FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: **The Commission**

FROM: **Office of the Commission Secretary** VFV

DATE: **April 30, 2024**

SUBJECT: **AOR 2024-05 (Nevadans for Reproductive Freedom) – Comment**

Attached is a comment received from NRSC. This matter is on the May 1, 2024 Open Meeting Agenda.

Attachment

RECEIVED
By Office of the Commission Secretary at 1:31 pm, Apr 30, 2024

NRSC

Senator Steve Daines
CHAIRMAN

Jason Thielman
EXECUTIVE DIRECTOR

April 30, 2024

Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First Street NE
Washington, DC 20463
ao@fec.gov

Re: Advisory Opinion Request 2024-05 (Nevadans for Reproductive Freedom)

Dear Ms. Stevenson:

The NRSC, a national party committee of the Republican Party, submits this comment to the Federal Election Commission ("FEC" or "Commission") in regard to the above-referenced advisory opinion request ("the AOR"). The NRSC believes that Draft A's analysis is flawed because it overlooks that solicitations for groups conducting federal election activity are within the scope of the federal candidate/officeholder soft money ban. And ballot measure committees supporting measures that appear on the ballot alongside federal candidates predominantly engage in federal election activity. The NRSC is also concerned that if the Commission approves Draft A, federal candidates will be permitted to solicit funds in unlimited amounts that will be spent to influence those candidates' own elections, including funds from foreign national sources. The Commission should decline to approve Draft A.

BACKGROUND

The AOR describes purported activities of two related entities operating under the banner of "Nevadans for Reproductive Freedom," both of which seek to encourage passage of an abortion-rights ballot measure in the November 2024 Nevada general election.[1] AOR001–002. One of those entities is a 501(c)(4) tax-exempt nonprofit organization that the AOR refers to as "NFRF c4." The second is a Nevada political action committee—which the AOR calls "NFRF PAC"—that is "connected to Planned Parenthood's political advocacy arm."[2] The PAC is well-funded, receiving $1.8 million in 2023, more than half of which came from an organization launched by Illinois Governor J.B. Pritzker that aims "to support and broaden abortion rights across the country" in the 2024 elections and beyond.[3] According to the AOR, Nevadans for Reproductive Freedom "is in

[1] Like the AOR, we use ballot measure, ballot initiative, and ballot referenda interchangeably in this comment.
[2] Eric Neugeboren & Tabitha Mueller, *Indy Explains: Why There Are Two Abortion Ballot Initiatives in Nevada*, The Nevada Independent (Mar. 14, 2024), https://thenevadaindependent.com/article/indy-explains-why-theres-two-abortion-ballot-initiatives-in-nevada; *see also* April Corbin Girnus, *Abortion is on the Ballot in Nevada … One Way or the Other*, Nevada Current (Jan. 23, 2024), https://nevadacurrent.com/2024/01/23/abortion-is-on-the-ballot-in-nevada-one-way-or-the-other/ ("The political action committee is a collaboration between Planned Parenthood Votes Nevada, Reproductive Freedom for All Nevada (formerly known as NARAL Pro-Choice Nevada), and the ACLU of Nevada.").
[3] Girnus, *supra* note 2.

the process of collecting the signatures necessary to place the Initiative on the 2024 general election ballot," AOR002, and based on public reporting it is well on its way to achieving this goal.[4]

The AOR, after limiting the scope of its initial request, now asks a single question of the Commission. NFRF seeks permission to enlist federal candidates and officeholders to solicit non-federal funds for both NFRF c4 and NFRF PAC "without regard to amount limitations or source restrictions" of the Bipartisan Campaign Reform Act of 2002 ("BCRA") amendments to the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30125(e)(1). AOR003–005. According to Draft A, the Commission is prepared to approve this request under the theory that federal candidates may raise unlimited amounts from restricted sources—even to entities that are *not* 501(c)s—if a political group simply labels itself a "ballot initiative committee." Draft A is based on the premise that a ballot initiative is not an "election" within the meaning of FECA—even if it appears on the same ballot as multiple federal elections and even if its proponents conduct clear federal election activity while encouraging its passage. AO 2024-05 – Draft A at 4–7 (hereinafter "Draft A").

