputes during campaigns.[42] The Committee's longstanding precedent provides no support for the proposition that a fact-specific issue of FEC compliance, without more, is an appropriate subject for investigation. For OCE to open an investigation on such allegations, where the possibility of surprise and unfairness to the newly elected Member is manifest, represents at the very least an inexplicable departure from past practice and an unbounded precedent.

Third, OCE infringed on the FEC's exclusive jurisdiction over civil enforcement of Federal campaign finance law.[43] The Committee recognizes that "FECA is enforced primarily by the Federal Election Commission ("FEC"), and House Members and their campaign staff should refer to the explanatory materials and advisory opinions issued by the FEC."[44] Yet in a June 7,

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[36] OCE makes no claim that the payments impacted the election outcome which might provide a basis for inquiry.
[37] *See* Statement of the Chairman and Ranking Member of the Committee on Ethics Regarding Representative Michael Grimm (Nov. 26, 2012), https://ethics.house.gov/press-release/statement-chairman-and-ranking-member-committee-ethics-regarding-representative-2.
[38] *See* 114 Cong. Rec. 8779 (1968).
[39] *See* 114 Cong. Rec. 8778 (1968) (emphasis added).
[40] *See In the Matter of Allegations Relating to Representative Ruben Kihuen*, Committee on Ethics, 115th Congress, 2d Session (2018) (involving a pattern of unwanted sexual advances that continued into Congressional service*); In the Matter of Representative Earl F. Hilliard*, Committee on Ethics, 107th Congress, 1st Session (2001) (involving a sustained pattern and practice of personal use extending into Congressional service); *In the Matter of Representative Jay Kim*, Committee on Ethics, 105th Congress, Second Session (1998) (involving aggravated crimes to which the Member had already pled guilty). *See also* Statement of the Chairman and Ranking Member of the Committee on Ethics Regarding Representative Michael Grimm (Nov. 26, 2012), https://ethics.house.gov/press-release/statement-chairman-and-ranking-member-committee-ethics-regarding-representative-2.
[41] *In the Matter of Allegations Relating to Representative Tom Petri*, Committee on Ethics, 113th Congress, 2d Session (2014).
[42] *In the Matter of Allegations Relating to Representative Ben Ray Lujan*, Committee on Ethics, 115th Congress, 1st Session (2017).
[43] 52 U.S.C.A. § 30106.
[44] House Ethics Manual at 122 (2008).

2019 letter to Representative Tlaib's counsel, OCE claimed "independent and parallel authority to investigate potential violations of the Federal Election Campaign Act." Having referred Members before on the theory that they are ultimately responsible for the conduct of their campaigns, OCE's referral means that any Member whose campaign draws an FEC complaint can reasonably fear public ethics investigation, for that reason alone. Sorting through those investigations that merit referral, and those that do not, would require standards that are not yet even in development. Without such standards, referrals will be either mandatory or arbitrary, neither of which serves the ethics process.

Finally, OCE failed fully or fairly to characterize the conduct of Representative Tlaib and her staff in connection with this review. OCE says they "refused to cooperate" with the review, because they were unavailable for interviews with OCE staff. Yet, it fails to disclose that Representative Tlaib produced every document included among its findings; that she raised jurisdictional and prudential objections that it disregarded; and that her counsel offered to submit interrogatory questions to be answered by the Congresswoman and her staff under penalty of perjury, as provided in OCE Rule 4(D), as an alternative to the burden and significant expense of interviews, which OCE declined.

C. If OCE's Erroneous Referral Is Allowed to Stand, It Will Chill Candidates of Average Means From Seeking Office, and Flood the Ethics Process With Campaign Finance Allegations

This review should alarm anyone thinking of running for Congress. Partisan FEC complaints have become a staple of the modern House campaign. The FEC has taken up more than 7,000 enforcement actions, and its rules are 547 pages long. If OCE takes the same posture with future candidates as it did with Representative Tlaib, then anyone could face an ethics investigation as soon as they arrive in Washington, even while trying in good faith to comply with the law. Non-incumbent candidates may be discouraged from running—especially working mothers like Representative Tlaib, who could otherwise avail themselves of the FEC's emerging allowances for salaries and child care but must fear unfounded charges of personal use.

