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By Office of General Counsel at 12:30 pm, Feb 27, 2024

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By Office of the Commission Secretary at 3:42 pm, Mar 05, 2024

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**BY ELECTRONIC MAIL DELIVERY**

Office of General Counsel  
Attn: Lisa J. Stevenson, Esq.  
Acting General Counsel  
Federal Election Commission  
1050 First Street NE  
Washington, DC 20463

**Re: Advisory Opinion Request**

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108, we seek an advisory opinion on behalf of Nevadans for Reproductive Freedom regarding the applicability of the Federal Election Campaign Act of 1971 (the “*Act*”) and Federal Election Commission (the “*Commission*”) regulations to its ballot measure activities.

The request first asks the Commission to confirm that a federal candidate or officeholder may solicit funds outside of the Act’s source restrictions and amount limitations to support efforts to advocate for a state ballot measure, both before and after the measure qualifies for the ballot. The request next asks the Commission to confirm that a ballot measure committee and a federal candidate may allocate the costs of a television advertisement that advocates for both a ballot measure and the election of the federal candidate on a time and space basis. Finally, if the answer to the second question is in the affirmative, the request asks whether all time and space that meets the content prong under 11 C.F.R. § 109.21 must be attributed to the candidate. This request proposes that only the content that promotes, attacks, supports, or opposes the federal candidate is attributable to the federal candidate.

**I. Background**

Nevada allows citizens to propose legislation, amend the state Constitution, and alter existing law through ballot initiatives and referenda. Nevadans for Reproductive Freedom maintains two entities – a Nevada registered “Committee for Political Action (PAC) Advocating Passage” (“*NFRF PAC*”) and a 501(c)(4) organization also called Nevadans for Reproductive Freedom (“*NFRF c4*”) (collectively referred to herein as “*NFRF*”).<sup>1</sup> NFRF’s mission is to enshrine

<sup>1</sup> See Nev. Sec’y of State, *Nevadans for Reproductive Freedom Committee Registration Form* (Sept. 1, 2023), [https://www.nvsos.gov/elections/11241.pdf?\\_gl=1\\*coaah9\\*\\_ga\\*MjA2NTUxNzQ4My4xNzA1NTk0MDEw\\*\\_ga\\_2QDKTLXQYL\\*MTcwNTU5NDAwOS4xLjEuMTcwNTU5NDEyNy40My4wLjA./](https://www.nvsos.gov/elections/11241.pdf?_gl=1*coaah9*_ga*MjA2NTUxNzQ4My4xNzA1NTk0MDEw*_ga_2QDKTLXQYL*MTcwNTU5NDAwOS4xLjEuMTcwNTU5NDEyNy40My4wLjA./)

reproductive freedom in the Nevada state constitution. NFRF filed a constitutional initiative petition (the “*Initiative*”)<sup>2</sup> that would, if enacted by Nevada voters, amend the state’s constitution to codify reproductive freedom as a fundamental right. NFRF is in the process of collecting the signatures necessary to place the Initiative on the 2024 general election ballot.<sup>3</sup> No federal candidate or officeholder established NFRF nor will a federal candidate or officeholder finance, maintain, or control NFRF moving forward.<sup>4</sup>

NFRF plans to raise funds to support the Initiative into both NFRF PAC and NFRF c4 from sources and amounts that are prohibited under federal law. As part of its fundraising, NFRF plans to partner with a wide-variety of important stakeholders who are committed to fundraising for NFRF. These stakeholders include federal candidates and officeholders who are, and are not, on the general election ballot this November in Nevada. NFRF wishes to ask these individuals to solicit funds that will be used in connection with the Initiative, both before and after the Initiative has qualified for the general election ballot. NFRF may ask federal candidates or officeholders to solicit into both NFRF PAC and NFRF c4. No federal candidate or officeholder will be asked to solicit funds on behalf of NFRF for any earmarked purpose beyond general support of the Initiative or NFRF’s mission, including but not limited to any federal election activity, as defined by the Act and Commission regulations. NFRF c4 would issue a certification under 11 C.F.R. § 300.65(e) once the Commission affirms that ballot measure activity does not fall under the category of “election activities.”

In addition, NFRF proposes to sponsor advertisements featuring prominent Nevadans, including federal candidates and officeholders, urging Nevadans to support the Initiative. Such advertisements may also in part expressly advocate for, promote, or support the featured federal candidate or expressly advocate against, attack, or oppose their opponent. The featured federal candidate would be responsible for the costs of any such portion of the advertisement. NFRF will only pay for those portions of the advertisements that promote the Initiative.