Draft A's reasoning and conclusions are flawed in two key ways. First, Draft A essentially concludes that because NFRF c4's principal purpose is encouraging Nevadans to vote for a ballot initiative, that it will not be principally engaged in getting out the vote or voter registration activities within the meaning of the Act. In reaching this conclusion, Draft A completely overlooks FECA's definition of "federal election activity" and Commission regulations stating that the period of time during which such activities occur—not the stated purpose or primary goal of such activities—determines whether get-out-the-vote and voter registration activities are "federal election activity."

Second, Draft A erroneously applies the Commission's precedents interpreting the phrase "in connection with" to mistakenly conflate the foreign national ban with the federal candidate/officeholder soft money ban. Although both prohibitions use the phrase "in connection with" an election, the scope of the latter is broader because it encompasses "federal election activity," and Commission regulations clearly define "federal election activity" for purposes of the soft money ban to extend to certain ballot measure activities. Draft A's flawed reasoning is further evidenced by a major unspoken consequence: if adopted, Draft A would permit federal candidates and officeholders to solicit unlimited funds from foreign nationals on behalf of ballot measure committees—funds that ballot measure committees could then spend on federal election activity boosting the soliciting federal candidates.

[4] Jessica Hill, *Nevada Voters Likely to Get Say on Abortion Protections*, Las Vegas Review-Journal (Apr. 2, 2024). https://www.reviewjournal.com/news/politics-and-government/nevada/nevada-voters-likely-to-get-say-on-abortion-protections-3027527/.

I. Draft A Fails to Adequately Consider Whether NFRF C4 Will Principally Engage in Federal Election Activity.

Draft A resolves the question of officeholder/candidate fundraising for NFRF c4 in three sentences, noting that federal candidates are authorized to solicit contributions on behalf of a 501(c) organization "other than an entity whose principal purpose is to conduct voter registration or get-out-the-vote activities, so long as the solicitation does not specify how the funds will be spent." *Id.* at 3–4. Because NFRF c4's "principal purpose is to advocate for the Initiative," Draft A determines that "federal candidates' solicitations on behalf of NFRF (c)(4) are not restricted" by the federal candidate/officeholder soft money ban—meaning, implicitly, that in Draft A's view advocating for the Initiative does not constitute "voter registration or get-out-the-vote activities." *Id.* at 4. Draft A's conclusion is based on a misapplication of the few facts within the AOR.

The Act permits federal candidates to make "general solicitations" on behalf of 501(c) organizations without regard to the Act's amount limitations or source prohibitions only if two important conditions are satisfied.[5] First, the 501(c) organization that is the beneficiary of the solicitation must not be an entity whose "principal purpose" is to engage in federal election activity as described in 52 U.S.C. § 30101(20)(A)(i)-(ii).[6] Second, the solicitation must not specify how the funds will or should be spent.[7]

Notably, the AOR fails to stipulate anywhere that NFRF c4's principal purpose is *not* federal election activity as described in 52 U.S.C. § 30101(20)(A)(i)-(ii). Instead, the AOR represents only that 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.'" AOR002. Draft A posits that NFRF c4's "principal purpose is to advocate for the Initiative," but overlooks that advocating for a ballot measure and "federal election activity" are not mutually exclusive activities. Draft A at 4.

As relevant here, the Act defines "federal election activity" to encompass (1) "voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election," and (2) "voter identification, get-out-the-vote activity, or generic campaign activity conducted *in connection with* an election in which a candidate for Federal office appears on the ballot (*regardless of whether a candidate for State or local office also appears on the ballot*)."[8] FEC regulations clarify that the phrase "in connection with an election in which a candidate for Federal office appears on the ballot" means "[t]he period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law . . . and ending on the date of the general election[.]"[9] In other words, whether an

[5] 52 U.S.C. § 30125(e)(4)(A).
[6] *Id.*
[7] *Id.*
[8] 52 U.S.C. § 30101(20)(A)(i)–(ii) (emphases added).
[9] 11 C.F.R. § 100.24(a)(1)(i).

organization's activities are "federal election activity" does not turn on the specific focus or purpose of the organization's voter identification, registration, and GOTV activities, but rather the *time period* during which such activities will occur. Importantly, Nevada's federal election activity window began on October 16, 2023, and continues through November 5, 2024.[10]

