



FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary ^{VFV}

DATE: October 3, 2024

SUBJECT: AOR 2024-13 (DSCC, et al.) Comment from CLC

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

Attachment

RECEIVED

By Office of the Commission Secretary at 3:57 pm, Oct 03, 2024

RECEIVED

By Office of General Counsel at 3:25 pm, Oct 03, 2024

CLC

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THROUGH LAW

October 3, 2024

Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First St. NE
Washington, DC 20463
ao@fec.gov

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

Dear Ms. Stevenson:

Campaign Legal Center (“CLC”) respectfully submits this comment on advisory opinion request (“AOR”) 2024-13, submitted to the Federal Election Commission (the “FEC” or “Commission”) by the DSCC, Montanans for Tester, and Gallego for Arizona (collectively, “Requestors”).¹ The Requestors seek the Commission’s guidance regarding how they may pay for television ads that will “primarily” expressly advocate for a federal candidate, while also, briefly, soliciting funds on behalf of a joint fundraising committee (“JFC”) that the Requestors intend to establish and participate in.² The Requestors propose that each of the two JFCs will pay either the entirety of the costs for such ads, or, alternatively, that the costs will be allocated on a time-space basis between the JFC and its participants.

Under the relevant joint fundraising regulations and FEC precedents,³ it is clear that the JFCs cannot pay for these ads, which “primarily” focus on expressly advocating for a federal candidate who is participating in the JFC, in their entirety. Instead, each JFC may only pay the allocated portion of the proposed ads that solicit funds for that JFC. The costs associated with those portions of the ads expressly advocating for a candidate must be paid for by Montanans for Tester or Gallego for

¹ See AOR 2024-13 (DSCC) (Sep. 18, 2024) (“AOR 2024-13”). Per the AOR, the participants in one JFC will be the DSCC and Montanans for Tester, while the participants in the other JFC will be the DSCC and Gallego for Arizona. *Id.* at 2.

² *Id.*

³ See 11 C.F.R. § 102.17(c)(7); Advisory Op. 2022-21 (DSCC, *et al.*), <https://www.fec.gov/files/legal/aos/2022-21/2022-21.pdf>; Advisory Op. 2010-14 (DSCC, *et al.*), <https://www.fec.gov/files/legal/aos/2010-14/AO-2010-14.pdf>.

Arizona, respectively (or paid for by the DSCC as a party-coordinated expenditure or contribution, subject to the relevant limits).

The request seeks the Commission’s confirmation that the mere inclusion of language soliciting funds to a JFC—here, “a QR code during the final few seconds that, when scanned, links to an online fundraising page for the applicable [JFC] . . . [and] a brief oral solicitation”⁴— does not negate the general allocation principles codified in the Federal Election Campaign Act (“FECA” or the “Act”) and the Commission’s regulations.⁵ It does not.

The Commission’s handling of “dual-purpose” solicitations in other contexts confirms this. For example, both the Commission and a federal court have held that a communication can be a reportable independent expenditure—*i.e.*, a communication that expressly advocates the election or defeat of a candidate that is not coordinated—when it has the purpose of soliciting funds. In *FEC v. Christian Coalition*, the U.S. District Court for the District of Columbia unequivocally stated that “express advocacy [] includes verbs that exhort one to campaign for, or *contribute to*, a clearly identified candidate.”⁶ The FEC has also explained that “exhortations to contribute time or money to a candidate would also fall within the revised definition of express advocacy.”⁷ In other words, just because a communication has, as one of its purposes, the solicitation of contributions, does not mean that it defies classification as an independent expenditure and is not subject to the independent expenditure reporting requirements.

Similarly, in Advisory Opinion 2022-21 (DSCC), the Commission recognized that a television advertisement supporting or opposing, or expressly advocating for or against, a candidate that includes a link to a contribution page for a national party committee’s legal proceedings account would “serve two purposes: it includes both a solicitation of funds to the Legal Proceedings Account as well as other content that would qualify the resulting television advertisement as a party coordinated communication.”⁸ The Commission therefore concluded that the party committee could pay for this dual-purpose communication only if it pays for the advocacy portion out of its general fund—subject to the party-coordinated spending limit—and then could pay the small amount attributable to the solicitation from its legal proceedings account.⁹ Notably, the inclusion of the solicitation did not turn the entire communication into a solicitation that could be paid for out of the legal proceedings account.

⁴ AOR 2024-13 at 2.