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<sup>2</sup> For purposes of this request, we use initiatives or ballot measures interchangeably, but both refer to questions that appear on a ballot to be voted on by voters. See FEC, MUR 7523 (Stop I-186 to Protect Mining and Jobs, et al.), First General Counsel’s Report at 2 n.3.

<sup>3</sup> Nev. Sec’y of State, *Notice of Intent for Statewide Initiative or Referendum petition*, Nevadans for Reproductive Freedom (Dec. 6, 2023), <https://www.nvsos.gov/sos/home/showpublisheddocument/12633/638375592027970000>; see also Sean Golonka, *Reproductive rights group seeks second initiative to protect abortion in NV Constitution*, Nevada Independent (Dec. 14, 2023, 3:49 PM.) <https://thenevadaindependent.com/article/reproductive-rights-group-seeks-second-initiative-to-protect-abortion-in-nv-constitution>.

<sup>4</sup> See Nev. Sec’y of State, *Notice of Intent for Statewide Initiative or Referendum petition*, Nevadans for Reproductive Freedom (Dec. 6, 2023), <https://www.nvsos.gov/sos/home/showpublisheddocument/12633/638375592027970000>.

## II. Questions Presented

1. May a federal candidate or officeholder solicit funds for NFRF PAC and NFRF c4, without regard to amount limitations or source restrictions both before and after the Initiative qualifies for the 2024 general election ballot?
2. May NFRF and a federal candidate allocate the costs of a television advertisement that both advocates for the Initiative and either expressly advocates for the election or defeat of a federal candidate or promotes, attacks, supports or opposes a federal candidate?
3. Assuming the answer to Question 2 is in the affirmative, is all time and space in the advertisement that meets the content prong of 11 C.F.R. § 109.21(c)(4) attributable to the candidate or does only the time and space that promotes, attacks, supports, or opposes the candidate, and not the underlying ballot measure, attributable to the candidate?

## III. Legal Analysis

### 1. *Can a federal candidate or officeholder solicit funds for NFRF without regard to source or amount limitations?*

Federal candidates and officeholders may solicit funds outside of the contribution limits and source restrictions of the Act for NFRF because the Act and Commission regulations, including the restrictions on federal candidate and officeholder solicitations, only extend to candidate elections, not ballot measure elections. This conclusion flows from the plain text of the Act, which reflects the fundamental distinction long made between efforts to influence the outcome of candidate elections and those that seek to influence passage or defeat of specific issues.

The Act, as amended by the Bipartisan Campaign Reform Act (“*BCRA*”), provides that a federal candidate, officeholder, or their agents, may not “solicit, receive, direct, transfer, or spend funds in connection” “with an election for Federal office” or “any election other than an election for Federal office” unless the funds are subject to the Act’s amount and source restrictions (the “*Soft Money Restriction*”).<sup>5</sup> With respect to a solicitation for a 501(c)(4) organization, a federal candidate, officeholder, or their agents may make a general solicitation of funds without regard to source or amount limitations so long as the organization’s principal purpose is not to conduct “election activities.”<sup>6</sup>

The plain text of the Act, legislative history surrounding the passage of *BCRA*, Supreme Court precedent, and Commission precedent all support the conclusion that a ballot measure election is not an “election” under the Act.

The Act expressly defines “election” in terms of a candidate election. An “election” is limited to “a general, special, primary, or runoff election; a convention or caucus of a political party which has authority to nominate a candidate; a primary election held for the selection of delegates to a

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<sup>5</sup> 52 U.S.C. § 30125(e)(1).

<sup>6</sup> *Id.* § 30125(e)(1), (4); 11 C.F.R. § 300.65(a). If the organization conducts some activities in connection with an election, the solicitation must not be to obtain funds for activities in connection with an election. 11 C.F.R. § 300.65(a)(2).

national nominating convention of a political party; and a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.”<sup>7</sup> Commission regulations similarly specify that “[e]lection means the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office.”<sup>8</sup>

In 1995, in keeping with the plain text of the Act, the United States Supreme Court made clear that “[t]he Federal Election Campaign Act of 1971 . . . *regulates only candidate elections, not referenda or other issue-based ballot measures*”<sup>9</sup> The Commission has similarly repeatedly held that an “election” under the Act does not include a ballot measure election.<sup>10</sup> This is true even where the Act references not just a federal election, but a state or local election. In a recent enforcement matter, the Commission dealt with a complaint alleging that a foreign national’s donation to a state ballot measure committee violated 52 U.S.C. § 30121(a)(1), which prohibits a foreign national from donating “in connection with a federal, state, or local election.” The Commission voted 5-1 to dismiss the complaint, affirming that “spending relating only to ballot initiatives is generally outside the purview of the Act because such spending is not ‘in connection with’ elections.”<sup>11</sup>

There is similarly no rationale for reading the Soft Money Restriction or its implementing regulations to extend to cover a ballot measure election. Requestors are not aware of any legislative history surrounding the passage of BCRA that indicates an intent to extend the scope of an “election” beyond candidate elections. In fact, Members of Congress who voted for BCRA

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<sup>7</sup> 52 U.S.C. § 30101(1).