The specific subcategories of "federal election activity" are also separately defined. "Voter identification" means "acquiring information about potential voters, including, but not limited to, obtaining voter lists and creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting in an upcoming election[.]"[11] "Get-out-the-vote activity" encompasses "[e]ncouraging or urging potential voters to vote, whether by mail (including direct mail), e-mail, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMS), or by any other means," as well as "[a]ny other activity that assists potential voters to vote."[12] Combining these definitions, this means that any 501(c) organization that principally engages in the activities described in this paragraph during the timeframe described in the preceding paragraph has principally engaged in "federal election activity," and therefore a federal candidate cannot solicit soft money on such an organization's behalf.

Put simply, if federal candidates are on the ballot, it's not relevant that NFRF c4's activities are principally directed at turning out voters for a *state* election (e.g., a popular vote on the Initiative). If NFRF c4's principal purpose is "[e]ncouraging or urging potential voters to vote" by texting, calling, emailing, or using "any other means" to get them to the polls in an election in which federal races appear on the ballot, then NFRF c4 intends to engage in "federal election activity" as defined by Commission regulations.[13] NFRF c4 will inevitably expend funds identifying and registering likely Initiative supporters and encouraging them to turn out on Election Day—where these voters will likely support the federal candidates closely aligned with the Initiative's goals.

Hence, because federal elections will occur simultaneously with a vote on the Initiative, every dollar that NFRF c4 spends on voter identification, registration, and GOTV activities is a dollar spent on "federal election activity" within the meaning of the Act. And if federal election activity is NFRF c4's principal purpose—and its sole purpose appears to be stimulating voter turnout to support the Initiative in the 2024 Nevada general election—then the 501(c) carveout upon which Draft A relies is unavailable, and federal candidates cannot solicit funds on NFRF c4's behalf outside of the Act's contribution limitations and source prohibitions. To hold

[10] Fed. Election Comm'n, *Federal Election Activity periods for each state (2024)*, https://www.fec.gov/help-candidates-and-committees/dates-and-deadlines/2024-reporting-dates/federal-election-activity-periods-each-state-2024/
[11] 11 C.F.R. § 100.24(4).
[12] *Id.* § 100.24(3)(i)(A), (D).
[13] 11 C.F.R. § 100.24(3)(i)(A).

otherwise would ignore the Act's definitions for each of the relevant terms, as well as NFRF's stated plans.

II. Approving "Draft A" Would Ignore NFRF PAC's status as a Non-Federal Committee and Would Open the Floodgates to Federal Candidate Solicitations of Unlimited Funds from Foreign Sources.

Draft A concludes that "the proposed solicitations by federal candidates and officeholders [on behalf of NFRF PAC] are not governed by Section 30125(e)(1)(A)" and, therefore, may be made without regard to the Act's amount limitations and source prohibitions. Draft A at 4. This conclusion rests on the premise that "[t]he definitions of 'election' in the Act and Commission regulations are limited to individuals seeking office, whereas the ballot initiative process allows voters to directly enact a proposed statute or constitutional amendment." *Id.* Draft A's analysis and conclusion are flawed, however, because they overlook the plain language of FECA, which prohibits federal candidates and officeholders from soliciting funds "for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements" of the Act.[14] Moreover, it is clear from Commission precedents that it is possible for a federal candidate or officeholder's solicitations on behalf of a ballot measure committee to occur "in connection with an election," even if the vote on a ballot measure is not itself an "election" within the meaning of the Act. Finally, if adopted, Draft A will interact with Commission precedents in a manner that will permit federal candidates and officeholders to solicit unlimited foreign national funds for ballot measure committees that benefit the candidates' elections.

A. Draft A Overlooks FECA's Prohibition on Federal Candidates and Officeholders Soliciting Funds for "Federal Election Activity" Outside of the Limits, Prohibitions, and Reporting Requirements of FECA.

