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September 29, 2016

The Honorable Charles W. Dent, Chairman
The Honorable Linda Sanchez, Ranking Member
House Committee on Ethics
1015 Longworth House Office Bldg.
Washington, DC 20515

Re: Rep. Marlin Stutzman – Response to August 31, 2016 Letter

Dear Chairman Dent and Ranking Member Sanchez:

The undersigned serves as counsel to Rep. Marlin Stutzman (R-IN). We are in receipt of the August 31, 2016 letter from the House Committee on Ethics (“the Committee”). This submission serves as our response to the letter and to the referral by the Office of Congressional Ethics (“OCE”) in Review No. 16-3645.

Rep. Stutzman did not violate the Federal Election Campaign Laws, Title 52 United States Code, Subtitle III, Chapter 301, Subchapter I (“the Act”) and the regulations promulgated thereunder by the Federal Election Commission (“FEC”). Specifically, Rep. Stutzman did not violate 52 U.S.C. §30114(b)(1), 11 C.F.R. §113.1(g) by using personal funds for a campaign fundraising trip to California in August 2015 (“California trip”). The OCE staff failed to present exculpatory evidence and arguments to the OCE Board for consideration during the Board’s deliberations. That evidence and argument is presented to the Committee in this submission.

The OCE staff clear from the beginning that it was predisposed to find Rep. Stutzman ‘guilty’ of a violation, and evidenced that bias from the first reference to the California trip in the very first interview it conducted:

On June 22, 2016, OCE staff attorneys Scott Gast, Konstantine Kastens and Helen Eisner interviewed Rep. Stutzman’s Chief of Staff, John Hammond. After preliminary questions involving Mr. Hammond’s background and his duties as the chief of staff, Mr. Gast then turned to the subject matter of the OCE Review:

“Scott Gast: ...I want to talk to you about the *Stutzman family trip* to California in August of 2015.

Cleta Mitchell: Could we refer to it differently?

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Scott Gast: Sure.

Cleta Mitchell: Not that “Stutzman family trip” because I think that’s presupposing that it was a Stutzman family trip. It was a trip to California which the congressman’s wife and children accompanied him, but it was a campaign trip.

Scott Gast: We’ll just call it the California trip in August of 2015.

Cleta Mitchell: That’s good.”

Transcript of Interview with Mr. John Hammond, June 22, 2016, p. 5, lines 8 – 17.

The OCE staff never deviated from their preconceived view that the California trip was a “family” trip, rather than a fundraising trip *and* a trip during which the congressman and his family met with Indiana constituents on separate events and occasions. In other words, the OCE would have the Committee believe that the predominant activities of the trip were personal, vacation activities, which is *not* the case.

The chief of staff testified that the California trip was a campaign fundraising trip:

Scott Gast: Are you familiar with that trip?

Chief of Staff: I am.

Scott Gast: What was the primary purpose of that trip?

Chief of Staff: My understanding of the primary purpose of the trip was to fundraise, to do a fundraising trip.

Cleta Mitchell: For?

Chief of Staff: For Stutzman for Senate, his Senate campaign.

Scott Gast: Were there other purposes for the trip?

Chief of Staff: There were some overlapping, I wouldn’t say they were official purposes, but there were constituents out there. Part of what I was doing is, my awareness of all the different schedules that he was keeping, was to make sure those constituents could possibly intersect with him so long as he met his obligations to the campaign. Most of those obligations were, obviously,

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they're in California, fundraising. He had a national fundraiser in addition.

Transcript of Interview with Mr. John Hammond, June 22, 2016, p. 5, lines 18 – 31.

Notwithstanding the testimony of several individuals (see below) and the itinerary of the trip itself, the OCE began its review with a pre-determination that Rep. Stutzman needed to be investigated and referred to the Committee.

