FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**

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

DATE: **October 9, 2024**

SUBJECT: **AOR 2024-13 (DSCC, Montanans for Tester, and Gallego for Arizona) Comment from the RNC #2**

The following is an AOR 2024-13 (DSCC, Montanans for Tester, and Gallego for Arizona) Comment from the RNC #2. This matter will be discussed on the next Open Meeting of October 10, 2024.

Attachment

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October 9, 2024

VIA EMAIL TO AO@FEC.GOV

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

Re: Second Comment of the Republican National Committee regarding Advisory Opinion Request 2024-13

Dear Commissioners:

The Republican National Committee ("RNC"), by and through undersigned counsel, respectfully submits this second comment concerning the above-referenced Advisory Opinion Request ("the AOR"). For the reasons set forth herein, as well as in the RNC's first comment submitted on September 30, 2024, we urge the Commission to adopt Draft A and reject Revised Draft B ("Draft B") in response to the AOR.

Only Draft A addresses the important concerns raised in the RNC's first comment. It does so by tracking the actual blackletter of the Commission's longstanding joint fundraising committee ("JFC") regulations and prior on-point guidance concerning allocations of costs of joint fundraising activities—including television advertising soliciting JFC contributions. Draft B does exactly the opposite. Draft B is a conclusion in search of a justification that (a) is unmoored from the unambiguous plain text of the controlling JFC regulations, (b) snubs the Commission's prior precedent, and (c) runs roughshod over the rights of committees that elect to engage in joint fundraising to control the content of their solicitations. We address each of these points in turn below, as well as the two available Drafts' handling of the AOR's additional question concerning the Federal Election Campaign Act ("the Act") and so-called "joint fundraising notices" under 11 C.F.R. § 102.17(c)(2).

A. Only Draft A follows the plain words of the Commission's controlling JFC regulations.

The Commission should vote to adopt Draft A because only Draft A follows the actual text of the Commission's controlling regulations at 11 C.F.R. § 102.17 by concluding that the JFCs described in the AOR would have to pay for the full cost of their proposed television advertisements soliciting contributions to the JFCs and allocate the costs pursuant to the applicable allocation formula under 11 C.F.R. § 102.17(c). *See* Draft A at 8.

Draft A specifically recognizes that the AOR's proposed JFC ads, by expressly soliciting contributions to the JFCs, would constitute joint "fundraising activity." *Id.* at 7-8. Accordingly, Draft A further acknowledges that those ads would have to be governed by the "procedures … described in 11 C.F.R. § 102.17"—including the requirement that "[e]ach participant's share of joint fundraising expenses must be calculated based on the percentage of receipts the participant has been allocated under the joint fundraising agreement." *Id.* at 6. Through this required cost-allocation, Draft A correctly finds that no JFC participant's involvement in the fundraising activity would be improperly subsidized by any other participant—as all participants would have to pay for their expected derived benefit from the activity (through a net proceeds deduction). *Id.* at 7-8 & n.13 (citing Advisory Op. 2024-07 (Team Graham) at 7); *cf.* 11 C.F.R. § 106.1(a). In other words, "[i]f each participant pays its own share of expenses calculated pursuant to this section [11 C.F.R. § 102.17(c)(7)], 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).

Draft B, too, acknowledges that the AOR's proposed television advertisements would constitute joint "fundraising activity," Draft B at 3, but then confusingly ignores 11 C.F.R. § 102.17's plain mandate that "the procedures in 11 CFR 102.17(c) *will* govern all joint fundraising activity conducted under [11 C.F.R. § 102.17]." 11 C.F.R. § 102.17(a)(2); *accord id.* § 102.17(c) ("The requirements of 11 CFR 102.17(c)(1) through (8) *shall* govern joint fundraising activity conducted under this section."); 48 Fed. Reg. at 26,299 ("This section sets forth the procedures for conducting joint fundraising activities."). This now 41-year-old regulation could not be any clearer, and the Commission simply "cannot disregard the plain meaning of a regulation based on policy considerations," as Draft B looks to do. *Huashan Zhang v. U.S. Citizenship & Immigr. Servs.*, 978 F.3d 1314, 1322 (D.C. Cir. 2020) (citing *Mercy Hosp., Inc. v. Azar*, 891 F.3d 1062, 1070 (D.C. Cir. 2018)).