Draft A focuses on explaining why ballot measures are not "elections" under FECA, but completely overlooks FECA's instruction that federal candidates and officeholders cannot solicit funds "for *any* Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements" of FECA.[15] Neither FECA nor the Commission's regulations limit this restriction to solicitations specifically for federal election activity. Instead, both FECA and Commission regulations view federal election activity as being "in connection with an election for Federal office" for purposes of the federal candidate/officeholder soft money ban, which aligns with the overall framework of the ban.[16] Because Section 30125(e)(1)(A) broadly prohibits federal candidates and officeholders from soliciting funds for *any* federal election activity that does not comply with FECA's contribution limits, source prohibitions, and reporting requirements, this provision by itself could extend to solicitations for entities that do not report to the FEC. Congress, therefore, provided that solicitations in connection with non-

[14] 52 U.S.C. § 30125(e)(1)(A).
[15] *Id.* (emphasis added).
[16] 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. § 300.61.

federal elections need only comply with FECA's contribution limits and source prohibitions (but not reporting requirements).[17]

Congress also specifically created a limited exemption for solicitations on behalf of certain 501(c) organizations at Section 30125(e)(4). This exemption recognizes that 501(c) organizations do not have the primary purpose of influencing candidate elections, but are nevertheless capable of conducting activities such as voter registration and get-out-the-vote activities that may have a connection to federal elections. Congress thought it was appropriate to loosen the solicitation restrictions for 501(c) organizations, but did not eliminate the solicitation restrictions altogether for good reason.

But make no mistake: NFRF PAC will be spending funds on federal election activity. Because ballot measures are not non-federal "elections" under FECA, Section 30125(e)(1)(B)—which permits federal candidates and officeholders to solicit funds that comply with FECA's limitations and prohibitions (but not reporting requirements)—does not apply to federal candidate and officeholder solicitations on behalf of NFRF PAC. And because NFRF PAC is not a 501(c) organization,[18] the Section 30125(e)(4) carveout also does not apply to federal candidate and officeholder solicitations on behalf of NFRF PAC. Section 30125(e)(1)(A), therefore, prohibits federal candidates and officeholders from soliciting funds for NFRF PAC—even funds that comply with federal contribution limits and source prohibitions—because such funds will not comply with FECA's reporting requirements.

B. Draft A Incorrectly Conflates the "In Connection With" Language in the Foreign National Ban with the "In Connection With" Language in the Soft Money Ban.

Under the Act, it is illegal for "a foreign national, directly or indirectly, to make [] a contribution or donation of money or other thing of value . . . in connection with a Federal, State, or local election."[19] Courts and the Commission have long held that foreign nationals may make contributions to state ballot measure initiatives even though they may not make contributions to candidates, because "spending relating only to ballot initiatives is *generally* outside the purview of the Act because such spending is not 'in connection with' elections."[20] In other words, FECA's foreign national ban only applies to activity in connection with *candidate* elections.

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[17] 52 U.S.C. § 30125(e)(1)(B).

[18] It is our understanding that ballot measure committees are often organized as 501(c)(4) organizations. See, e.g., AO 2007-08 (McCarthy/Nunes); AO 2010-07 (Yes on FAIR). However, NFRF made no such representation and describes NFRF PAC and NFRF c4 as "two entities." AOR001. Moreover, NFRF only stipulates that NFRF c4 will provide a certification letter under 11 C.F.R. § 300.65(e). AOR002. If NFRF PAC is organized as a 527 organization, it has determined that it is organized and operated primarily for the purpose of influencing the selection, nomination, election, appointment or defeat of candidates to federal, state or local public office. 26 U.S.C. § 527(e)(1),(2).

[19] 52 U.S.C. § 30121(a)(1)(A).

[20] Factual & Legal Analysis at 4, MUR 7523 (Stop I-186 to Protect Mining and Jobs), Oct. 4, 2021 (quoting Advisory Op. 1989-32 (McCarthy) (emphasis added)).