However, the facts of the investigation, together with the authorities and guidance cited by OCE in its referral to the Committee, clearly dictate a finding that Rep. Stutzman did *not* violate federal law governing the personal use of campaign funds, to-wit:

- It is undisputed that Rep. Stutzman conducted fundraising meetings and calls during the course of the California trip
- It is undisputed that a conservative radio talk show host in Rep. Stutzman's district sponsored an "American Exceptionalism" trip to California for Indiana listeners to his radio program which overlapped with Rep. Stutzman's trip to California, and that Rep. Stutzman met with the Indiana constituents and voters during the California trip
- It is undisputed that Rep. Stutzman's wife and children accompanied Rep. Stutzman in the events with the Indiana constituents: a dinner and a tour of the Ronald Reagan Library.
- It is undisputed that Rep. Stutzman paid personally for the dinner with the constituents and for the tour tickets to the Reagan Library
- It is undisputed that Rep. Stutzman directed his chief of staff to contact the FEC to ask whether campaign funds could be used to purchase airline tickets for his spouse and children for the California trip.
- It is undisputed that the FEC's congressional liaison advised Rep. Stutzman's chief of staff that it was permissible for campaign funds to be used to purchase airline tickets for family members for a campaign trip, *if* the family members were participating in the events on the trip. The FEC's congressional liaison forwarded to the chief of staff FEC Advisory Opinion 2005-09, which outlined the facts and circumstances under which campaign funds may be used to pay for travel costs of family members of a candidate for federal office.

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- It is undisputed that the airplane tickets were not purchased using campaign funds until after the communications with the FEC seeking advice on this question.
- It is undisputed that the Stutzman campaign's national fundraising consultant flew to California for two days of fundraising meetings and calls related to the US Senate campaign during the California trip
- It is undisputed that during the course of the US Senate primary campaign in 2016, the issue of the California trip arose in news articles generated by Rep. Stutzman's political opponents. To avoid political concerns, Rep. Stutzman was advised to and did personally reimburse the campaign for the costs of the airfare for his family members earlier this year, despite his belief that FEC regulations allowed the campaign to pay for the airline tickets.
- It is undisputed that prior to the commencement of the OCE review, Rep. Stutzman had already reimbursed the campaign for the costs of the airline tickets for his wife and sons.

Yet, despite these undisputed facts, OCE nonetheless referred this matter to the Committee for further action. Rep. Stutzman urges the Committee to dismiss this matter and to take no further action related to the referral.

Supporting Documentation Ignored by OCE In Making Its Referral

OCE simply disregarded the factual record in making its referral to the Committee and has selectively referenced only partial information in order to support its faulty findings. The full record discloses the following material facts that OCE ignored.

Fact #1: Rep. Stutzman conducted fundraising meetings and calls during the course of the California trip.

OCE was well aware of the fact that the itinerary / schedule for the California trip included multiple fundraising meetings. While there were many iterations of the schedule, *all* of the versions included multiple fundraising meetings. Documents produced by Mary Wells, scheduler to Rep. Stutzman, *Emails sent from Mary Wells (scheduler) re: California MS-1.2.MW00001-MW00012.*

There were numerous documents produced to OCE reflecting the efforts of the campaign fundraiser to schedule donor meetings during the California trip. Documents produced by John Hammond: *JRH Correspondence with Laura Van Hove MS-1.2.JRH-LVH00001 – LVH00041;*

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Documents produced by Laura Van Hove, National Fundraiser: *California Correspondence Sent From Laura Van Hove (National Fundraiser)* MS-1.2.LVH-00001 – LVH00020.

Rep. Stutzman¹, Mrs. Stutzman², the Senate campaign manager³ and the national fundraiser⁴ each testified to OCE that there were fundraising meetings during the California trip.

For OCE to conclude that the California trip was ‘personal’ is to disregard the facts presented from multiple sources and documents. Clearly, Rep. Stutzman, his wife, his campaign staff and consultants spent the weeks and months preceding the California trip lining up meetings for campaign and fundraising purposes. That is undisputed. Several took place, others were rearranged at the last minute. But the primary purpose of the California trip, according to all concerned, was campaign and fundraising related.