The Commission should follow the plain words of its own regulations, adopt Draft A, and reject Draft B.

B. Only Draft A acknowledges that Advisory Opinion 2007-24 (Burkee/Walz) answers the question presented here.

If more were somehow needed, the Commission also should adopt Draft A because only Draft A recognizes that the Commission's unanimously approved Advisory Opinion 2007-24 (Burkee/Walz) confirms that 11 C.F.R. § 102.17(c)(7)'s expenses-allocation procedure "must" be applied to all JFC activities that "include a solicitation"—even "promotional" television ads featuring candidates. *See* Draft A at 8, 8 n.15 (citing Advisory Op. 2007-24 (Burkee/Walz) at 5).

Draft B tries to quickly breeze over this inconvenient precedent. In a mere footnote, Draft B suggests, as some misguided commenters also have, that Burkee and Walz's joint television

solicitations are distinguishable because they involved two candidates for the same office and thus their content would not have been seen as campaign advertising. *See* Draft B at 8 n.15 (suggesting that the joint Burkee and Walz ads would not have appeared as "campaign advertisements for just one participant"). That is a disingenuous take. The Commission's plain language and intentional framing of the issues in Advisory Opinion 2007-24 quite clearly set forth a brightline—objective—proposition, dictated by the Commission's JFC regulations: "Expenses for joint advertising efforts that include solicitations must be" treated as a joint fundraising activity subject to 11 C.F.R. § 102.17(c)(7), while expenses for any "joint campaign … advertising activities that do not include solicitations" are not fundraising activities and are, thus, subject to a space/time attribution. Advisory Op. 2007-24 at 5. Draft B's assertions to the contrary are pure mental gymnastics.

Indeed, Draft B's simple assessment of Advisory Opinion 2007-24 ignores critical aspects of the Commission's earlier opinion further underscoring its applicability to the ads at issue here.[1] Specifically, the Commission in Advisory Opinion 2007-24 determined that the JFC fundraising allocation rules would apply to *all* of Burkee and Walz's joint campaign advertisements that included solicitations even though: (i) the Commission understood all of Burkee and Walz's joint advertisements to be "promotional media" designed "to promote their campaigns" for Congress, *id.* at 2; (ii) the Commission knew that JFC donors could always elect to designate contributions to one candidate over another in response to an ad, *id.* at 2, 4 n.5—such that one candidate, by rule, could end up covering a greater share of the joint advertising costs; and (iii) it would have been far simpler for the Commission just to say that a time/space allocation would apply to all of the proposed joint advertising, if that were a proper approach. *Id.* But the Commission reached the result it did because the plain language of its regulations demanded it. Likewise here, those regulations demand that the Commission adopt Draft A and reject Draft B.

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[1] It also ignores the on-the-ground realities. Burkee and Walz were not running disparate campaigns—they were working cooperatively on a "tag team" effort to try to unseat their long-serving incumbent U.S. congressman and looking to pool resources in support of their joint effort. *See* Marie Horrigan, *Rare Bipartisan Tag Team Takes On Wisconsin House Veteran*, N.Y. Times (July 24, 2007), https://archive.nytimes.com/www.nytimes.com/cq/2007/07/24/cq_3153.html ("Sensenbrenner, in the 2008 campaign, is being double-teamed by Republican Jim Burkee and Democrat Jeff Walz, friends and teaching colleagues at the district's Concordia University—who are staging a rare tandem challenge to the incumbent."); *see also id.* ("Walz, a professor of political science at Concordia, described the campaign as a collaboratively run grass-roots effort."). They admittedly did not care who between them won. *Id.*

C. Only Draft A respects the rights of joint fundraising committees to determine their own fundraising messaging.

If the actual words of the Commission's JFC regulations and the Commission's prior on-point application of those rules do not sway at least four Commissioners to vote for Draft A, the fact that only Draft A respects the fundamental rights of committees that choose to jointly fundraise should. Indeed, it is "a 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, 477 n.9 (2007)). And only Draft A respects this protection.