⁵ See *id.* at 6 (“Commission regulations and guidance consistently stand for the proposition that advertising with dual purposes must be reasonably allocated.”).

⁶ *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 62 (D.D.C. 1999) (emphasis added).

⁷ Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,294 (Jul. 6, 1995).

⁸ Advisory Op. 2022-21 (DSCC, *et al.*) at 8.

⁹ *Id.* at 7-8.

Applying the same analysis to this request would avoid the deeply problematic implications of allowing JFCs to pay the full cost of ads that primarily feature electoral advocacy: Because the proposed communications “include[] both a solicitation of funds”—albeit as a very small proportion of the communication—“as well as other content that would qualify the resulting television advertisement as a party coordinated communication,”¹⁰ the JFCs can only pay for the portion of the communications soliciting funds for the JFC (passing those costs through to the participants in accordance with the allocation formula). With respect to the substantial portion of the advertisement expressly advocating in support of candidates, either the candidates could pay the attendant costs or the DSCC could pay those costs as a party-coordinated expenditure or contribution, subject to the relevant limits; in either case, the JFC would not be paying the costs for express advocacy. A contrary approach—*i.e.*, allowing the JFC to pay for the ad and allocating the costs to the participants per the terms of the JFC allocation agreement—would open the door to widespread circumvention of FECA’s contribution limits and potentially prohibitions through JFC ads, like those presented in this AOR, that are primarily intended to support the election of specific federal candidates rather than to raise funds.

The inclusion of language soliciting funds for the JFC—as opposed to a party committee or other entity—does not alter this analysis or support a different outcome. The Commission’s joint fundraising regulations¹¹ do not operate in a vacuum; they must be interpreted and applied in a way that is consistent with all other relevant requirements in FECA and other FEC regulations. For instance, like all committees, JFCs must register with the Commission, abide by contribution limits, keep records and file periodic disclosure reports, and include “paid for by” disclaimers on their communications.¹² The joint fundraising regulation explicitly clarifies that it does not supersede the regulations at 11 C.F.R. part 300, which implement the Bipartisan Campaign Reform Act.¹³ Accordingly, JFCs must comply not only with the Commission’s joint fundraising regulations—including the allocation of *fundraising* expenses—but with Commission regulations and precedents governing the allocation of costs for communications made on behalf of candidates,¹⁴ in addition to the coordinated-communication regulations. The joint fundraising regulations must operate in tandem with—not to the exclusion of—other federal campaign finance laws.

FEC advisory opinions do not undermine this straightforward conclusion. In Advisory Opinion 2007-24 (Burkee/Walz)—which several commentators erroneously rely on to support allowing JFCs to finance the communications presented in the request—the Commission readily approved allowing a JFC to pay for solicitation

¹⁰ *Id.* at 8.

¹¹ See 11 C.F.R. § 102.17.

¹² See, e.g., *Joint Fundraising with Other Candidates and Political Committees*, FEC, <https://www.fec.gov/help-candidates-and-committees/joint-fundraising-candidates-political-committees/> (last visited Oct. 1, 2024).

¹³ 11 C.F.R. § 102.17(a).

¹⁴ *Id.* § 106.1(a)(1).

communications, allocated 50/50 per the JFC’s allocation formula, since that requestor stipulated that “on all advertising”—be it on television, radio, or in print—“both candidates will be featured with equal time and prominence.”¹⁵ That opinion did not ask the Commission to consider whether a different allocation would be necessary because the advertising expressly advocated for just one of the two JFC participants, or advocated for one more than the other, such that the unequal division of advocacy—if paid for by the JFC—would result in one JFC participant underwriting the other’s campaign. In other words, Advisory Opinion 2007-24 simply did not present the same scenario presented by this request.¹⁶

Likewise, nothing in Advisory Opinion 2024-07 (Team Graham) addresses the scenario presented here, where a JFC seeks to pay for an entire communication when only a very small portion is dedicated to soliciting funds: the Commission concluded, in that opinion, that when each JFC participant pays for “its proportionate share” of a JFC’s communication, as proposed by that requestor, the payment prong of the coordinated communications test is not satisfied.¹⁷ Here, by contrast, because the first 26 seconds of the proposed communications would not be raising funds for the JFC, and would instead be advocating for one participant in the JFC (the candidate), and not the other (the DSCC),¹⁸ if the JFCs wholly paid for the communications, then one participant would be subsidizing the other and the participants would obviously not be paying for their “proportionate share” of the communications.

