FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**

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

DATE: **October 8, 2024**

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

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

Attachment

Holtzman Vogel

HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC

RECEIVED
By Office of the Commission Secretary at 3:44 pm, Oct 08, 2024

October 8, 2024

RECEIVED
By Office of General Counsel at 3:28 pm, Oct 08, 2024

VIA EMAIL

Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2024-13 (DSCC/Tester/Gallego)

Dear Commissioners:

These comments are submitted by the undersigned in response to Advisory Opinion Request 2024-13 (DSCC/Montanans for Tester/Gallego for Arizona). We write in our individual capacities, based upon our many years of experience practicing campaign finance law, and not on behalf of any client.

The Request may technically satisfy the requirements set forth at 11 C.F.R. § 112.1, but we believe it is, like Advisory Opinion Request 2022-21, an effort to impose restrictions on a third party. Requestors' counsel openly acknowledges this in a comment submitted on October 3, 2024 (the "October 3 Comment"), in which counsel writes, "[w]hile 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." The October 3 Comment leaves no doubt that the Request was filed for offensive purposes, and, like Advisory Opinion 2022-21, it is an abuse of the advisory opinion process.

However, given that the Commission is likely to oblige the Requestors, we submit these comments to correct misstatements by Requestors' counsel, and provide Commissioners with important context that a genuine Request would have included.[1]

The advertisement described in the Request is substantially similar to an advertisement aired by a joint fundraising committee that includes Senator Tester's general election opponent. As the Request and October 3 Comment make clear, the Requestors ask the Commission to analyze their proposal in a way that ensures no one would ever engage in the activity. Various commenters explained why the proposal is permissible under the Commission's joint fundraising regulations, but the October 3 Comment objects strenuously to their analyses. Requestors' counsel hyperbolically claims that "the Commenters' approach would trump the plain meaning of a statute," "destroy the fundamental purpose of the Act," and constitute "a fundamental re-

[1] On September 24, 2024, Marc Elias of the Elias Law Group quipped on X (formerly Twitter), "In the next 20 days the @FEC will weigh in on whether a candidate can offload their TV ad costs to a joint fundraising committee." (Tweet available at https://x.com/marceelias/status/1838573047428661662?s=46.) Needless to say, this would be a strange way for Requestors' counsel to characterize the request were they genuinely seeking approval.

write of campaign finance law as passed by Congress."[2] Requestors' counsel also undermines the pending Request at every opportunity, going so far as to claim that the proposed advertisement "is unlikely to raise much, if any, money."[3]

However, what the Request proposes is not new. Joint fundraising committee advertisements like the one proposed in the Request draw on the pioneering efforts of the Hillary Victory Fund, a joint fundraising committee that included Hillary Clinton's 2016 presidential campaign. In 2016, "Hillary Victory Fund spent more than $54 million on online ads that are almost indistinguishable from those paid for by her campaign."[4] As was reported at the time, "instead of just transferring its cash to the signatories of the joint fundraising agreement, the Clinton campaign is also using a significant amount of the money the Hillary Victory Fund collects to finance pro-Clinton advertising."[5] The Clinton campaign was accused of "offload[ing] campaign costs" at the time.[6] According to Requestors' counsel, "[t]his approach is plainly impermissible."[7]

The Requestors' protests notwithstanding, nothing prohibits joint fundraising committees from distributing fundraising solicitations in the form of television ads (or online ads, as was the case in 2016). In fact, as three commenters demonstrated, the Commission has already approved the practice.[8]

The Commission's Joint Fundraising Regulations Are Firmly Rooted In The Act and Codify Established Practices of the Mid-1970s

Requestors' counsel recklessly argues that the Commission's joint fundraising regulation is without any statutory basis, and that the Commission only "permitted" joint fundraising when it adopted the joint fundraising regulation in 1983. These assertions warrant correction, and the Commission should not be misled by them.

According to Requestors' counsel, "[t]he Act does not mention, much less authorize, joint fundraising."[9] This is simply wrong. The 1979 amendments to the Federal Election Campaign Act specifically reference "joint fundraising" and this provision remains in the Act

[2] Advisory Opinion Request 2024-13 (DSCC/Tester/Gallego), Comment of Requestors (Oct. 3, 2024) at 1, 2, https://www.fec.gov/files/legal/aos/2024-13/202413C_4.pdf.
[3] *Id*. at 2.
[4] Michael Beckel, *Clinton's super-sized fundraising machine pushes legal boundaries*, The Center for Public Integrity (Nov. 7, 2016), https://publicintegrity.org/politics/clintons-super-sized-fundraising-machine-pushes-legal-boundaries/.
[5] *Id*.
[6] *Id*.
[7] Advisory Opinion Request 2024-13 (DSCC/Tester/Gallego), Comment of Requestors (Oct. 3, 2024), https://www.fec.gov/files/legal/aos/2024-13/202413C_4.pdf.
[8] *See* Advisory Opinion Request 2024-13 (DSCC/Tester/Gallego), Comments of NRCC (Sept. 30, 2024), https://www.fec.gov/files/legal/aos/2024-13/202413C_3.pdf; Advisory Opinion Request 2024-13 (DSCC/Tester/Gallego), Comments of NRSC (Sept. 30, 2024), https://www.fec.gov/files/legal/aos/2024-13/202413C_2.pdf; Advisory Opinion Request 2024-13 (DSCC/Tester/Gallego), Comments of Republican National Committee (Sept. 27, 2024), https://www.fec.gov/files/legal/aos/2024-13/202413C_1.pdf.
[9] Advisory Opinion Request 2024-13 (DSCC/Tester/Gallego), Comment of Requestors (Oct. 3, 2024) at 3.