Like the nonprofit solicitation regulations struck down in *Emily's List*, *id.*, Draft B's approach would "run afoul" of this important First Amendment protection. *Id.* It would create an entirely "new regime for solicitations" disseminated by candidate-authorized JFCs, *id.*, which would sew compliance confusion and chill protected speech, in the heart of a competitive election. *Id.* Draft B's approach would wrongly force candidate-authorized JFCs to have to make a choice between becoming subjected to more burdensome expenditure-allocation rules or restricting their fundraising efforts to avoid those rules—by forgoing all "public communications" or references to their authorizing candidates and/or key legislative actions by their candidates.[2] *See id.* (citing *Davis v. FEC*, 554 U.S. 724, 738 (2008)). "[T]he argument that speakers can avoid the burdens of a law 'by changing what they say' does not mean the law complies with the First Amendment." *Arizona Free Enter. Club's Freedom PAC v. Bennett*, 564 U.S. 721, 739 (citing *Wisc. Right to Life*, 551 U.S. at 477 n.9). Because the Commission cannot sanction such a "drag" on protected speech, *FEC v. Cruz*, 596 U.S. 289, 303-04 (2022), it should reject Draft B and adopt Draft A.[3]

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[2] Draft B suggests that AOR's proposed ads would "serve primarily as campaign advertising for the candidate featured in each ad," Draft B at 8, but offers no actual details for when a JFC advertisement—where the only "call to action" is an appeal to donate—might be deemed to *objectively* cross this line. It notes that the proposed ads would discuss "the candidate's position on a policy issue" and "air … in th[e] candidate's home state in the month prior to the general election." *Id.* But emphasizing those elements ignores that such timing is when voters are most energized to contribute; a candidate's home state is where putative donors are most likely to reside; and "solicitation is characteristically intertwined with informative and perhaps persuasive speech," *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

[3] The suggestion made in Draft B, as well as in some comments, that allowing JFCs to pay for fundraising advertising that might also be deemed to "promote" a participating candidate would open the door to widespread circumvention of the Act's contribution limits defies all credulity, and borders on the ludicrous. On a practical level, that assertion ignores the reality that solicitations are hardly a preferred way to appeal for actual votes. Normatively, that take erects a whole new

D. Draft A best applies the regulatory fundraising notice requirement—though neither Draft answers the question actually presented in the AOR.

Finally, of the two Drafts, Draft A provides the best answer to the AOR's question of "does 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)." Draft A's flexible approach to assessing when a "joint fundraising notice" will be deemed "included with" a "solicitation for contributions" best embodies the mere administrative, donor notification objectives of the regulation, as the RNC further described in its first comment on the AOR.

But there is a glaring issue with each Draft: the Act's disclaimer provisions do not "require" a fundraising notice of this type at all. 52 U.S.C. § 30120. Unlike the concept of JFCs themselves, 52 U.S.C. § 30102(e)(3)(A)(ii), the "fundraising notice" is wholly a creature of regulation and is intended merely to "inform[] contributors of specific details of the fundraising activity," 48 Fed. Reg. at 26,299, not to further the FEC lone viable interest in preventing *quid pro quo* or its appearance. So, the Commission's answer to the question actually presented by the AOR must be "*No*."[4]

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For all these reasons, we urge the Commission to adopt Draft A and reject Draft B. Thank you for this opportunity to comment.

Respectfully,

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Counsel for the Republican National Committee

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level of unjustifiable "prophylaxis-upon-prophylaxis approach" to campaign-finance regulation. *Cruz*, 596 U.S. at 305.

[4] Any advisory opinion issued by the Commission also should acknowledge that, in light of the total statutory silence on the question of fundraising notices, the Commission's ability to actually enforce 11 C.F.R. § 102.17(c)(2) is—at best—dubious under Administrative Procedure Act under *Relentless, Inc. v. Department of Commerce and Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).