FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: **The Commission**

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

DATE: **September 30, 2024**

SUBJECT: **AOR 2024-13 (DSCC, et al.) - Comment from Jones Day**

Attached is AOR 2024-13 (DSCC, et al.) Comment from Jones Day.

Attachment

Received by OGC on Sept. 27, 2024

JONES DAY

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September 27, 2024

VIA EMAIL TO AO@FEC.GOV

Federal Election Commission
1050 First Street, N.E.
Washington, DC 20463

Re: Advisory Opinion Request 2024-13 (DSCC, et al.)

Dear Commissioners:

The Republican National Committee ("RNC"), by and through undersigned counsel, respectfully submits this comment in response to Advisory Opinion Request 2024-13 (DSCC, et al.) ("the Request" or "AOR"), concerning the financing of television advertisements soliciting funds to two (putative) candidate-authorized joint fundraising committees ("JFCs").

The RNC regularly participates in JFCs with federal candidates and party committees. The RNC thus has a substantial interest in the Commission answering the questions presented in the Request correctly. For the reasons set forth below, we therefore urge the Commission to act consistently with the plain letter of its regulations specific to JFCs, 11 C.F.R. § 102.17, and prior on-point precedent interpreting those rules and vote "Yes" on the Request's first question presented and "No" on the Request's third question presented.[1]

BACKGROUND

The Request has been filed on behalf of the DSCC and the principal campaign committees of two 2024 general election Senate candidates, Jon Tester (Montanans for Tester) and Ruben Gallego (Gallego for Arizona). AOR 1. According to the Request, the "DSCC wishes to establish two separate joint fundraising committees" with each of those Senate campaigns. *Id.* at 2. In turn, each JFC would be an authorized committee of the respective participating Senate candidate. 52 U.S.C. § 30102(e)(3)(ii); 11 C.F.R. § 102.17(a)(1)(i); *see also* AOR 3, 3 n.5.

The Request states that the proposed JFCs would conduct their activities pursuant to the Commission's regulations on "[j]oint fundraising by committees other than separate segregated funds" at 11 C.F.R § 102.17. AOR 2. The proposed JFCs and their participants therefore would follow the specific "[j]oint fundraising procedures" that the Commission has established "shall govern joint fundraising activity conducted under [11 C.F.R. § 102.17]." 11 C.F.R. § 102.17(c);

1 We do not address the second question presented in the Request because a correct, affirmative answer to Question 1, would moot the Commission's need to do so.

AOR 2. The proposed JFCs' activities would be done subject to "a written agreement" that would "identify the [relevant JFC] as the fundraising representative" and specify an allocation formula—apparently on a percentage basis—for allocating fundraising proceeds and expenses between the participants. AOR 2; *see also generally* 11 C.F.R. § 102.17(c)(1)-(8) (setting out JFC procedures).

Once established, the proposed JFCs "plan to engage in a variety of fundraising activities, including financing television advertisements that contain a solicitation for the relevant [JFC]." *Id.* at 2. As to the television advertisements, the Request proposes "distributing 30-second television advertisements" that would clearly identify and reference the JFCs' authorizing Senate candidates within 90 days of the general election and air in the Senate candidates' states. *Id.* at 2-3, 5. The advertisements would conclude with explicit solicitations of funds to support the JFCs, along with the presentation of a QR code directly linking to online fundraising webpages for the JFCs that (though the Request is silent on the question) presumably would include the JFCs' fundraising notice language described at 11 C.F.R. § 102.17(c)(2). *Id.* at 2-3, 5. Consistent with 11 C.F.R. § 102.17(c), "[a]ny contributions received through the fundraising page[s] associated with the QR code[s]" in the advertisements and any "[e]xpenses for the advertisement[s] will … be divided between participants on the basis of the" allocation formula set out in the relevant joint fundraising agreement. *Id.* at 2

The Request provides a "sample script" of a proposed fundraising television advertisement supporting the putative Tester JFC, *id.* at 2-3, and asserts that any television ads run by either of the proposed JFCs would be "materially indistinguishable from the sample advertisement," *id.* at 5. The sample script presents a testimonial highlighting purported policy accomplishments of Senator Tester relating to drug pricing and concludes with an express on-camera solicitation for the JFC made by Senator Tester himself, asking the viewer to "Join [Tester's] team and donate now." *Id.* at 3. The script also notes the advertisement's inclusion of an "[o]n screen … QR code that [would] link[] to a fundraising page for the [JFC]." *Id.* It, however, provides no information on any written or spoken disclaimers that would be presented in the advertisement or its accompanying landing page.