<sup>8</sup> 11 C.F.R. § 100.2(a).

<sup>9</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 356, (1995) (emphasis added). *See also Bluman v. Fed. Election Comm’n*, 800 F. Supp. 2d 281, 291 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012) (noting that Congress’ ban on foreign contributions in candidate elections do not extend to ballot initiatives).

<sup>10</sup> FEC, AO 1989-32 (McCarthy) (July 2, 1990) at 3, <https://www.fec.gov/files/legal/aos/1989-32/1989-32.pdf> (“The Commission has previously recognized the distinction between a candidate-related ‘election to any political office,’ as used in 2 U.S.C. 441e and other provisions of the Act, and issue related ballot initiatives. The Commission has stated that contributions or expenditures relating only or exclusively to ballot referenda issues, and not to elections to any political office, do not fall within the purview of the Act”); *see also* FEC, AO 1984-62 (B.A.D. Campaigns) (March 21, 1985), at 1 n.2, <https://www.fec.gov/files/legal/aos/1984-62/1984-62.pdf> (“The Commission has previously held that contributions or expenditures exclusively to influence ballot referenda issues are not subject to the Act.”); FEC, AO 1984-41 (National Conservative Foundation) (Oct. 12, 1984), at 1-2, <https://www.fec.gov/files/legal/aos/1984-41/1984-41.pdf>; FEC, MUR 7523 (Stop I-186 to Protect Miners and Jobs) (Oct. 4, 2023), Factual and Legal Analysis at 4, [https://www.fec.gov/files/legal/murs/7523/7523\\_24.pdf](https://www.fec.gov/files/legal/murs/7523/7523_24.pdf) (“Consistent with the Act and court precedents, the Commission has observed that spending relating only to ballot initiatives is generally outside the purview of the Act because such spending is not ‘in connection with’ elections”); FEC, MUR 7512 (Jordan Cove LNG, LP) (Oct. 5, 2021), Factual and Legal Analysis at 5, [https://www.fec.gov/files/legal/murs/7512/7512\\_101.pdf](https://www.fec.gov/files/legal/murs/7512/7512_101.pdf); FEC, AO 2010-07 (Yes on Fair), Concurring Opinion of Chairman Petersen and Commissioners Hunter and McGahn, (June 30, 2010), <https://www.fec.gov/files/legal/aos/2010-07/1142185.pdf> (“The Act and Commission regulations define an ‘election’ in terms of individual candidates seeking representative office. The ballot initiative process, on the other hand, allows voters to directly enact a proposed statute, constitutional amendment, or ordinance. This is a straightforward distinction: a candidate is elected into representative office - not passed into law - by voters, whereas the opposite is true for ballot initiatives; they are passed into law - not elected - by voters. Under the Act, the Commission’s jurisdiction is circumscribed accordingly; it reaches the process by which voters select their representatives, but not how those representatives, or the people themselves, enact legislation.”).

<sup>11</sup> FEC, MUR 7523 (Stop I-186 to Protect Miners and Jobs) (Sept. 30, 2021), Factual and Legal Analysis at 4 [https://www.fec.gov/files/legal/murs/7523/7523\\_24.pdf](https://www.fec.gov/files/legal/murs/7523/7523_24.pdf), Commission Certification (Sept. 30, 2021)

contacted the Commission in 2005 to express their opinion that BCRA does not cover ballot measure elections.<sup>12</sup> Similarly, the Commission itself acknowledged that “there has been no intervening change in the law—including enactment of the Bipartisan Campaign Reform Act of 2002 (“BCRA”)—that has altered the longstanding distinction between elections and ballot initiative activity” under the Act.<sup>13</sup>

