FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**

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

DATE: **May 3, 2023**

SUBJECT: **AO 2023-03 (Colorado Republican State Central Committee)**
Comment from Campaign Legal Center

Attached is AO 2023-03 (Colorado Republican State Central Committee) Comment from Campaign Legal Center. This matter will be discussed on the Open Meeting of May 4, 2023.

Attachment

CLC
ADVANCING DEMOCRACY THROUGH LAW

May 2, 2023

Lisa J. Stevenson, Esq.
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Re: Advisory Opinion Request 2023-03 (Colorado Republican State Central Committee)

Dear Ms. Stevenson:

Campaign Legal Center ("CLC") respectfully submits this comment on the Federal Election Commission's (the "Commission") draft advisory opinion regarding Advisory Opinion Request 2023-03 (Colorado Republican State Central Committee), which is designated as Agenda Document No. 23-09-A (Draft A) for the Commission's May 4, 2023, open meeting.

We urge the Commission to remove footnote 22 from the draft opinion. Footnote 22 contravenes federal law by addressing hypothetical or conditional facts that are not presented in the request, and it would thus be highly irregular and inappropriate for the Commission to include that material in its final advisory opinion.

Under the Federal Election Campaign Act of 1971 ("FECA"), the Commission is required to respond to the specific facts presented by a requester, not to hypothetical or conditional facts.[1] Commission regulations, moreover, provide that an advisory opinion "shall set forth a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future" and specifically state that requests "presenting . . . or posing a hypothetical situation . . . do not qualify" as a valid request.[2]

[1] FECA states that an advisory opinion requester must submit a request regarding "a specific transaction or activity," and "the Commission shall render a written advisory opinion relating to such transaction or activity." 52 U.S.C. § 30108(a)(1).
[2] 11 C.F.R. § 112.1(b).

In its request, the Colorado Republican State Central Committee (the "Committee") asked whether a segregated account would be subject to FECA's contribution limits and source prohibitions if: (1) the account were used solely to defray the costs of challenging a state law governing the process for nominating candidates to the general election ballot; (2) all solicitations for the fund were to make clear that the money would not be used for the purpose of influencing any federal election; (3) an independent governing board (that excludes federal candidates and officeholders) would manage the fund, including controlling the solicitations and disbursements; and (4) all leftover funds following the conclusion of the lawsuit would be refunded or donated to charity.[3]

The draft advisory opinion would answer the Committee's question by stating that the proposed account would not be subject to FECA's contribution restrictions because it would not be accepting "contributions" — *i.e.*, funds provided "for the purpose of influencing" federal elections.[4] But in footnote 22, the draft opinion offers additional guidance addressing the hypothetical factual scenario — distinct from what the requester proposes to do — in which the segregated account would *not* be governed by an independent board:

> While the Committee's creation of an independent governing board to manage the proposed legal fund would serve as an additional safeguard against the fund being used to receive contributions or make expenditures regulated by the Act, the establishment of such an independent board was not necessary to the Commission's conclusion that donations to or payments by the legal fund would not constitute federal contributions or expenditures under the facts presented here.[5]

In other words, this footnote addresses different facts, and answers a different question, than what is presented in the request: would the Committee's segregated fund be required to abide by FECA's source restrictions and amount limitations if only safeguards 1, 2, and 4 were in place? That question is not what the request asks and is an alternative, hypothetical scenario, and by addressing it, the draft opinion contravenes the legal requirement that the Commission provide an advisory opinion on the "specific transaction or activity" described in the request.[6]

Regardless of whether footnote 22 is correct as a matter of substantive campaign finance law — which it probably is not — it represents a major procedural departure from the requirements of FECA and the Commission's regulations. We are unaware of the Commission ever before using an advisory opinion to issue guidance on a hypothetical, unasked question, and it should not start now. The Commission should remove footnote 22 from its final advisory opinion.

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[3] Draft A at 3-4, Advisory Op. Request 2023-03 (Colorado Republican State Central Committee) (Apr. 27, 2023).
[4] *See id.* at 5-9.
[5] *Id.* at 8 n.22.
[6] *See* 11 C.F.R. § 112.1(b).

Respectfully submitted,

/s/ Shanna (Reulbach) Ports

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