Based on this planned fundraising activity, and the sample provided, the Request presents the following three questions to the Commission:

1. *May each [JFC] finance the entire costs of the proposed television advertising, allocating the costs according to [its allocation formula under the written agreement]?*

2. *In the alternative, may each [JFC] finance the portion of the television advertising that includes a solicitation for the [JFC], calculated on a*

time/space basis (approximately four seconds in the example provided), allocating the costs according to the [a]llocation [f]ormula?

3. *If the answer to question 1 or 2 is yes, does the Act require that the television advertising contain an on-screen disclaimer that meets the requirements of 11 C.F.R. § 102.17(c)(2)?*

ANALYSIS

The answer to the Request's first question is "Yes," as a matter of law. Indeed, consistent with the text of Commission regulations, the Commission has made clear that JFCs under 11 C.F.R. § 102.17 "must" finance any joint advertising activity that includes a solicitation of contributions to the JFC pursuant to the applicable allocation formula. The Request's second question, consequently, need not be addressed.

As for the Request's third question, the answer should be "No"—"the Act" does not require the disclosure of a fundraising notice under 11 C.F.R. § 102.17(c)(2) in any context. With respect to any regulatory obligation, as long as the fundraising notice accompanies the solicitation, permitting a potential contributor to know the fundraising mechanics and allocations prior to contributing, the rule should be deemed satisfied.

A. THE PROPOSED JFCs MUST FINANCE THE ENTIRE COSTS OF THEIR TELEVISION ADVERTISEMENTS, ALLOCATING THE COSTS ACCORDING TO ITS ALLOCATION FORMULA

The Commission should answer "Yes" to Question 1 in the Request. In fact, since the proposed planned joint television advertisements would include solicitations to the proposed JFCs, the Commission's regulations and prior guidance make clear that the JFCs *must* allocate the costs of the activities pursuant to their governing allocation formula. The Request's concerns over whether different allocation rules may apply under Commission regulations are misplaced.

1. The Commission's JFC regulations and prior guidance answer the question presented.

The Request states that the proposed JFCs intend to operate under the Commission's regulations at 11 C.F.R. § 102.17. AOR 2. Those regulations specifically state that the "[j]oint fundraising procedures" listed under 11 C.F.R. § 102.17(c) "*shall* govern joint fundraising activity conducted under [11 C.F.R. § 102.17]." 11 C.F.R. § 102.17(c) (emphasis added). Among the mandatory obligations imposed is to make an "[a]llocation of expenses" of any joint fundraising "events or activities" pursuant to a funds-received method consistent with the JFC's written fundraising agreement. *See* 11 C.F.R. § 102.17(c)(7)(i)(A) ("After gross contributions are allocated among the participants …, the fundraising representative shall calculate each participant's share of expenses based on the percentage of the total receipts each participant had been allocated.").

Consistent with this command, the Commission has already (unanimously) answered the question presented here, in Advisory Opinion 2007-24 (Burkee/Walz)—which the AOR never mentions. In that advisory opinion, the Commission concluded that any "[e]xpenses for joint advertising efforts that *include solicitations* ***must*** *be allocated* to [JFC participants] under the joint fundraising agreement based on each [participant's] allocation of receipts from the joint advertising efforts." Advisory Op. 2007-24 at 5 (emphasis and bold added). The Commission applied this conclusion to a broad variety of proposed "joint advertising efforts," including joint public communications, involving two federal candidates—such as "*television*, radio, and newspaper advertisements, bumper stickers, campaign banners, and yard signs, … which may solicit contributions to the joint campaign." *Id.* (emphasis added). The Commission did not require any further scrutiny of JFC advertising content where it "include[s] a solicitation." To the contrary, the Commission distinctly held that a time/space cost allocation would only be appropriate for "joint campaign events and advertising activities that do not include solicitations." *Id.*[2]

The Commission should follow the plain language of its JFC regulations and its prior guidance on this issue and answer Question 1 in the affirmative.

2. The Request's uncertainty over the applicable allocation rule is misplaced.

That should be the end of the matter, yet the Request states it is "uncertain" about the required cost allocation applicable to its proposed JFC television advertisements. AOR 6. The Request suggests that because its proposed television advertisements would contain candidate references, they might be deemed to have "dual purposes" under the test for "coordinated party communications" and, in turn, might be subject to different allocation rules, such as time/space, under Commission regulations. *Id.* at 4-6. Yet the Commission has never subjected JFC solicitations to a cost allocation other than 11 C.F.R. § 102.17(c)(9), and it would be wrong for the Commission to impose new allocation rules on the JFC fundraising communications proposed here, for several reasons.