Given the lack of any statutory support or legislative intent to extend the Soft Money Restrictions to cover ballot measure elections, the Commission should confirm that an “election” does not include a ballot measure election and therefore a federal candidate or officeholder may solicit without regard to amount limitations or source restrictions for NFRF PAC or NFRF c4. This distinction between candidate and ballot measure elections rests not only on the plain text of the law, but on the fundamental principal expressed by the United States Supreme Court that “the risk of corruption perceived in this Court’s decisions involving candidate elections is not present in a popular vote on a public issue.”<sup>14</sup>

**2. *May Nevadans for Reproductive Freedom and a federal candidate allocate the costs of a television advertisement that advocates for the Initiative and either advocates the election or defeat of a federal candidate or promotes, attacks, supports, or opposes (“PASOs”) a federal candidate?***

NFRF wishes to run joint television advertisements that promote the Initiative while also featuring a federal candidate (by likeness or name) who advocates for the Initiative and also promotes their own election. This promotion could come either in the form of: (i) express advocacy for the featured candidate or against their opponent; or (ii) the promotion or support of the featured candidate or attacking or opposing of their opponent.

NFRF would split the full costs of the advertisement, including production costs and the cost to place the advertisement, with the featured federal candidate on a time-space basis, thereby allocating to itself the costs of the portion of the advertisement that promote the Initiative and that does not expressly advocate or PASO a federal candidate, and to the featured candidate the parts that promote the candidate’s election.

Under the Act, the provision of “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office” generally results in a contribution.<sup>15</sup> Commission regulations and guidance, however, have consistently held that where the cost of an expense is allocated between multiple payors in a way that reasonably reflects the benefit received by each payor, no contribution results.<sup>16</sup>

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<sup>12</sup> See FEC, AO 2005-10 (Berman Doolittle), Ex Parte Communication from Representative Howard L. Berman, Representative Nancy Pelosi, (Aug. 17, 2005), <https://www.fec.gov/files/legal/aos/2005-10/413239.pdf>.

<sup>13</sup> FEC, MUR 7523 (Stop I-186 to Protect Miners and Jobs) (Sept. 30, 2021), Factual and Legal Analysis at n. 18, [https://www.fec.gov/files/legal/murs/7523/7523\\_24.pdf](https://www.fec.gov/files/legal/murs/7523/7523_24.pdf).

<sup>14</sup> *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 766 (1978).

<sup>15</sup> 52 U.S.C. § 30101(1).

<sup>16</sup> See 11 C.F.R. §§ 106.8(a); 106.4; FEC, AO 2022-21 (DSCC, Bennet for Colorado, and People for Patty Murray) (Oct. 20, 2022) <https://www.fec.gov/files/legal/aos/2022-21/2022-21.pdf> (“[T]he Commission’s allocation regulations ‘stand generally for the proposition that allocation is an appropriate way to fund activities with multiple

For some types of costs, Commission regulations proscribe a method of allocation. The absence of a proscribed method has not served as a bar to cost allocation. In such instances, the Commission has emphasized that the “allocation regulations ‘stand generally for the proposition that allocation is an appropriate way to fund activities with multiple purposes’” and approved methods of allocation that reasonably divide costs by benefit received.<sup>17</sup> In the context of television advertising specifically, the Commission has routinely permitted costs to be allocated between payors on a time/space basis. For example, at least since 2004, the Commission has allowed national party committees to allocate the costs of “hybrid” television advertisements that promote both the party and a federal candidate.<sup>18</sup> The concept of hybrid television advertising is not expressly found in either the Act or Commission regulations. Rather, the allowance rests on an extension of the hybrid phone bank regulation and the general logic of allowing cost allocation based on benefit received.<sup>19</sup> That same logic applies to an advertisement that promotes both a ballot measure and a federal candidate. And in fact, in Advisory Opinion 2004-29 (Akin), the Commission expressly approved of a candidate and ballot measure committee splitting the costs of a television advertisement.

Under NFRF’s proposal, just like the other cost splitting arrangements approved by the Commission, NFRF and the benefiting federal candidate will each cover their allocable share of the costs, preventing a contribution from resulting.

Assuming the Commission approves the ability to cost split, the benefiting federal candidate would either reimburse NFRF for its allocable share of costs or pay the underlying vendors directly.

- 3. Assuming the answer to Question 2 is in the affirmative, is all time and space in the advertisement that meets the content prong of 11 C.F.R. § 109.21(c)(4) attributable to the candidate or is only the time and space that PASOs the candidate or their opponent attributable the candidate?***

NFRF specifically requests that the Commission approve the following as a reasonable allocation method for an advertisement that both promotes the Initiative and a federal candidate:

- 1 The portion of the advertisement on a time/space basis that advocates for passage of the initiative without featuring a federal candidate is attributable to NFRF;
- 2 The portion of the advertisement on a time/space basis that PASOs a featured federal candidate or their opponent is attributable to the featured candidate; and

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purposes.”); FEC, AO 2022-05 (DSCC) (permitting the DSCC to allocate the costs of research books between itself and campaign committees based on benefit derived).