Draft A asserts that because courts and the Commission have concluded that since donations to ballot measure committees are not "in connection with a Federal, State, or local election" for purposes of the foreign national ban, then that must also mean that solicitations for ballot measure committees are not "in connection with an election for Federal office" or "any election other than an election for Federal office" for purposes of the federal candidate/officeholder soft money ban. As explained above, Draft A overlooks the fact that FECA specifically prohibits federal candidates and officeholders from soliciting funds "in connection with an election for Federal office, *including funds for any Federal election activity*."[21] Because of this specific language in Section 30125(e)(1)(A), the scope of the phrase "in connection with" for purposes of the federal candidate/officeholder soft money ban is broader than the scope of the "in connection with" language in the foreign national ban. By its own terms, the foreign national ban does not prohibit foreign nationals from contributing directly to state ballot measure committees or, in many cases, 501(c) organizations that spend funds on "federal election activity," but the soft money ban *does* prohibit federal candidates and officeholders from soliciting soft money on behalf of such entities.

While the Commission's earlier advisory opinions addressing this issue are not a model of clarity, and the present Commission may not agree with all aspects of those analyses, the bottom-line holdings of each of these advisory opinions consistently reflect Congress's decision to limit federal candidates and officeholders from soliciting unlimited funds for federal election activity.

In AO 2003-12 (Flake), the Commission concluded "that the activities of a ballot measure committee that is not 'established, financed, maintained or controlled' by a Federal candidate [or] officeholder . . . are not 'in connection with any election other than an election for Federal office' prior to the committee qualifying an initiative or ballot measure for the ballot, but 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."[22] The Commission analyzed the proposed federal officeholder solicitations under Section 30125(e)(1)(B) because it viewed an "election" under FECA as "not limited to elections for political office,"[23] a position with which the present Commission likely disagrees. However, the Commission's separate analysis and treatment of the proposed federal officeholder solicitations for a ballot measure committee *before* and *after* the measure qualifies for the ballot inherently reflect Section 30125(e)(1)(A)'s restriction on soliciting unlimited funds for any federal election activity.[24] Prior to a measure qualifying for the ballot, a ballot measure committee's activities primarily consist of "petition and signature gathering, which do not occur within close proximity to an election."[25] After a measure qualifies

[21] 52 U.S.C. § 30125(e)(1)(A) (emphasis added).
[22] AO 2003-12 (Flake) at 6.
[23] *Id.*
[24] Importantly, AO 2003-12 involved a ballot measure committee that intended to qualify and advocate for the passage of a measure that would appear on the ballot alongside elections for federal candidates. *Id.* at 3.
[25] *Id.* at 6.

for the ballot, however, a ballot measure committee's activities "occur within close proximity to elections and potentially *involve greater amounts of Federal election activity*," thereby directly implicating the restriction of Section 30125(e)(1)(A).[26]

In AO 2005-10 (Berman/Doolittle), two officeholders asked the Commission whether they may raise funds outside of FECA's amount limitations, source prohibitions, and reporting requirements for California ballot measure committees formed to support ballot measures that would appear on the ballot for a statewide special election.[27] The statewide special election was to be held on November 8, 2005, and—significantly—no federal candidates would appear on the ballot alongside the initiative.[28] The two officeholders also represented that they did not establish, finance, maintain, or control the California ballot measure committees.[29] The Commission concluded that Section 30125(e)(1)(A) and (B) "[did] not apply to the fundraising activities . . . in the circumstances that you describe," but did not provide any analysis explaining that conclusion that was supported by four Commissioners.[30]

This conclusion, however, highlights the continuing importance of "federal election activity" to the scope of the federal candidate/officeholder soft money ban. The ballot measure committees in AO 2005-10 could not have conducted any federal election activity because the measures they supported would not have appeared on a ballot that featured any federal candidate elections. Although Draft A suggests that the Commission's conclusion in AO 2005-10 "is in conflict with its earlier conclusion in [AO] 2003-12," differing material facts drove the divergent conclusions. Draft A at 6, n.16. AO 2003-12 involved solicitations for a ballot measure committee supporting a measure that would appear on the ballot alongside elections for federal candidates. The ballot measure committee would necessarily spend funds on federal election activity. AO 2005-10, on the other hand, involved solicitations for ballot measure committees supporting measures that would be voted on at a special election in which no federal candidates would appear on the ballot. In this scenario, the ballot measure committees could not spend funds on any federal election activity.