Fact #2: During the California trip, Rep. Stutzman and his family met with Indiana constituents who were in California on a trip hosted by a leading conservative talk show host in Indiana.

OCE seems to believe that dinner with a constituent group⁵ and spending the following day with those constituents at the Reagan Library⁶ constituted ‘personal’ or ‘vacation’ time for purposes of allocating the “purpose” of the California trip. Just because an event is not directed solely at fundraising does not mean that it isn’t campaign-related.

Spending time with constituents and voters is *always* permissible campaign-related activity for a member of Congress.

Even the campaign manager, who seemed to be unaware that Rep. Stutzman and his family spent time in California with the group hosted by the radio personality, nonetheless testified to OCE “...that doesn’t mean there wasn’t a political purpose to other events.”⁷

¹ Marlin Stutzman transcript, p. 9, lines 9-46, p. 11, lines 19-44.

² Christy Stutzman transcript, p. 1, lines 13 – 15; p. 4, lines 8-9; p. 8, lines 18-29;

³ Campaign Manager transcript, p. 14, lines 14-27

⁴ FR Consultant transcript, p. 6, line 30 through p. 7, line1; p. 11, lines 19-26

⁵ Christy Stutzman transcript, p. 21, lines 4 – 27, p. 22, lines 1 – 11.

⁶ Christy Stutzman transcript, p. 22, lines 12 – 29; Chief of Staff transcript, p. 32, p. 33, lines 1 – 20.

⁷ Campaign Manager transcript, p. 45, lines 17-18.

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Fact #3: Rep. Stutzman directed his chief of staff to inquire as to the permissibility of using campaign funds to pay for airfare for his wife and children accompanying him on the California trip, and did not purchase the airline tickets for the trip until after receiving information from the FEC indicating that if his family participated in political events, it would be permissible for the campaign to purchase the tickets.

Rep. Stutzman asked his chief of staff to check with the FEC regarding the use of campaign funds to purchase airline tickets for his family members. (“...On June 11th or June 12th, I was asked to check on whether the boys can go on political trips...I was only calling the congressional relations person because...that’s the only contact with the FEC I have...I think sometime that day or maybe the day after she sends me an opinion that she was relying on for whatever advice she had given me...it was an opinion that seemed to suggest that the boys’ trip could be paid for by the campaign in this instance. At least that’s what she said she was relying on when we were talking on the phone. I either gave it to the congressman or emailed it to him...” Chief of Staff transcript, p. 30, lines 6 – 29)

FEC Advisory Opinion 2005-09 was forwarded from the FEC congressional liaison to Rep. Stutzman’s chief of staff who, in turn, gave it to Rep. Stutzman. The airline tickets were purchased thereafter using campaign funds⁸.

Fact #4: The amount(s) at issue in the OCE referral are de minimis at best, and the Committee should dismiss this entirely spurious referral.

Before the OCE even began its review, Rep. Stutzman had already reimbursed the campaign for the California trip airline tickets for his wife and sons.⁹ An individual hosted Rep. Stutzman and his family for a lunch meeting during the California trip, and paid \$361.24 for the meal, during which Rep. Stutzman discussed his campaign for the US Senate. The campaign is amending its FEC reports to incorporate the in-kind contribution from this individual for the costs of the lunch. The campaign has also reimbursed Mr. Bill Abbott for the costs of the dinner (\$900.00) attended by Rep. and Mrs. Stutzman and their sons, along with several others from California, which should have been done at the time but was not. It was a mistake and Rep. Stutzman regrets that mistake in the campaign accounting.

Even if the OCE’s allegations of using campaign funds for personal purposes were true (which they are not), the amounts at issue here do not merit the type of full-scale “investigation” the OCE demands. The OCE believes that the Committee should issue a *subpoena* to an individual for

⁸ Rep. Stutzman Transcript, p. 27, lines 1 – 14.

⁹ Rep. Stutzman Transcript, p. 27, lines 32 – 39.

