FEDERAL ELECTION COMMISSION
Washington, DC 20463

**MEMORANDUM**

**TO:** **The Commission**

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

**DATE:** **October 3, 2024**

**SUBJECT:** **AOR 2024-13 (DSCC Montanans for Tester and Gallego for Arizona) Comment from Counsel**

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

**Attachment**

ELIAS LAW GROUP

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October 3, 2024

**VIA ELECTRONIC MAIL**

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

**Re: Advisory Opinion 2024-13**

Dear Commissioners,

I write as counsel to the DSCC, Montanans for Tester and Gallego for Arizona ("***Requestors***") in regard to comments submitted on Advisory Opinion Request 2024-13 (the "***Request***"). Since the submission of the Request, the RNC, NRSC and NRCC (collectively, "***Commenters"***) each submitted separate comments to the Federal Election Commission ("***Commission***") suggesting that the Request proposes nothing more than routine joint fundraising activity that is squarely permitted by the Commission's joint fundraising regulations. Requestors write to re-ground the analysis in the actual statute passed by Congress and to be clear about the stakes of this Request.

The Federal Election Campaign Act of 1971, as amended (the "***Act***") provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate."[1] Commenters urge the Commission to read a regulation that authorizes the practice of joint fundraising to override this statute to permit national party committees to finance unlimited television advertising on behalf of federal candidates without treating those costs as a contribution. This approach is plainly impermissible. A regulation can never "trump the plain meaning of a statute," *Atl. City Elec. Co. v. FERC,* 295 F.3d 1, 11 (D.C.Cir.2002).

To say the adoption of the Commenters' approach would trump the plain meaning of a statute is a dramatic understatement. Should the Commission approve the proposed activity as Commenters suggest, it will destroy the fundamental purpose of the Act, which is to prevent the corruption of our democracy by limiting contributions to federal candidates. Federal candidates will no longer need to finance their own television advertisements, the biggest line item in any campaign budget. Instead, mega joint fundraising committees composed of national party committees and an unlimited number of political action committees will pay for these advertisements for them. We

[1] 52 U.S.C. § 30116(a)(7)(B)(i).

urge the Commission to reject Commenters' approach and instead answer the Request in a manner that is consistent with the plain text of the Act.

## I. Factual Background

Commenters suggest that the question posed to the Commission is routine. We disagree and wish to reiterate the question. Requestors ask the Commission whether the DSCC may set up a joint fundraising committee between itself and a federal candidate and then use that joint committee to run television advertisements. The advertisements will contain candidate advocacy for 26 out of the 30 seconds allotted, including express advocacy for the candidate's election. In the last few seconds, the candidate will face the camera and say "join my team and donate now" while an on-screen QR code appears. The advertisement will not give the viewer any direct way to donate. Instead, a viewer of the television advertisement would need to manage to take out a phone in the few seconds the QR code is on screen, capture it via their phone's camera and then visit an external website to donate. Needless to say, this advertisement is unlikely to raise much, if any, money.

Because the advertisement contains this oral statement and QR code, Requestors ask if this advertisement is no longer a campaign advertisement but instead a joint fundraising expense that can be allocated on a funds received basis. If it is a joint fundraising expense that can be allocated according to funds received, the DSCC can pay for the advertisement according to whatever percentage of the proceeds it gets under the overall joint fundraising arrangement. Meaning, if the joint fundraising committee usually allocates the first 2/3 of proceeds to the DSCC, the DSCC can pay for 2/3 of the advertising. If the DSCC usually gets 99% of proceeds, it can pay for 99%.

At its core, the Request asks the Commission if the DSCC can take a regular candidate television advertisement, tack on a statement that says, "join my team and donate now" and a QR code and pay for it without treating it as a contribution to the candidate because it is now a joint fundraising expense. This would allow national party committees and political action committees to cover hundreds of millions of dollars in candidate advertising expenses by claiming such costs are fundraising expenses. Of course, the advertising won't actually raise any more than de minimis money because it is exceedingly difficult for a viewer to effectuate a donation in response to the advertisement. And the advertisement is designed that way. Because fundraising is not the point, candidate advocacy is the point. Approving this would be anything but routine. It would be a fundamental re-write of campaign finance law as passed by Congress.

## II. Payment for Proposed Television Advertising

In answering the Request, the Commission must interpret the interaction of three provisions – a statute passed by Congress that dictates when spending by a non-candidate results in a contribution to a candidate, the Commission's regulations implementing that statute and a separate regulation on the permissibility of joint fundraising. In doing so, the Commission is limited by the plain text of the Act. "[A] valid statute always prevails over a conflicting regulation,"[2] and a regulation can

[2] *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales,* 468 F.3d 826, 829 (D.C.Cir.2006).

never "trump the plain meaning of a statute."[3] There are two ways for the Commission to answer the Request consistent with these limitations, as laid out below.[4]

A. Statutory and Regulatory Background

52 U.S.C. § 30116(a)(7)(B)(i) states that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." A "person" includes a committee and an "expenditure" means "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."[5] Thus, under the plain text of the Act, any payment made by a national party committee in concert with a candidate to influence their election is a contribution to that candidate, subject to the amount limitation on contributions.