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[2] If one were to try to suggest that Advisory Opinion 2007-24 is distinguishable because the JFC's participants were two candidates and did not include a party committee, that argument would have no merit. The Commission reached its conclusion based on the plain language of its regulations—which are applicable to all JFCs, 11 C.F.R. § 102.17(a)—not the identity of the participants in the JFC. *See* Advisory Op. 2007-24 at 5 (describing JFC procedures, including allocation of expenses, as a mandatory "must" rules).

First, doing so would defy the plain language of 11 C.F.R. § 102.17(c). Although the Request asserts that "[n]othing in the Act or Commission regulations exempt a joint fundraising committee from the coordinated communication test," *id.* at 4, 6, that is false. As described above, the JFC regulations specifically state that all JFC fundraising activity "shall" be subject to 11 C.F.R. § 102.17(c)(7)'s funds-received cost allocation rule. Yet, if that somehow were not clear enough, the "old and familiar" canon of construction, *generalia specialibus non derogant*, under which the "specific must govern the general," demands that Commission give priority to this mandatory regulation specifically "govern[ing]" costs incurred in connection with JFC fundraising over more general allocation rules broadly applicable to other types of activities. *Genus Med. Techs. LLC v. U.S. Food & Drug Admin.*, 994 F.3d 631, 639 (D.C. Cir. 2021) (explaining that "'[h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" (quoting *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957))); *see also Patten v. District of Columbia*, 9 F.4th 921, 926 (D.C. Cir. 2021) ("We are guided by the 'old and familiar rule' that 'the specific governs the general,' which is 'particularly true' where 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645-46 (2012))).

Second, and relatedly, in promulgating 11 C.F.R. § 102.17(c), the Commission has already conclusively determined that any other cost-allocation is unnecessary and inappropriate when committees engage in joint activities that solicit funds to benefit all of the participants. *Accord* Advisory Op. 2007-24 (Burkee/Walz) at 5. In other words, the Commission deemed the funds-received allocation the best way to estimate "the benefit reasonably expected to be derived" from this joint activity and thereby avoid impermissible subsidization of the participants. *Cf.* 11 C.F.R. § 106.1(a). "If each participant pays its own share of expenses calculated pursuant to [11 C.F.R. § 102.17(c)(7)]," the Commission explained, "*no contribution in-kind from one or more of the participants occurs*." *Transfer of Funds; Collecting Agents, Joint Fundraising*, 48 Fed. Reg. 26,296, 26,300 (June 7, 1983) (emphasis added); *accord* Advisory Op. 2024-07 (Team Graham) at 7 ("[B]ecause Team Graham will pay the full cost of the public communications attributable to Team Graham, the communications will not meet the payment part of the coordinated communication test and, therefore, will not be in-kind contributions to Senator or Team Graham.").

This makes the circumstances here quite different from those in Advisory Opinion 2022-21 (DSCC, Bennett), which the Request references several times but which did not involve JFC activity. That advisory opinion instead involved proposed activity with no specific applicable allocation rule—party committee-paid ads that would include a solicitation to financially benefit only the party committee plus campaign advocacy (under the coordination regulations) for the benefit of the coordinating federal candidate. Advisory Op. 2022-21 at 8. This meant that the Commission had to look to its general allocation principles in the regulations. *Id.* Applying those general rules, the Commission correctly determined that the competing "benefit[s] reasonably expected to be derived" were best apportioned on a time/space allocation. *Id.* But that is not applicable here.

Third, a novel cost-allocation method subjectively tied to the "purpose" (whatever that means) of content in JFC solicitations would be unworkable—especially for JFCs with candidate participants. All of their activity inherently will be "coordinated" activity, in the sense of 11 C.F.R. § 109.21(d)'s "conduct prong." *See, e.g.*, 2024-07 (Team Graham) at 7. The activity also routinely will meet the "content" prong under 11 C.F.R. § 109.21(c). Indeed, any solicitation using a commonplace "public communication" (11 C.F.R. § 100.26) fundraising method—such as paid digital, mail, and phone calls—which merely references or includes images of a participating candidate in the middle of the high-stakes fundraising period close to Election Day would trigger the test. 11 C.F.R. § 109.21(c). This means JFCs would have to parse every word and image in their fundraising appeals to assess their "purpose" or restrict their chosen media, or else risk a campaign-finance violation and government enforcement. This cannot be—and has never been—required. The Supreme Court has admonished, "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney," *Citizens United v. FEC*, 558 U.S. 310, 324 (2010), and the Commission clearly intended to avoid imposing any such byzantine obligations on JFCs soliciting money when it adopted 11 C.F.R. § 102.17.

