



FEDERAL ELECTION COMMISSION
Washington, DC

AGENDA DOCUMENT NO. 24-17-A
AGENDA ITEM
For meeting of May 1, 2024

April 24, 2024

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
Acting General Counsel

Neven F. Stipanovic *NFS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joanna S. Waldstreicher *JSW*
Attorney

Subject: AO 2024-05 (NFRF)– Draft A

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on Tuesday, April 30, 2024.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2024-05

2

3 Jacquelyn Lopez, Esq.

4 Ezra Reese, Esq.

5 Jonathan Peterson, Esq.

6 Emma Anspach, Esq.

7 Elias Law Group LLP

8 250 Massachusetts Ave. NW, Suite 400

9 Washington, DC 20001

10

11

12 Dear Counsel:

13 We are responding to your advisory opinion request on behalf of Nevadans for
14 Reproductive Freedom, concerning the application of the Federal Election Campaign Act,
15 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to federal candidates’
16 and officeholders’ activities in support of a state ballot initiative. The Commission
17 concludes that federal candidates and officeholders may solicit funds for the requestor’s
18 activities without regard for the amount limitations and source prohibitions of the Act.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letters received on
21 February 27, 2024 and March 15, 2024, and your supplemental email received on April 4,
22 2024.

23 Nevadans for Reproductive Freedom has filed a state constitutional initiative
24 petition (the “Initiative”) in Nevada and is in the process of collecting signatures needed
25 to place the Initiative on the 2024 general election ballot in Nevada. Nevadans for
26 Reproductive Freedom maintains two entities engaged in this effort: a Nevada
27 “Committee for Political Action Advocating Passage” (“NFRF PAC”) and a 501(c)(4)
28 organization (“NFRF (c)(4)”) (collectively “NFRF”). NFRF’s mission is “to enshrine

DRAFT A

1 reproductive freedom in the Nevada state constitution.”¹ NFRF was not established by
2 any federal candidate or officeholder, and it is not now and will not be financed,
3 maintained, or controlled by any federal candidate or officeholder.²

4 NFRF plans to raise funds to support the Initiative into both NFRF PAC and
5 NFRF (c)(4) from sources and amounts that are prohibited under federal law.³ As part of
6 its fundraising, NFRF plans to ask federal candidates and officeholders to solicit funds
7 that will be used in connection with the Initiative, both before and after it has qualified
8 for the ballot.⁴ NFRF may ask federal candidates and officeholders to solicit funds for
9 both NFRF PAC and NFRF (c)(4).⁵ NFRF will ask federal officeholders and candidates
10 to solicit funds to be used for general support of the Initiative or NFRF’s overall mission
11 but will not ask them to solicit funds to be used or earmarked for any specific purpose,
12 including federal election activity.⁶

13 ***Question Presented***

14 *May a federal candidate or officeholder solicit funds for NFRF (c)(4) and NFRF*
15 *PAC, without regard to amount limitations or source restrictions both before and after*
16 *the Initiative qualifies for the 2024 general election ballot?*

1 Advisory Opinion Request at AOR001-02.

2 AOR002.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

1 ***Legal Analysis***

2 Yes, federal candidates and officeholders may solicit funds for NFRF (c)(4) and
3 NFRF PAC without regard to amount limitations or source restrictions, at any time.

4 The Act regulates certain actions of federal candidates and officeholders, their
5 agents, and entities directly or indirectly established, financed, maintained, or controlled
6 by them (collectively, “covered persons”) when they raise or spend funds in connection
7 with either federal or non-federal elections.⁷ Specifically, covered persons are prohibited
8 from soliciting, receiving, directing, transferring, or spending: (A) funds in connection
9 with an election for federal office, including funds for any federal election activity, unless
10 the funds are subject to the limitations, prohibitions, and reporting requirements of the
11 Act;⁸ and (B) funds in connection with any election other than an election for federal
12 office unless the funds are not in excess of the amounts permitted with respect to
13 contributions to candidates and political committees under 52 U.S.C. § 30116(a)(1), (2),
14 and (3), and are not from sources prohibited by the Act from making contributions in
15 connection with an election for federal office.⁹

16 The Act excludes from these restrictions certain solicitations, including those by
17 federal candidates “on behalf of any organization that is described in section 501(c) of the
18 Internal Revenue Code of 1986” other than an entity whose principal purpose is to
19 conduct voter registration or get-out-the-vote activities, so long as the solicitation does

⁷ 52 U.S.C. § 30125(e)(1).