In 2003, the Commission adopted rules to implement Section 30116(a)(7)(B)(i) in the specific context of communications. Those rules set out a three-part test for when an expenditure for a communication results in a contribution to a candidate (the "***coordinated communication test***").[6] That test is mechanical and straightforward. In relevant part, the test is met if: (1) the communication is "paid for by a political party committee or its agent"[7] (the "***payment prong***"); (2) the communication is a "public communication" that "expressly advocates the election or defeat of a clearly identified candidate" or "refers to a clearly identified [] Senate candidate and is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the clearly identified candidate's general . . . election" (the "***content prong***");[8] and (3) a candidate or their agent is "materially involved" in decisions regarding the "content" of the communication, the "means or mode" or "specific media outlet used" for the communication, or the "timing or frequency" of the communication ("***conduct prong***").[9] As explained in the Request, the proposed advertising meets the content and conduct prong, leaving open only the question of whether the payment prong is met.

The Act does not mention, much less authorize, joint fundraising. Instead, in 1983 the Commission, with no statutory basis, promulgated the joint fundraising regulations at 11 C.F.R. § 102.17 to permit the practice of two or more committees spending funds to jointly raise contributions.[10] The joint fundraising regulations make no mention of communications, instead assuming an event based fundraising model.[11] In the context of event based fundraising, the

[3] *Atl. City Elec. Co. v. FERC,* 295 F.3d 1, 11 (D.C.Cir.2002).
[4] While Requestors have serious doubts about the legality of the proposed conduct, we wish to be clear that the Request is not hypothetical. Should the Commission approve it, Requestors cannot afford to be at a competitive disadvantage and wish to engage in the proposed conduct.
[5] 52 U.S.C. §§ 30101(9)(A)(i), (11).
[6] 11 C.F.R. §§ 109.37; 109.21.
[7] *Id.* § 109.37(a)(1).
[8] *Id.* §§ 109.37(a)(2)(ii), (iii)(A).
[9] *Id.* §§ 109.37(a)(3); 109.21(d)(2).
[10] 48 Fed. Reg. 26296 (June 7, 1983).
[11] 11 C.F.R. § 102.17(c)(7)(i)(C).

regulation requires allocation of expenses among participants in the joint fundraising effort "based on the percentage of the total receipts each participant had been allocated."[12]

B. Question Presented

The fundamental question posed by the Request is when an expense is a joint fundraising expense subject to allocation on a funds received basis under 11 C.F.R.§ 102.17 and when it is instead subject to the general statutory rule set forth at 52 U.S.C. § 30116(a)(7)(B)(i) and the regulations directly implementing it, 11 C.F.R. § 109.21 and 109.37. Commenters want the answer to be always, allowing a regulation with no statutory basis to swallow the plain text of the law passed by Congress. This approach would plainly allow a regulation to "trump the plain meaning of a statute" and is impermissible.[13] Requestors propose two alternative answers, each of which comply with the statutory language.

*i. Only the portion of an advertisement that solicits a contribution is a fundraising expense allocable under 11 C.F.R. § 102.17.*

In promulgating 11 C.F.R. § 102.17 the Commission crafted an exception to 52 U.S.C. § 30116(a)(7)(B)(i) only where two entities are engaged in joint fundraising. The Commission should interpret this exception to only override the statutory language and its direct implementing regulations where actual fundraising is happening – namely where a solicitation is present. If a solicitation is present, that portion of the advertising on a time/space basis may be paid for on a funds received basis because it is fundraising subject to 11 C.F.R.§ 102.17.

Commenters suggest there is no way for the Commission to know when part of an advertisement contains a solicitation. Yet, all this requires is asking if a given portion of the advertisement is expressly asking the viewer to donate money. In the proposed advertisement, that happens only during the last four seconds. And in fact, many areas of Commission regulations require the Commission to answer this very same question.[14]

Contrary to Commenters' suggestion, this approach is also fully consistent with Advisory Opinions 2024-07 (Team Graham), and 2007-24 (Burkee/Walz). In Advisory Opinion 2004-07 (Team Graham), the Commission approved of a joint fundraising committee paying for "public communications ***in the form of solicitations***, invitations, and similar fundraising event announcements."[15] The question presented assumed any communication was a solicitation and offered no details to suggest otherwise. The same is true of Advisory Opinion 2007-24 (Burkee/Walz). There, a Democratic and Republican candidate for the U.S. House planned to campaign together to promote a campaign "marked by civility and honesty."[16] The candidates told the Commission they intended to "appear jointly in television and radio advertisements, as well as in 'web-based' and e-mail advertisements" and that "in addition" they "intend to solicit

