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 Campaign Legal Center ("CLC"). This matter is on the May 1, 2024 Open Meeting Agenda.

Attachment

RECEIVED
By Office of the Commission Secretary at 12:04 pm, Apr 30, 2024

CLC
ADVANCING DEMOCRACY THROUGH LAW

April 30, 2024

Lisa J. Stevenson, Esq.
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Federal Election Commission
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Re: Advisory Opinion Request 2024-05 (Nevadans for Reproductive Freedom)

Dear Ms. Stevenson:

Campaign Legal Center ("CLC") respectfully submits this comment on advisory opinion request ("AOR") 2024-05, submitted to the Federal Election Commission (the "Commission") by Nevadans for Reproductive Freedom ("NRF"), a group whose "mission is to enshrine reproductive freedom in the Nevada state constitution" through ballot-measure activities.[1] NRF has two arms: a 501(c)(4) and a Nevada registered "Committee for Political Action Advocating Passage" ("NRF PAC").[2]

NRF asks the Commission whether federal candidates and officeholders may solicit unlimited funds, and money from donors prohibited from contributing under the Federal Election Campaign Act (the "Act"), on behalf of both NRF PAC and NRF's 501(c)(4).[3] The Commission has released a draft advisory opinion ("Draft A") concluding that unlimited solicitations for both entities are permissible.[4] Draft A improperly purports to narrow the scope of 52 U.S.C. § 30125(e)(1)(A) and would undermine the anticorruption objectives underlying Congress's enactment of the Bipartisan Campaign Reform Act ("BCRA"). CLC thus respectfully urges the Commission to reject Draft A and conclude that federal candidates and officeholders *cannot* make unlimited solicitations for NRF PAC.

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[1] *See* AOR 2024-05 (NRF) at 1–2 (Feb. 27, 2024), https://www.fec.gov/files/legal/aos/2024-05/202405R_1.pdf.
[2] *Id.* at 1.
[3] *Id.* at 3.
[4] *See* Draft A, AOR 2024-05 (NRF) (Apr. 24, 2024), https://www.fec.gov/files/legal/aos/2024-05/202405.pdf ("Draft A").

Section 30125 states that federal candidates and officeholders "shall not" solicit "funds in connection with an election for Federal office, *including funds for any Federal election activity*, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act."[5] "Federal election activity" ("FEA") includes, *inter alia*, (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 (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."[6]

Draft A, however, fails to apply these important, explicit restrictions in section 30125(e)(1)(A), stating:

> Raising and spending [ ] funds related only to a ballot initiative are generally not in connection with an election for federal office, and NRF has stated that it will not be asking federal candidates or officeholders to solicit funds earmarked for federal election activity. Therefore, the proposed solicitations by federal candidates and officeholders are not governed by Section 30125(e)(1)(A).[7]

This assertion—which is unsupported by any citations or further explanation—is deeply flawed. Section 30125(e)(1)(A) does not prohibit only solicitations that are "earmarked" for FEA; the statute is broad and prohibits any soft-money solicitation "in connection with an election for Federal office, *including funds for any Federal election activity*."[8] Section 30125(e)(1)(A) thus prohibits federal candidates and officeholders from soliciting money that may be used on FEA, regardless of whether the solicitation was specifically earmarked for FEA. As such, the relevant inquiry is how the funds solicited may be used, not how the candidate framed the solicitation.

Furthermore, if Congress had intended to limit Section 30125(e)(1)(A) to govern only soft-money solicitations that are *earmarked* for FEA, it could have done so. Indeed, it did just that in drawing a narrow exception for soft-money solicitations for 501(c) nonprofit organizations: Section 30125(e)(4), which was also enacted as part of BCRA, allows federal candidates and officeholders to make general, non-earmarked solicitations for 501(c) organizations that engage in some forms of FEA—including, *e.g.*, voter registration and get-out-the-vote ("GOTV") activity—so long as FEA is not

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[5] 52 U.S.C. § 30125(e)(1)(A) (emphasis added).