<sup>17</sup> FEC, AO 2022-05 (DSCC) (quoting Advisory Opinion 2010-14 (DSCC) at 6); FEC, AO 2006-11 (Washington Democratic State Central Committee); FEC, AO 2022-21 (DSCC, Bennet for Colorado, and People for Patty Murray); FEC, Report of the Audit Division on Bush-Cheney ’04, Inc. and the Bush-Cheney ’04 Compliance Committee.

<sup>18</sup> FEC, Report of the Audit Division on Bush-Cheney ’04, Inc. and the Bush-Cheney ’04 Compliance Committee, Inc. (April 24, 2007) at 10–11; MUR 7530 (NRCC), Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor (Nov. 8, 2021), [https://www.fec.gov/files/legal/murs/7530/7530\\_16.pdf](https://www.fec.gov/files/legal/murs/7530/7530_16.pdf); see also FEC, MUR 7169 (Santarsiero for Congress) (Nov. 22, 2017), Factual and Legal Analysis, <https://www.fec.gov/files/legal/murs/7169/17044432804.pdf> (applying time/space allocation analysis to multicandidate advertisements).

<sup>19</sup> See 11 C.F.R. § 106.8.

- 3 The portion of the advertisement on a time/space basis that advocates for the Initiative and features a federal candidate but lacks any PASOing of the federal candidate or their opponent is attributable to NFRF.

Commission regulations do not proscribe a method for allocating the costs of an advertisement that advocates both for the passage or defeat of a ballot measure and for a candidate's election. Therefore, here, as it has done in the past, the Commission must opine on a method that reasonably allocates costs according to the benefit derived.<sup>20</sup> For broadcast communications split *between candidates*, Commission regulations require the use of "space or time" – but that space or time calculation is not merely when a candidate appears, but the "proportion of space or time devoted to each candidate."<sup>21</sup> Here, the advertisement's portion "devoted to" the federal candidate should not include space or time where the candidate appears to promote the Initiative without any PASOing of themselves or their opponent. The reason is straightforward - the beneficiary of the candidate's appearance in this instance is the Initiative. The use of the candidate's likeness serves as an endorsement by an influential person in the state, designed to use their celebrity or credibility to persuade voters to support the Initiative.

The logic of this allocation principle comes directly from Commission regulations, which provide that a federal candidate may appear in a communication to endorse another candidate or solicit for another candidate and absent any PASOing of themselves or their opponent, the costs of the communication are not attributable to their campaign.<sup>22</sup> In the context of the coordinated communication test, this allowance overrides the general rule that an advertisement must be treated as an in-kind to a candidate if they are featured within 90 or 120 days of their election.<sup>23</sup> In setting exceptions, the regulations expressly recognize that where a candidate appears in an advertisement not to promote themselves but to use their popularity to aid another cause the cost of that appearance is not allocable to their campaign.

The same exact analysis applies here. The Commission should recognize the vital First Amendment interest a federal candidate has in speaking out in support of or in opposition to a ballot measure, separate from promoting their own campaign. The costs of the portion of an advertisement where a candidate does so are not properly attributed to their campaign. Therefore, we ask the Commission to confirm the allocation method proposed above.

#### **IV. Conclusion**

For these reasons, NFRF may ask federal candidates and officeholders to solicit general funds on its behalf without implicating the Act's source restrictions and amount limitations. NFRF may also include federal candidates and officeholders in its communications and allocate the costs of the communications based on a time-space allocation. When allocating the costs of any communications, NFRF will only allocate the time and space of the communications that PASOs the federal candidate.

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<sup>20</sup> See *id.* § 106.1(a)(1); FEC, AO 2006-11 (Washington Democratic State Central Committee); FEC, Report of the Audit Division on Bush-Cheney '04, Inc. and the Bush-Cheney '04 Compliance Committee.

<sup>21</sup> 11 C.F.R. § 106.1.

<sup>22</sup> See *id.* § 109.21(g).

<sup>23</sup> *Id.* § 109.21(c)(4).

Very truly yours,

A handwritten signature in black ink that reads "Jacquelyn Lopez". The signature is written in a cursive, flowing style.

Jacquelyn Lopez

Ezra Reese

Jonathan Peterson

Emma Anspach

*Counsel to Nevadans for Reproductive Freedom*