⁸ *Id.* § 30125(e)(1)(A); *see also* 11 C.F.R. § 300.61.

⁹ 52 U.S.C. § 30125(e)(1)(B); *see also* 11 C.F.R. § 300.62.

1 not specify how the funds will be spent.¹⁰ Here, NFRF (c)(4) is registered as a 501(c)(4)
2 organization and its principal purpose is to advocate for the Initiative; it will ask federal
3 candidates to solicit funds for “general support of the Initiative or NFRF’s mission,” and
4 not for any specific purpose.¹¹ Therefore, federal candidates’ solicitations on behalf of
5 NFRF (c)(4) are not restricted by Section 30125(e)(1)(A) or (B).

6 As to candidates’ solicitations on behalf of the NFRF PAC, Section
7 30125(e)(1)(A) and (B) cover activities in connection with either “an election for Federal
8 office” or “any election other than an election for Federal office,” and thus the threshold
9 question in deciding whether either of these restrictions apply here is whether the
10 activities in question are in connection with an “election.” Raising and spending of funds
11 related only to a ballot initiative are generally not in connection with an election for
12 federal office, and NFRF has stated that it will not be asking federal candidates or
13 officeholders to solicit funds earmarked for federal election activity. Therefore, the
14 proposed solicitations by federal candidates and officeholders are not governed by
15 Section 30125(e)(1)(A).

16 Neither the Act nor Commission regulations define what “any election” means for
17 the purposes of Section 30125(e)(1)(B). The Act defines “election” generally as
18 including a “general, special, primary, or runoff election,” as well as a convention or
19 caucus of a political party, and primary elections held for the purpose of selecting
20 delegates to national nominating conventions or to express a preference for Presidential

¹⁰ 52 U.S.C. § 30125(e)(4)(A).

¹¹ AOR002.

1 nominations.¹² Similarly, Commission regulations define “election” as “the process by
2 which individuals . . . seek nomination for election, or election, to Federal office.”¹³

3 Both the statutory and regulatory definitions existed prior to the adoption of
4 Section 30125(e), and both define “election” in terms of individuals seeking federal
5 office, while Section 30125(e)(1)(B), by its terms, applies only to elections outside that
6 category. Nonetheless, the statutory and regulatory definitions of “election” are
7 instructive in this context. The definitions of “election” in the Act and Commission
8 regulations are limited to individuals seeking office, whereas the ballot initiative process
9 allows voters to directly enact a proposed statute or constitutional amendment. The
10 distinction between selection of candidates and decisions on ballot measures is consistent
11 with the United States Supreme Court’s recognition that the Act “regulates only
12 candidate elections, not referenda or other issue-based ballot measures.”¹⁴ The Court has
13 explained that this distinction matters because “the risk of corruption perceived in cases
14 involving candidate elections simply is not present in a popular vote on a public issue.”¹⁵

¹² 52 U.S.C. § 30101(1).

¹³ 11 C.F.R. § 100.2(a).

¹⁴ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 356 (1995) (citing *Buckley v. Valeo*, 424 U.S. 1, 80 (1976)); see also *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 790 (1978) (“Referenda are held on issues, not candidates for public office.”). See also Concurring Opinion, Vice Chairman Michael E. Toner and Commissioner David M. Mason at 1, Advisory Opinion 2005-10 (Berman/Doolittle) (Aug. 29, 2005) (“The plain meaning of the statute is that the soft-money ban applies to federal and non-federal elections for public office, but does not apply to non-candidate political activity, such as ballot initiatives and referenda.”); Concurring Statement, Commissioner Ellen L. Weintraub and Commissioner Danny Lee McDonald at 1, Advisory Opinion 2005-10 (Berman/Doolittle) (Sept. 5, 2005) (“The law has long distinguished between efforts related to ballot measures and those intended to influence candidate elections. Advocacy related to ballot measures is generally seen as issue-, rather than candidate-driven, and the funding of such efforts has been acknowledged to present less potential for corruption.”).