today. The Act provides that "candidates may designate a political committee established solely for the purpose of ***joint fundraising*** by such candidates as an authorized committee."[10] This specific reference to joint fundraising committees in the Act makes clear that such committees existed at the time of the 1979 Amendments and that Congress acted to clarify how they should be classified.

Next, Requestors' counsel wrongly asserts that "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."[11] As noted above, the statutory basis for joint fundraising is clear. In addition, the Commission issued a series of advisory opinions in 1977 approving detailed joint fundraising proposals.[12] The 1977 advisory opinions make clear that the practice already existed and was accepted and uncontroversial when the Act was written. The Commission's 1981 Annual Report described its proposed joint fundraising regulations as an effort to "establish procedures … for joint fundraising, amplifying guidelines that had been previously set out in several advisory opinions."[13] In fact, one of the Requestors, the DSCC, sought one of these advisory opinions and quite obviously engaged in joint fundraising long before the Commission supposedly "permitted" the practice through its 1983 regulation. *See* Advisory Opinion 1979-35 (DSCC). Far from inventing joint fundraising out of whole cloth "to permit" the practice in 1983, the Commission codified a well-established, existing practice that it had repeatedly approved in advisory opinions prior to 1983.

Finally, Requestors' counsel baselessly claims that Commission regulations "assum[e] an event based fundraising model." Discrete fundraising events, such as dinners or other functions, may have been the most common form of joint fundraising, but there is no language in the regulation or the 1983 Explanation and Justification that in any way limits joint fundraising to an "event based fundraising model." To the contrary, the regulation refers more generally to "joint fundraising effort[s]," joint fundraising activit[ies]," and "a series of joint fundraising events or

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[10] 52 U.S.C. § 30102(e)(3)(A)(ii) (emphasis added); Federal Election Campaign Act Amendments of 1979, Title I, § 102, 93 Stat. 1339; Report of Committee on House Administration on H.R. 5010, Sept. 7, 1979, at 13 ("National party committees and committees established solely for ***joint fundraising*** purposes are an exception and may be designated as authorized committees.") (emphasis added) (available at https://www.fec.gov/resources/legal-resources/legislative-history/legislative_history_1979.pdf). Joint fundraising is also referenced at 52 U.S.C. § 30116(a)(5) ("nothing in this sentence shall limit transfers between political committees of funds raised through joint fundraising efforts").

[11] Advisory Opinion Request 2024-13 (DSCC/Tester/Gallego), Comment of Requestors (Oct. 3, 2024) at 3 (emphasis added).

[12] *See* Advisory Opinion 1977-08 (Sasser); Advisory Opinion 1977-14 (Bayh); Advisory Opinion 1977-23 (Steers); Advisory Opinion 1977-61 (Colorado Democratic Party); *see also* Advisory Opinion 1979-06 (Shasteen); Advisory Opinion 1979-12 (Burlison); Advisory Opinion 1979-35 (DSCC); Advisory Opinion 1979-75 (ABC-PAC). The 1977 and 1979 advisory opinions are referenced in the 1983 Explanation and Justification on Joint Fundraising. *See* 48 Fed. Reg. 26,296, 26,298 (June 7, 1983).

[13] Federal Election Commission, Annual Report 1981 at 18, https://www.fec.gov/resources/cms-content/documents/ar81.pdf. This description appeared in a section of the report titled "Clarifying the Law," and the Commission noted that "[i]ts objective was to revise problem areas in the regulations, to remove burdensome requirements and, generally, *to make revisions that more accurately reflected the realities of political committee operations*." *Id*. at 17 (emphasis added).

activities."[14] Moreover, Advisory Opinion 1977-23 (Steers) involved joint fundraising through a direct mail program. The Commission was fully aware that joint fundraising took forms other than "events" when it adopted the 1983 regulation.

Requestors' counsel's efforts to undermine the Commission's joint fundraising regulation should be firmly rejected. The practice is unquestionably rooted in both the statute and established practice. Requestors' counsel's claims are incorrect on a basic factual and legal level. Proposed Draft A correctly analyzes the Request and applies 11 C.F.R. § 102.17 properly and in accordance with its plain language.

