



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary ^{VFV}

DATE: September 12, 2022

SUBJECT: AO 2022-19 (Maggie for NH) Comment

Attached is a comment memo on AO 2022-19 (Maggie for NH).

Attachment

Holtzman Vogel

HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC

September 9, 2022

Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: Advisory Opinion Request 2022-19

Dear Commissioners,

The undersigned counsel submit the following comments on Advisory Opinion Request 2022-19 (Maggie for NH) on behalf of the NRSC.

Requestor's counsel originally asked if a campaign committee's text messages to supporters that provide a link to a "split-it" fundraising page would be subject to the Commission's joint fundraising rules. Through a series of follow-up questions, counsel confirmed that there would be nothing whatsoever "joint" about any aspect of its proposal. Based on those representations, the answer to counsel's question was entirely obvious and we doubt we are the only ones who wondered why counsel would feel compelled to ask the question in the first place.

The Commission proposed a draft response, to be voted on tally today, that answered Requestor's question consistent with Commission precedent. Advisory Opinion 2014-13 provides the answer, although perhaps not in the explicit detail counsel requires. In 2014, the Commission wrote: "ActBlue asks whether use of the Split It box on a contribution form would trigger these joint fundraising requirements *when the solicitation at issue would otherwise not be considered joint fundraising*. The Commission concludes it would not." Advisory Opinion 2014-13 at 5. In the pending request, the proposed text messages are "*the solicitation at issue*" and counsel represents that those text messages would be produced and distributed solely by Maggie for NH without any other committee's involvement and that there are absolutely no other indicia of joint fundraising present. The pending request falls squarely within ground already covered by Advisory Opinion 2014-13.

The requestor's counsel reveals an awareness of the stakes at issue, explaining that "[t]reating text messages that promote split-it pages as joint fundraising would subject many of these campaigns and organizations – and their millions of supporters – to the expensive and onerous process of establishing a new joint fundraising committee, executing a new joint fundraising agreement, establishing a new depository, and so forth, merely on the basis of embedding an existing form for another campaign on an existing fundraising page." Advisory Opinion Request 2022-19 at 4. This is all correct – counsel asks for the Commission to bless a widespread practice that has existed for years on solid legal ground, and has already been blessed by the Commission in Advisory Opinion 2014-13. Why that blessing is needed again *now* is

unclear as no new developments or technologies have emerged that might change the legal calculus. Nevertheless, counsel placed the broad, unquestioned consensus upon which both parties' main fundraising platforms are built up for debate.

In its draft response, the Commission answered the Requestor's question exactly as it should. However, requestor now complains that the Commission did not address an additional question and asks the Commission to determine whether potentially coordinated text messages should be treated as in-kind contributions, or whether they are not subject to such analysis because they do not qualify as public communications. The question presented in Requestor's comment, however, is not what was presented in their original request. The original Request presented the entire proposal as an independent effort, yet now, for reasons that are utterly inexplicable, counsel says there may have been collaboration in some regard with respect to *other* efforts so their text messages may be coordinated after all.

In Part B of the original Request, counsel seeks to relitigate a failed advisory opinion request from last year in what seems to be a concerted effort to turn an easy win into a loss. Despite the Commission's response in Advisory Opinion 2014-13 being key to the pending request, and despite that opinion being extremely important to the broader fundraising operations of both major political parties, counsel nevertheless proposes this alternative approach. The header of Part B reads, "*Even if the use of a 'split-it' fundraising page were to constitute an 'agreement to fundraise jointly' ...*" Advisory Opinion Request 2022-19 at 5. We certainly hope counsel did not mean to suggest that the Commission should reconsider a central piece of modern political fundraising, but if that is what counsel is inviting, the Commission should continue to decline that invitation.

Counsel's proposal in Part B assumes the proposed activity "*could* constitute joint fundraising," Advisory Opinion Request 2022-19 at 8, and calls for the Commission to reconsider an issue that divided it last year. Neither part of this is a good idea. In Advisory Opinion 2021-11, some of the same lawyers, representing the DSCC and DCCC, asked the Commission to conclude that text messages are not public communications. The implications were unstated in the request, but fairly obvious. Quite predictably, the Commission divided on the question and issued a close-out letter. Now, counsel would apparently have the Commission set aside the unanimously decided Advisory Opinion 2014-13, upon which the entire federal fundraising community relies, for the sake of rehashing the debate from Advisory Opinion 2021-11. This is a bad idea and terrible strategy, and does a tremendous disservice to everyone who relies heavily on the very precedent counsel now asks the Commission to revisit, and who do so without needing to incur attorneys' fees to confidently move forward. And this appears to be a deliberate strategy, as the Elias Group has now submitted nearly 37% of the Commission's AO requests this year, most requesting unnecessary clarification on well-established precedent.

We express no opinion here on the substance of counsel's public communication arguments. Counsel's main question – whether the proposed text messages are subject to the joint fundraising rules – was answered by the Commission years ago, and can be answered (again) here, hopefully unanimously, without addressing counsel's alternate theory that assumes the proposed texts are subject to the joint fundraising rules. They are not, so there is no need to

indulge the hypothetical assumption in order to reach a question that is certain to divide the Commission.

Counsel's comment appears to be a bait-and-switch tactic. The original question presented in Part A is easily answered based on counsel's original representations. Counsel's comment, however, undermines those original representations and throws a new factor into the mix at the last minute.

If the Commission intends to vote on tally today, we urge it to answer the question originally presented in Part A as reflected in the existing draft response, and to avoid in any way suggesting that Advisory Opinion 2014-13 has been reconsidered or superseded. The Commission should not indulge whatever game counsel is playing with Part B of the request and its latest comment. If the requestor insists on pressing the questions raised in Part B and its comment, those questions should be part of a separate request that can be addressed on the basis of a separately developed fact pattern that has not been changed by counsel at the very end of the process.

Sincerely,

A handwritten signature in black ink, appearing to read 'JF Johnson', with a horizontal line extending to the right.

Jessica F. Johnson
Michael Bayes
Counsel to NRSC