¹⁵ *Bellotti*, 435 U.S. at 790.

1 This interpretation comports with prevailing Commission advisory opinions and
2 enforcement precedents. In Advisory Opinion 2005-10 (Berman/Doolittle), the
3 Commission concluded that Section 30125(e)(1)(A) and (B) did not apply to two
4 Members of Congress seeking to raise funds for ballot measure committees they did not
5 establish, finance, maintain, or control, whose initiatives had already qualified for the
6 upcoming election.¹⁶ Similarly, in two enforcement matters—MUR 7512 (Pembina
7 Pipeline Corporation, *et al.*) and MUR 7523 (Stop I-186 to Protect Mining and Jobs, *et*
8 *al.*)—the Commission considered whether two foreign corporations that had donated
9 funds to state-level ballot committees had made prohibited foreign-national contributions
10 in violation of 52 U.S.C. § 30121. Relying on these same statutory and regulatory
11 definitions of “election,” as well as Supreme Court and Commission precedents, the
12 Commission concluded that ballot initiatives and referenda were not “Federal, State, or
13 local election[s]” within the meaning of that statutory provision.¹⁷

14 The Initiative at issue here is not any of the types of elections enumerated in the
15 Act’s definition of “election,” nor is it similar to the type of “election” encompassed in
16 either the statutory or regulatory definition because it does not involve any individual

¹⁶ Advisory Opinion 2005-10 (Berman/Doolittle) at 2–3. The Commission’s conclusion in Advisory Opinion 2005-10 (Berman/Doolittle) is in conflict with its earlier conclusion in Advisory Opinion 2003-12 (Stop Taxpayer Money for Politicians Committee) that “activities of a ballot measure committee that is not ‘established, financed, maintained, or controlled’ by a Federal candidate . . . are ‘in connection with any election other than an election for Federal office’ after the committee qualifies an initiative or ballot measure for the ballot.” Advisory Opinion 2003-12 (Stop Taxpayer Money for Politicians Committee) at 6. Therefore, the Commission is superseding Advisory Opinion 2003-12 (Stop Taxpayer Money for Politicians Committee) to the extent that it is inconsistent with Advisory Opinion 2005-10 (Berman/Doolittle) and this advisory opinion.

¹⁷ See Factual & Legal Analysis at 5–6, MUR 7523 (Stop I-186 to Protect Mining and Jobs, *et al.*) (Oct. 4, 2021); Factual & Legal Analysis at 6–8, MUR 7512 (Pembina Pipeline Corporation, *et al.*) (Oct. 5, 2021).

1 seeking office. Accordingly, NFRF's proposed solicitations by candidates in support of
2 the Initiative are not in connection with any election, for federal office or otherwise, and
3 are not restricted by Section 30125(e)(1)(A) or (B). Therefore, federal candidates and
4 officeholders may solicit funds for NFRF PAC and NFRF (c)(4) both before and after the
5 Initiative has qualified for the ballot, as described in the request, without regard to the
6 amount limitations or source prohibitions of the Act.

7 The Commission expresses no opinion regarding the possible application of the
8 Internal Revenue Code or State tax laws, or any other State laws, to the proposed
9 activities, as those questions are outside of its jurisdiction.

10 This response constitutes an advisory opinion concerning the application of the
11 Act and Commission regulations to the specific transaction or activity set forth in your
12 request.¹⁸ The Commission emphasizes that, if there is a change in any of the facts or
13 assumptions presented, and such facts or assumptions are material to a conclusion
14 presented in this advisory opinion, then the requestor may not rely on that conclusion as
15 support for its proposed activity. Any person involved in any specific transaction or
16 activity which is indistinguishable in all its material aspects from the transaction or
17 activity with respect to which this advisory opinion is rendered may rely on this advisory
18 opinion.¹⁹ Please note that the analysis or conclusions in this advisory opinion may be
19 affected by subsequent developments in the law including, but not limited to, statutes,

¹⁸ See 52 U.S.C. § 30108.

¹⁹ See *id.* § 30108(c)(1)(B).

1 regulations, advisory opinions, and case law. Any advisory opinions cited herein are
2 available on the Commission's website.

3 On behalf of the Commission,

4

5 Sean J. Cooksey,

6 Chairman