Unlike AO 2005-10, AOs 2007-28 (McCarthy/Nunes) and 2010-07 (Yes on FAIR) both involved federal officeholders asking whether they may solicit funds on behalf of ballot measure committees supporting measures that would appear on general election ballots alongside federal candidates. The ballot measure committees identified in both advisory opinions were organized as 501(c)(4) organizations and were not established, financed, maintained, or controlled by the federal officeholders.[31]

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[26] *Id.* (emphasis added).
[27] AO 2005-10 (Berman/Doolittle) at 1–2.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 2.
[31] AO 2007-28 at 1–2; AO 2010-07 at 2.

In AO 2007-28, the Commission voted 5-0 to approve an advisory opinion concluding that the federal officeholders may solicit up to $20,000 per year from individuals for the ballot measure committees, but did not provide an analysis explaining that conclusion that was supported by four Commissioners.[32] Three Commissioners issued a concurring opinion explaining that "when a candidate is raising funds that will be used for voter registration and get-out-the-vote (GOTV) activity to bring people to the polls to vote for an initiative on the same day (and using the same ballot) as the Federal candidate's primary election, these activities will inherently affect turnout for the Federal candidate's election."[33] These three Commissioners believed that "the general solicitation exception does not apply to the request presented here" due to the ballot measure committees' federal election activities, but "[b]ecause the ballot initiative committee at the heart of th[e] request [wa]s a 501(c)(4), [the three Commissioners] concluded that the requestors may solicit funds on behalf of the ballot initiative committee in $20,000 annual increments, as long as those solicitations are made exclusively to individuals."[34]

In AO 2010-07, the Commission issued an Advisory Opinion (1) concluding that Section 30125(e) does not apply to federal candidate or officeholder solicitations on behalf of a ballot measure committee prior to the measure qualifying for the ballot and (2) permitting federal candidates and officeholders to solicit up to $20,000 per year from individuals on behalf of the ballot measure committee after the measure qualifies for the ballot.[35] In a concurring opinion, three Commissioners explained that they believed Section 30125(e) did not apply to solicitations on behalf of ballot measure committees because votes upon ballot measures are not "elections" under FECA.[36] These Commissioners directly addressed Section 30125(e)'s application to federal election activity, but their analysis misses the mark. They characterize the argument that a ballot measure committee's activities "are 'in connection with an election for Federal office' because those activities are FEA, and those activities are FEA because they are 'in connection with an election for federal office'" as "circular."[37] But, as explained above, this overlooks how the Commission has defined "federal election activity" in its regulations, which explicitly incorporates the "in connection with" language.

Commission regulations apply the soft money ban to solicitations for "any Federal election activity as defined in 11 CFR 100.24," which encompasses, among other activities, voter identification and get-out-the-vote activity "conducted *in connection with an election in which one or more candidates for Federal office appears on the ballot*."[38] 11 C.F.R. § 100.24 defines the phrase "in connection with an election in which a candidate for Federal office appears on the

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[32] AO 2007-28 at 3.
[33] Concurring Statement of Chairman Lenhard & Commissioners Walther & Weintraub, AO 2007-28 at 1 (Dec. 31, 2007).
[34] *Id.* at 2.
[35] AO 2010-07 at 3–4.
[36] Concurring Statement of Chairman Peterson & Commissioners Hunter & McGahn, AO 2010-07 at 3–6 (June 30, 2010).
[37] *Id.* at 5.
[38] 11 C.F.R. § 100.24(b)(2) (emphasis added).

ballot" to mean "[t]he period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law . . . and ending on the date of the general election[.]"[39] The remaining three Commissioners in AO 2010-07 recognized that ballot measure committees typically conduct federal election activity (at least after they have qualified for the ballot) and, accordingly, believed it was appropriate to limit federal officeholder solicitations on behalf of the committee to $20,000 per year from individuals given that the ballot measure committee at issue was a Section 501(c)(4) organization.[40]

As these Advisory Opinions demonstrate, the scope of Section 30125(e)'s federal candidate/officeholder solicitation restriction is nuanced. Draft A erroneously conflates language from the foreign national ban with the federal candidate/officeholder soft money ban. These are separate prohibitions in two separate provisions FECA that have different scopes, even though the words used in the two sections are undeniably similar. Conflating the two prohibitions disregards Congress's decision to include solicitations for "federal election activity" in the soft money ban, while leaving that language out of the foreign national prohibition. And, moreover, conflating these two provisions will lead to unintended consequences.