In fact, allowing the JFCs to pay in full for the proposed communications would actually violate the joint fundraising rules, which state that “[t]he payment by one participant of another participant’s expenses is treated as a contribution subject to contribution limits,” and “no participant may subsidize or make a contribution to any other participant in excess of the contribution limits.”¹⁹ If the JFCs pay for the proposed communications and pass those costs on to their participants per the allocation agreement, then the DSCC would be paying for a communication that exclusively—for 26 of 30 seconds—benefits the other JFC participant without raising funds for the JFC or engaging in advocacy that benefits the DSCC.

And aside from violating the joint fundraising rules, approving this arrangement would create a loophole for circumventing FECA’s contribution limits and prohibitions through JFCs by allowing leadership PACs, which cannot spend money on behalf of their sponsoring candidate’s campaign, as well as super PACs, which are explicitly barred from coordinating with or contributing to candidates’

¹⁵ Advisory Op. 2007-24 (Burkee/Walz) at 2, 5; AOR 2007-24 (Burkee/Walz) at 2.

¹⁶ See 52 U.S.C. § 30108(c)(1) (providing that advisory opinions “may be relied upon by” persons “involved in the specific transaction” and “any person involved in any specific transaction or activity which is *indistinguishable in all its material aspects*” from the proposed activity presented in the advisory opinion (emphasis added)).

¹⁷ Advisory Op. 2024-07 (Graham) at 7.

¹⁸ See AOR 2024-23 at 5 (explaining that the first 26 seconds of the ads would be “devoted to messaging supporting either Senator Tester or Congressman Gallego,” and the final 4 seconds would have a solicitation for the applicable JFC).

¹⁹ *Id.*

campaigns, to subsidize candidates' electoral advocacy. For example, suppose that a JFC has three participants: a candidate's campaign, a leadership PAC sponsored by that candidate, and a super PAC; if that JFC paid the full cost to run a 30-second ad featuring 4 seconds dedicated to soliciting funds for the JFC and 26 seconds of express advocacy supporting the candidate, and those costs were then allocated among the three participants, then, regardless of the specific terms of the JFC allocation agreement, the leadership PAC and super PAC would be coordinating with or contributing to the candidate's campaign, which FECA clearly prohibits.

Indeed, the very concept of a JFC paying for an ad that serves two purposes—electoral advocacy and soliciting funds—is fundamentally contrary to FECA's provisions governing joint fundraising committees, which provide that JFCs may be established “solely for the purpose of joint fundraising.”²⁰ In Advisory Opinion 2013-13 (Freshman Hold'em), the Commission stated: “By definition, a joint fundraising committee . . . is ‘established *solely* for the purpose of joint fundraising by’ the candidates who form it. . . . In other words, a [JFC] such as the requestor here exists only to raise funds for its participants.”²¹ The fact that JFCs are supposed to work only to raise funds for—not advocate for the election of—their participants further reinforces the conclusion that a JFC cannot pay for those portions of an advertisement that have the singular purpose of advocating for the election or defeat of a candidate. As such, allowing the Requestors' JFCs to pay for the proposed communications, where only “the final few seconds” would be dedicated to fundraising,²² would turn on its head FECA's requirement that a JFC exists “*solely* for the purpose of joint fundraising.”²³

If a communication both solicits funds and expressly advocates for candidates, like those communications proposed by Requestors, it must be paid for according to the generally applicable allocation rules and treated, in whole or in part, as a coordinated communication or independent expenditure (as applicable). As the proposed communications—which will predominantly feature electoral advocacy, with language soliciting funds included almost as an afterthought—and others like it aptly illustrate, allowing JFCs to pay for such “dual purpose” ads would contravene the joint fundraising regulations and carve a clear path around FECA's contribution limits.

²⁰ 52 U.S.C. § 30102(e)(3)(A)(ii).

²¹ Advisory Op. 2013-13 (Freshman Hold'em) at 3.

²² AOR 2024-13 at 2.

²³ Advisory Op. 2013-13 (Freshman Hold'em) at 3.

The inclusion of a “final few seconds”²⁴ devoted to soliciting funds does not suddenly render all other aspects of FECA inapplicable to a communication. Accordingly, we respectfully urge the Commission, in responding to this request, to firmly reject the legally flawed and problematic argument that a JFC can pay for electoral advocacy.

Respectfully submitted,

/s/ Saurav Ghosh

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²⁴ AOR 2024-13 at 2.