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spending \$361.24 of his own money for a lunch discussing Rep. Stutzman's Senate campaign? The failure of the campaign committee to report the in-kind contribution and to pay for the dinner in California are errors, but they are *de minimis* and would not give rise to an FEC investigation, much less an investigation by the Ethics Committee.

The Arguments and Authorities Cited by OCE do not support the OCE Referral.

Federal Election Campaign Law, Regulations, and Guidance

The Federal Election Campaign Act provides: "A contribution or donation . . . shall not be converted by any person to personal use."⁶

Federal Election Commission ("FEC") regulations define "personal use" as "any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder."⁷

Here, Rep. Stutzman traveled to California on a trip that was weeks (or months) in the planning, involving the national fundraising consultant and her firm. All witnesses who were interviewed by OCE stated that the primary purpose of the California trip was political or campaign related.

OCE has characterized as 'vacation' or 'personal' the time Rep. Stutzman spent with his constituents, a dinner followed the next day by a tour with the constituents of the Reagan Library and lunch afterwards at the Reagan Library. But Rep. Stutzman would not have engaged in such activities were he not a member of Congress, running for a statewide office in his home state. Thus, the threshold question of 'personal use' as defined by the FEC regulations is clearly not applicable. The events from Wednesday evening through Sunday afternoon of the California trip would not have existed 'irrespective of Rep. Stutzman's campaign or duties as a Federal officeholder.'

FEC regulations require disclosure of expenditures for campaign-related travel in FEC reports: "Where a candidate conducts any campaign-related activity in a stop, the stop is a campaign-related stop and travel expenditures made are reportable. 11 C.F.R. § 106.3(b)(3)." Even if *some* of the time spent was 'personal', there is no question that there are substantial reporting obligations of the costs of this trip. A national fundraising consultant spent *two days* in California, traveling with Rep. Stutzman to various meetings. Such activities clearly convert this trip from 'personal' to campaign-related, necessitating reporting as campaign expenses. Had Rep. Stutzman paid for the entire trip from his personal funds, he would have been obligated to report *his* payments as in-kind contributions to the campaign. The campaign-related expenses were *not* incidental to the trip.

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In the event of travel or vehicle expenses that comingle personal and campaign or officeholder activity, the beneficiary of the personal use expenses must reimburse the committee within thirty days for the entire amount associated with the personal activities (the amount over and above what the cost would have been had the trip/vehicle use been solely for campaign/officeholder-related purposes). However, “a slightly different approach would apply to the cost of the actual airfare Because the airfare represents a defined expense that would have existed irrespective of any personal or campaign related activities, the entire cost of the ticket” for a mixed purpose trip may be paid for by a campaign. FEC Advisory Op. 2002-05 (May 10, 2002).

And, as stated above, the FEC has determined that campaign funds may be used to pay for expenses for travel related to a candidate’s campaign or duties as a federal officeholder incurred by a candidate’s spouse¹⁰ and minor children¹¹.

House Ethics Manual

The House Ethics Manual provides that “[a] Member’s use of campaign funds for federal office is permissible only if it complies with the provisions of both the House Rules and [the Federal Election Campaign Act].” House Ethics Manual (2008) at 152 (emphasis in original).

With respect to trips that have mixed purposes, the Manual provides: “[T]he Member . . . must determine the primary purpose of the trip. The source associated with that primary purpose – for example, a political committee for campaign or political activity, the federal government for official business, or the traveler’s own funds for personal business – must pay for the airfare . . . and all other travel expenses incurred in accomplishing that purpose. Any additional meal, lodging, or other travel expenses that the Member . . . incurs in serving a secondary purpose must be paid by the source associated with the secondary purpose.”¹²

¹⁰ See FEC Advisory Op. 1996-19 (June 10, 1996) (concluding that campaign funds could be used to pay for the expenses of a candidate’s spouse to travel to a national political party convention, when the spouse expected to “engage in activities . . . in furtherance of” the candidate’s election, including “attempt[ing] to maintain contacts and goodwill with persons who will support your campaign through fundraising assistance and contributions,” and “communicat[ing] with constituents with respect to your campaign.”); FEC Advisory Op. 1995-47 (Mar. 29, 1996) (reaching a similar conclusion while noting that, “[i]n making this conclusion, the Commission is mindful of the inherently political nature of the national nominating convention of a political party. Its conclusion as to your general description of the . . . types of activities in which you and your wife will engage is made in the context of that event.”).