[12] *Id*. § 102.17(c)(7)(i)(A).
[13] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 11 (D.C. Cir. 2002).
[14] *See e.g.*, 11 C.F.R. §§ 300.2(m); 114.5(a); 104.7(b); *see also* FEC, AO 1991-03 (TEX/CON); FEC, MUR 782 (Honor Bound PAC); FEC, AO 2003-14 (Home Depot).
[15] FEC, AO 2024-07 (Team Graham) at 7 (emphasis added).
[16] FEC, AO 2007-04 (Burkee/Walz) at 2.

contributions through some or all of these promotional media."[17] No further detail regarding the content of the advertising was provided and nothing in the request suggested an advertisement could contain both a solicitation and candidate advocacy. And in fact, it is difficult to imagine how such an advertisement would have even worked in the context of two opposing candidates. On these facts, the Commission held that joint advertising with a solicitation can be allocated on a funds received basis.[18] For advertising that does not include a solicitation, the Commission required allocation on a time/space basis.[19] This is precisely the test suggested by Requestors, just applied to the facts at hand – an advertisement that contains both a solicitation and extensive candidate advocacy.

*ii. Only the portion of the advertising that does not PASO the candidate may be allocated to a non-candidate participant.*

The Commission may also respond to the Request consistent with 52 U.S.C. § 30116(a)(7)(B)(i) by relying on the plain language of its regulation implementing that statute. 11 C.F.R. § 109.21 squarely answers the question of when an expense for a communication paid by a non-candidate committee is a solicitation expense for that entity, not allocable to a candidate. The regulation provides that "[a] public communication in which a candidate for Federal office solicits funds for another . . . political committee . . . is not a coordinated communication with respect to the soliciting Federal candidate unless the public communication promotes, supports, attacks, or opposes the soliciting candidate or another candidate who seeks election to the same office as the soliciting candidate."[20] Put simply, another way to answer the Request consistent with the Act is to hold that to avoid meeting the coordinated communication test, the DSCC can only pay for the portion of the proposed advertising that does not promote or support the benefitting candidate or attack or oppose their opponent.

It is worth noting that Commenters also argue that under 11 C.F.R. § 109.21, the payment prong is not met merely because a joint fundraising committee is an "authorized committee." This is nonsensical. Yes, a joint fundraising committee is an authorized committee and would be the sponsor of the proposed advertising. The relevant legal question, however, is not who sponsors the advertising, but whether the money for it comes from a source other than the benefitting candidate's committee. The Act states "***expenditures made by any person*** in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate."[21] Similarly, the regulation asks if a communication was "***paid for by a political party committee*** or its agent"[22] Under the facts in the Request, an expenditure will be made, and an expense paid for, by a national political party committee regardless of the fact that a joint fundraising committee sponsors the advertising.

[17] *Id*.
[18] *Id*. at 5.
[19] *Id*.
[20] 11 C.F.R.§ 109.21(g)(2).
[21] 52 U.S.C. § 30116(a)(7)(B)(i).
[22] *Id.* § 109.37(a)(1).

## III. Disclaimer Requirements

The third question in the Request asks whether a television advertisement that contains a joint fundraising solicitation must include a joint fundraising notice under 11 C.F.R. § 102.17(c)(2) on the advertisement itself. With regards to this question, Commenters urge the Commission to now all of a sudden ignore the plain text of the regulation they claim answers the first two questions. 11 C.F.R. § 102.17(c)(2) provides that a "joint fundraising notice shall be included ***with every solicitation for contributions***." Commenters both argue that the entire proposed advertisement is clearly a joint fundraising solicitation under 11 C.F.R. § 102.17, which renders it exempt from Section 30116(a)(7)(B)(i), *but also that* the requirement in 11 C.F.R. § 102.17 that every joint fundraising solicitation contain a fundraising notice does not apply. Both things simply cannot be true.

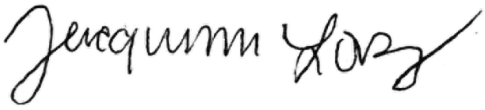
Commission regulations require that a "joint fundraising notice shall be included ***with every solicitation for contributions***."[23] If the proposed television advertising is itself a solicitation, then it requires a disclaimer. If the proposed television advertising is not itself a solicitation, Requestors assume that the joint fundraising rules do not apply at all and the answer to all three questions is no.

## IV. Conclusion

The question posed to the Commission in the Request is fundamentally whether a regulatory allowance for joint fundraising can be read to swallow the general rule set forth by Congress that spending money in coordination with a candidate to aid their election is subject to the contribution limits. Commenters urge the Commission to say yes. They suggest you extend the scope of the joint fundraising regulations to mean that any time an advertisement contains a passing solicitation for funds, the entire advertisement can be paid for out of a joint fundraising committee without regard to the contribution limits. The problem with this argument is that it has completely lost the thread on the language of the statutes the Commission is charged with interpreting.

If the Commission takes this position, there is nothing to stop federal candidates from fully offloading their entire advertising budget to national party committees and political action committees. The Act's contribution limits will no longer have meaning and our campaign finance system will be fundamentally changed. The Commission was created to enforce the Act as passed by Congress, not to re-write it. Requestors urge it to do so here.

Very truly yours,



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[23] *Id.* § 102.17(c)(2).