[6] *Id.* § 30101(20)(A)(i)–(ii). The Commission's conclusion on another question presented in the request—whether a ballot measure election is an "election" within the meaning of the Act—has no bearing on the question of whether a ballot measure committee is engaging in Type I or II FEA. Whether an activity is Type I or II FEA turns on whether the activity is occurring in close proximity to a federal election featuring candidates, and NRF concedes that the reproductive-freedom ballot measure would be part of a November general election featuring federal candidates. *See id.*; AOR 2024-05 at 2.

[7] Draft A at 4.

[8] 52 U.S.C. § 30125(e)(1)(A) (emphasis added).

the 501(c) organization's "principal purpose,"[9] and to make solicitations earmarked for FEA, provided the request is only to individuals and is capped at $20,000.[10] Congress did not, however, create such an exemption or distinguish between "general" and "specific" soft money solicitations for nonfederal political committees. Under basic canons of statutory interpretation, the Commission must give effect to the choice Congress made; it should not further narrow the scope of Section 30125(e)(1)(A) to solicitations *earmarked* for FEA when there is no such limitation in the statute.

Draft A's conclusion would also undermine Congress's basic legislative purposes in enacting BCRA. In *McConnell v. FEC*, the Supreme Court articulated those purposes—*i.e.*, why Congress enacted the soft-money prohibition and recognized "FEA" as an activity subject to restriction:

> Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself. Without some restriction on solicitations, federal candidates and officeholders could easily avoid FECA's contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities. As the record demonstrates, even before the passage of BCRA, federal candidates and officeholders had already begun soliciting donations to state and local parties, as well as tax-exempt organizations, in order to help their own . . . electoral cause.[11]

NRF's request specifies that the ballot measure it supports will be "on the 2024 general election ballot," and that it plans to invite federal candidates who will be on the 2024 general election ballot in Nevada to fundraise for it.[12] Accordingly, under Draft A, a federal candidate would be able to solicit "[l]arge soft-money donations" to a "like-minded" organization that could use those funds on FEA, such as voter registration, voter identification, and GOTV activity, which helps the candidate's "electoral cause."[13] The evident corruption potential—precisely as described in *McConnell*—is exactly what BCRA was intended to foreclose. Draft A's conclusion, however, flatly undermines this clear legislative purpose.

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[9] *Id.* § 30125(e)(4)(A).
[10] *Id.* § 30125(e)(4)(B).
[11] *McConnell v. FEC*, 540 U.S. 93, 182–83 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).
[12] AOR 2024-05 at 2.
[13] *See McConnell*, 540 U.S. at 182–83.

Prior Commissioners have highlighted this exact risk. In Advisory Opinion 2010-07 (YES on Fair), three Commissioners explained that, without BCRA, federal candidates and officeholders "would be able to solicit non-Federal funds . . . for those ballot measures that are expected to appeal to that Federal candidate or officeholder's likely supporters," thereby funding "voter registration, voter identification and get-out-the-vote activities to benefit both the ballot measure and the Federal candidate or officeholder who solicited the funds."[14] Because those activities "are likely to have a significant and predictable effect" on the federal candidate's election, solicitations for "ballot measure committees could provide an opportunity for *significant* circumvention of the Act."[15]

BCRA prohibits federal candidates and officeholders from soliciting donations to state ballot measure committees that may engage in FEA unless the solicitations are limited to funds that comply with the "limitations, prohibitions, and reporting requirements of [the] Act."[16] In light of BCRA's statutory language and structure, as well as the important policies underpinning it—namely, the risk of corruption through the circumvention of federal contribution limits—the Commission should reject Draft A and conclude that federal candidates and officeholders may not solicit soft money for NRF PAC.

Respectfully submitted,

/s/ Saurav Ghosh

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[14] Concurring Statement of Vice Chair Bauerly and Comm'rs Walter and Weintraub at 3–4, Advisory Op. 2010-07 (Yes on FAIR).
[15] *Id.* at 3 (emphasis added).
[16] 52 U.S.C. § 30125(e)(1)(A).