C. Draft A Would Allow Federal Candidates and Officeholders to Solicit Unlimited Funds from Foreign Nationals for Ballot Measure Committees.

If the Commission approves Draft A, then state ballot measure committees will immediately become the most popular political fundraising vehicles in the country. Federal candidates will spend significant sums of time soliciting unlimited funds for closely aligned ballot measure committees (some of which will inevitably come from foreign sources) under the understanding that every dollar the ballot initiative raises and spends will redound to the candidate's benefit on Election Day. This outcome would undermine the legislative purpose of the foreign national prohibition by permitting foreign nationals to directly influence federal candidate elections (even if federal campaigns are not the *direct* recipient of foreign national contributions).[41]

The primary rationale for treating foreign national issue advocacy different from direct contributions to candidates is the assumption that "the risk of undue foreign influence is greater in the context of candidate elections than it is in the case of ballot initiatives," but approving Draft A would eliminate any distinction between the two in one fell swoop.[42] Draft A would permit federal candidates and officeholders to solicit unlimited funds from foreign nationals on

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[39] *Id.* § 100.24(a)(1)(i).
[40] Concurring Statement of Vice Chair Bauerly & Commissioners Walther & Weintrub, AO 2010-07 at 3–4 (July 8, 2010).
[41] *Bluman v. FEC*, 800 F. Supp. 2d 281, 291 (D.C. CIR. 2011) ("It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government."); *see also* 52 U.S.C. § 30121(a)(1)(A) ("It shall be unlawful for [] a foreign national, *directly or indirectly*, to make [] a contribution or donation of money or other thing of value . . . .") (emphasis added).
[42] *Bluman*, 800 F. Supp. 2d at 291.

behalf of ballot measure committees planning to spend those funds on federal election activity that will directly boost the soliciting federal candidate's electoral prospects. Congress extended the solicitation restrictions in Section 30125(e)(1)(A) to "any federal election activity" for good reason—they wanted to prevent federal candidates from soliciting funds that would benefit their own elections outside of the Act's amount limitations, source prohibitions, and reporting requirements.

Under Draft A, the risk of corruption inherent in direct foreign national contributions to candidates would simply metastasize to the ballot initiative context, with the same deleterious effect. A federal candidate could easily owe their election to foreign national contributions that are expressly prohibited by the Act—it would just take a few extra steps.

CONCLUSION

At its heart, "the advisory opinion process is not a means of promulgating new rules."[43] The Act could not be clearer: "[a]ny rule of law which is not stated in this Act . . . may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in . . . [52 U.S.C. § 30111(d)]."[44] The Act is silent on the question of state ballot measure committees, and yet the Commission has repeatedly attempted to fill that gap with Advisory Opinions based on shifting rationales and narrow compromise holdings. Rather than perpetuating this "veritable soup of advisory opinions and enforcement matters" for another two decades, the Commission should recognize that "advisory opinions cannot be used as a rule of law" and instead initiate "proper rulemaking procedures."[45] Approving Draft A *would* promulgate new rules for federal candidate solicitations on behalf of 501(c) organizations, non-federal PACs, and state ballot measure committees, and implicitly overrule a host of Advisory Opinions in the process. If the Commission intends to alter the scope of these longstanding regulations and incentivize a flood of foreign contributions into the American political system, it should do so through a formal rulemaking process that invites public comments from the regulated community.

Respectfully submitted,

Ryan G. Dollar, General Counsel
Andrew Pardue, Associate General Counsel

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[43] Statement of Reasons of Chairman Dickerson & Commissioners Cooksey & Trainor at 4–5, MUR 7491 (American Ethane Co., LLC), Oct. 27, 2022 (quoting Statement of Reasons of Vice Chair Dickerson at 11, MURs 7165/7196 (Jesse Benton), Oct. 12, 2021) (cleaned up).
[44] 52 U.S.C. § 30108(b).
[45] Statement of Reasons of Vice Chair Dickerson & Commissioners Cooksey & Trainor at 4–5, MUR 7180 (GEO Corrections Holdings, Inc. *et al.*), Oct. 13, 2021.