Indeed, a new regime demanding that JFCs allocate the costs of their fundraising activities based on subjective assessments of the "purpose" of content in a solicitation would chill protected speech. Political committees, operating through JFCs and subject to the Commission's rules at 11 C.F.R. § 102.17, have the right to jointly raise money consistent with applicable contribution limits. They also have an unfettered right to determine and utilize the best type of truthful messaging to motivate their donors—whether it be consistent hard asks for money or more subtle appeals tied to candidate or officeholder policy positions or actions as in the Request. For candidate-authorized JFCs, in particular, their solicitations likely will have the dual effect of swaying voting behavior, but that does not mean those solicitations lose their character as fundraising activity. It simply cannot be—and never has been—the rule that a JFC must restrict the content or medium of its fundraising appeals to avoid electorally benefitting its own candidate participant too much. Any "'[s]uch notions run afoul of the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.'" *Emily's List v. FEC*, 581 F.3d 1, 18 (D.C. Cir. 2009) (quoting *FEC v. Wisc. Right to Life*, 551 U.S. 449, 449 n.9 (2007)).

Accordingly, for all these reasons, the Commission should follow its existing rules and guidance and answer "Yes" to the Request's Question 1.

B. THE ACT DOES NOT REQUIRE THAT THE JFC TELEVISION ADVERTISING CONTAIN AN ON-SCREEN DISCLAIMER THAT SATISFIES 11 C.F.R. § 102.17(c)(2).

As to the Request's Question 3—which asks if "the Act require[s] that the television advertising contain an on-screen disclaimer that meets the requirements of 11 C.F.R. § 102.17(c)(2)"—the answer is: no, it does not. The Commission thus should answer "No" to this question.

The applicable disclaimer provision of the Act, 52 U.S.C. § 30120, provides only that any public communication paid for by "an authorized political committee of a candidate," including any that "solicits any contribution," must "clearly state that the communication has been paid for by such authorized political committee." 52 U.S.C. § 30120(a)(1). Under the Bipartisan Campaign Reform Act of 2002, authorized committee television advertisements also must include a spoken and written "stand by your ad" statement of 2002. *Id.* § 30120(d)(1)(B). But that is all that the statute requires. So the answer to Question 3, as worded, is plainly "No."

With that said, despite the statutory silence on the issue, the Commission's JFC regulations at 11 C.F.R. § 102.17(c)(2) do provide that a "joint fundraising notice shall be included with every solicitation for contributions." 11 C.F.R. § 102.17(c)(2). The notice identifies the names of all participating committees in the joint fundraising activity; the allocation formula to be used for distributing the joint fundraising proceeds; a statement informing contributors that, notwithstanding the stated allocation formula, they may designate their contributions for a particular participant or participants; and a statement informing contributors that the allocation formula may change if a contributor makes a contribution exceeding the amount limitation under the Act and Commission regulations. *See* 11 C.F.R. § 102.17(c)(2)(i)(A)-(D); 48 Fed. Reg. at 26,299. Neither the regulation, nor the Commission's explanation for it, detail what it means for the notice to be "included with" a solicitation, particularly one that is not made on paper.

What is clear, however, is that the objective of this regulatory notice requirement, in light of the Commission's anti-corruption purpose, is merely administrative. It is meant only to "inform[] contributors of specific details of the fundraising activity," 48 Fed. Reg. at 26,299, so they can track their contribution limits to comply with the Act, *see, e.g.*, Advisory Op. 1977-23 (Steers) ("The materials used throughout the mail solicitation project must clearly indicate the pro rata distribution which will be made of each contribution received so that contributors have notice as to the extent to which their contribution limits are being 'used up' with respect to each participating campaign."). The fundraising notice, in other words, has no bearing on the public's ability to identify who paid for an advertisement or any candidate involvement in the advertisement.

Therefore, so long as the notice (which is substantial in length[3]) is disclosed to a prospective JFC donor as part of the solicitation, viewed holistically, and thus prior to a contribution—such as on the fundraising page linked through the QR code in the proposed television advertisements—it should be considered "included with [the] solicitation for contributions" and the regulation satisfied. *Cf.* 11 C.F.R. §§ 110.11(c)(2)(iv), (f).

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We thank you for this opportunity to comment on the pending Request.

Respectfully,

E. Stewart Crosland

Counsel for the Republican National Committee

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[3] For example, the relevant portion of the Harris Victory Fund's online fundraising notice, available on ActBlue.com, is over four hundred words long.