As noted above, the Committee has reserved the ability to "deal with any given act, or accumulation of acts which, in the judgement of the committee, are severe enough to reflect discredit on the Congress."[45] At the same time, the House has disclaimed any desire to make "violations of law simultaneous violations of the code . . . for the reason that it might open the door to stampedes for investigation of every minor complaint or purely personal accusation made against a Member."[46] If not corrected, the primary effect of this referral will be to signal to the partisan world that the ethics enforcement process is available to be used as a cudgel against political opponents, no matter the character of the alleged violation.

This would occur just when the FEC has been trying as a matter of policy to make it easier for a working parent to run for Congress. When it wrote the candidate salary rule on which Representative Tlaib relied, the FEC observed that "a candidate who is dependent on an income is put at a severe disadvantage compared to an incumbent who is free to campaign at all times

[45] 114 Cong. Rec. 8778 (Apr. 3, 1968).
[46] *Id.*

without any reduction in compensation or to an affluent challenger, who can afford to campaign without receiving any compensation . . . candidates without significant financial resources might not be able to forego salary payments in order to run for Federal office."[47] Similar considerations led the FEC recently to allow payment of child care expenses from campaign resources, when such expenses are "incurred as a direct result of campaign activity."[48]

Because the FEC's candidate salary and child care regulations, by their nature, inevitably involve questions of personal use, they provide a ready weapon to be used against the working mothers and fathers who would rely on them in good faith. Such was the case with Representative Tlaib, who had to wrestle with conflicting obligations to her campaign and to her family while she was a candidate. Ultimately, when her family's well-being was threatened by the financial pressures of forgoing her income from the Sugar Law Center to work full-time on the campaign, she made the difficult choice many would-be candidates in her position undoubtedly choose: she decided to return to work to support her family. Knowing the campaign would suffer from the diminished presence of its candidate, her staff and counsel urged her to draw a salary from the Campaign instead, and she took that opportunity.

As OCE itself observed, "Rep. Tlaib appears to have been the type of candidate contemplated by the FEC when it implemented rules permitting candidates to receive a salary. Documents provided to OCE by Rep. Tlaib suggest that Rep. Tlaib did not have the financial means to campaign full-time without being compensated by her campaign committee."[49] The documents further show that before availing herself of the opportunity, even in the heat of a contested primary campaign, Representative Tlaib and her staff took reasonable steps to comply with each element of the rule, including consulting with counsel who relied on the FEC's own campaign guide to interpret the rule.[50] Yet now, despite those good faith efforts, Representative Tlaib finds herself the subject of a politically inspired inquiry, likely initiated by one of her political adversaries.

Recognizing the financial and personal toll of modern campaigns, the FEC has sought to level the playing field. But if this review is not dismissed, it will be a new game altogether. Instead of ending their campaigns on Election Day, candidates will be forced to defend every compliance decision made by their campaigns through the public investigation process of H. Res. 895. This can only discourage candidates from running, especially those of limited means.

IV. CONCLUSION

There is no reasonable basis for OCE's referral of Representative Tlaib in this matter. OCE's findings admit that FEC rules permitted the Campaign to pay her a salary. The findings admit that she received no greater amount than the rule would allow. They admit that the timing of the final two payments, at issue in this matter, does not present a prima facie violation of the rules. And they present evidence that the Congresswoman and her campaign took steps in good faith to

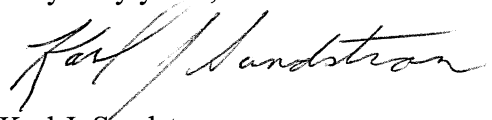
[47] 67 Fed. Reg. at 76,971.
[48] FEC Advisory Opinion 2018-06, at 3 (May 10, 2018).
[49] Findings of Facts and Citations to Law, OCE ¶ 20.
[50] Findings of Facts and Citations to Law, OCE ¶ 26.

comply with the rules. In short, the facts as presented in the findings are entirely consistent with compliance with the law and House Rules.

In making its recommendation, OCE exceeded its authority, departed from its own past practices, and pursued a matter of the type that the Committee regularly and wisely declines to pursue. By imagining itself as an enforcement agency parallel to the FEC, OCE risks making the ethics process a partisan battleground over alleged, highly fact-specific violations of campaign finance law. And in taking this action, OCE failed to acknowledge the extent of Representative Tlaib's cooperation with its investigation and declined to provide a justification for a review that raises serious questions of fairness and imposes unwarranted costs on a newly elected Member whose conduct has brought no discredit upon the House.

For the reasons set forth above, Representative Tlaib respectfully requests the Committee on Ethics dismiss Review 19-4114.

Very truly yours,



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