¹¹ See FEC Advisory Op. 2005-09 (Aug. 19, 2005) (concluding that campaign funds could be used to pay for the travel expenses of a candidate’s minor children when the parents were traveling in connection with the candidate’s *bona fide* campaign or officeholder responsibilities).

¹² *Id.* at 116 (emphasis in original).

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The Manual advises: “The determination of the primary purpose of a trip must be made in a reasonable manner, and one relevant factor in making that determination is the number of days to be devoted to each purpose. That is, often the primary purpose of a trip is the one to which the greater or greatest number of days is devoted.”¹³

The Manual explains that “when the primary purpose of a trip is personal in nature, the airfare of that trip may not be paid with campaign funds, and must be paid with personal funds. While each Member has the responsibility to determine the ‘primary purpose’ of any trip the Member takes, that determination must be made in a reasonable manner, taking into account all of the activities in which the Member intends to engage during the course of the trip.”¹⁴

The Manual further explains that the Committee on Ethics “has taken the position that Members, in making expenditures of their campaign funds, must observe these provisions strictly: A bona fide campaign purpose is not established merely because the use of campaign money might result in a campaign benefit as an incident to benefits personally.”¹⁵

All of the authorities relied upon by OCE, incorporated above, as the legal justification for its referral to the Committee point to *no* referral and dismissal by the Committee. Even the most conservative counting of the days spent on the trip reflect the following primary purposes:

Wednesday, August 12 :	Travel to California, Dinner with Hallmark executives
Thursday, August 13:	Fundraising meetings by Rep. Stutzman
Friday, August 14:	Fundraising meetings by Rep. Stutzman
Saturday, August 15:	Dinner with Indiana constituents / voters
Sunday, August 16:	Tour and Lunch with Indiana constituents / voters; dinner event with Frank Luntz
Monday, August 17:	Meeting with Frank Luntz re: Campaign Messaging; Tour of Reagan Center / Reagan Ranch – Family Only; Flight back to Indiana

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

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Of the six days of travel, not even *one* day was a Stutzman family only day. There was something related to the Senate campaign *every day* of the trip. Every day.

The OCE referral utterly disregards the constant mixed purposes of everything a Member of Congress / candidate / parent / spouse must juggle. Simply because Rep. Stutzman chose to keep his family with him on the west coast fundraising trip and because he wanted to accommodate an important media figure in his state by spending time with Indiana voters during the California trip does not convert this trip to a 'vacation' or a 'personal' use of campaign funds.

Conclusion. We hereby submit the OCE referral was erroneous and urge the Committee to dismiss it and take no further action. We stand ready to provide whatever additional information the Committee may require. Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink that reads "Cleta Mitchell". The signature is fluid and cursive, with the first name "Cleta" being more prominent than the last name "Mitchell".

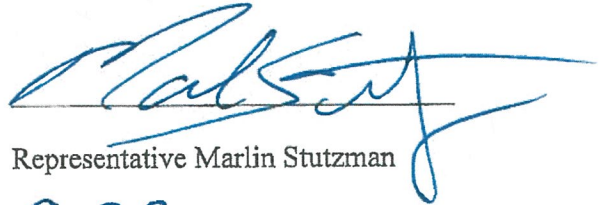
Cleta Mitchell, Esq., Counsel
Rep. Marlin Stutzman

cc: The Honorable Marlin Stutzman

Declaration

I, Representative Marlin Stutzman, declare (certify, verify, or state) under penalty of perjury that the response and factual assertions contained in the attached letter dated 9.28, 2016, relating to my response to the August 31, 2016, Committee on Ethics letter, are true and correct.

Signature:



Name:

Representative Marlin Stutzman

Date:

9.28, 2016