The Requestors' Efforts To Distinguish Advisory Opinion 2024-07 and Advisory Opinion 2007-24 Fail

Requestors' counsel contends that Advisory Opinion 2024-07 (Team Graham) should not be applied to the Request because "[t]he question presented [in Advisory Opinion 2024-07] assumed any communication was a solicitation and offered no details to suggest otherwise."[15] Requestors' counsel similarly discounts Advisory Opinion 2007-24 (Burkee/Walz) because "[n]o 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."[16] This attempt to distinguish plainly applicable Commission precedent rests on the erroneous premise that solicitations and candidate advocacy are distinct, mutually exclusive content categories. However, neither Advisory Opinion 2024-07 nor Advisory Opinion 2007-24 support this proposition, and anyone who has ever seen a solicitation is aware that they contain candidate advocacy. In 2016, for example, when the Hillary Victory Fund distributed advertising that the Requestors' counsel now professes to believe was illegal, a Clinton campaign spokesman explained that their joint fundraising solicitations contained candidate advocacy because the "online videos help 'give people a reason to donate' to the Hillary Victory Fund."[17]

We also note that many of the paid digital advertisements included in Exhibits 1 – 4 of the comment submitted by the NRSC do not contain any solicitation.[18] Rather, these non-solicitation communications consist of what can only be described as "candidate advocacy."

Requestors' counsel's suggestion that the Commission's joint fundraising regulations somehow exclude content in a solicitation that advocates for or against candidates is, quite frankly, absurd. The Commission's regulations at Section 102.17 do not impose *any* restrictions on what methods committees may use to raise funds jointly or *any* content standards for solicitation communications. Any conclusion otherwise would establish a dangerous precedent that would require the Commission to begin policing the content of joint fundraising communications. The Commission has never before done this and should not start now.

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[14] 11 C.F.R. §§ 102.17(a)(1)(i), 102.17(c)(7)(C).
[15] Advisory Opinion Request 2024-13 (DSCC/Tester/Gallego), Comment of Requestors (Oct. 3, 2024) at 4.
[16] *Id*. at 5.
[17] Michael Beckel, *Clinton's super-sized fundraising machine pushes legal boundaries*, The Center for Public Integrity (Nov. 7, 2016), https://publicintegrity.org/politics/clintons-super-sized-fundraising-machine-pushes-legal-boundaries/.
[18] *See* Advisory Opinion Request 2024-13 (DSCC/Tester/Walz), Comment of NRSC (Sept. 30, 2024).

The Requestors' Claimed Concerns About Coordination Are Misplaced

The question of coordination raised in the Request and the October 3 Comment is answered by the required cost allocation method set forth in the joint fundraising regulations. Under Commission precedent, a communication that is paid for by multiple candidates or committees, whether through a joint fundraising committee or not, and that is properly allocated, *does not* constitute a coordinated communication because the payment prong is not satisfied.[19] In the context of joint fundraising committees, the Commission recently made this point absolutely clear in Advisory Opinion 2024-07 (Team Graham):

> For a communication to be a "coordinated communication" under Commission regulations, it must be paid for by a person other than the federal candidate, authorized committee, or political committee. Here, Team Graham represents that it will pay its allocable share of the costs of the expanded Joint Fundraising Committee's public communications; **because 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**.[20]

Requestors' counsel next suggests that "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," per 11 C.F.R. § 109.21(g)(2). Section 109.21(g)(2) provides a full exemption from the coordination rules; without this full exemption, the public communication described in the provision would satisfy all three prongs of the coordination standard. A joint fundraising committee's participants have no need of this full exemption. In the context of joint fundraising, the prescribed allocation of costs pursuant to 11 C.F.R. § 102.17(c)(7) ensures that the payment prong is not satisfied.[21] In other words, the joint fundraising regulation contains a built-in mechanism that prevents the participating committees from distributing public communications that qualify as coordinated communications.

Again, Proposed Draft A correctly analyzes the Request and applies 11 C.F.R. § 102.17, Advisory Opinion 2024-07, and Advisory Opinion 2007-24 properly.

The Joint Fundraising Notice Is Not Required To Appear In A Television Advertisement If It Is Displayed On A Linked Website Where The Contribution Is Actually Made

Finally, the Request assumes the joint fundraising notice must be displayed on-screen during the proposed television advertisements, and the October 3 Comment insists that the

[19] *See* 11 C.F.R. § 109.21(a)(1).
[20] Advisory Opinion 2024-07 (Team Graham) at 7 (emphasis added); *see also* Advisory Opinion 2007-24 (Burkee/Walz).
[21] *See* Advisory Opinion 2024-07 (Team Graham) at 7; *see also* Advisory Opinion 2007-24 (Burkee/Walz) at 5.

Commission answer this question in a way that would make compliance impossible. Proposed Draft A reaches the correct conclusion.

The Request and the October 3 Comment omit any explanation of how a QR code works. If the QR code in the Requestors' proposed advertisement functions properly, it will link to the joint fundraising committee's contribution webpage. The full joint fundraising notice is typically displayed on the committee's contribution webpage. This arrangement is functionally no different than any other scenario involving an oral solicitation of contributions to the joint fundraising committee. For example, at an in-person fundraising event, a speaker who asks attendees to contribute does not then immediately read the committee's full joint fundraising notice. Rather, the notice is included in written materials that are provided to attendees. Similarly, when a joint fundraising committee representative contacts a prospective donor by telephone to solicit a contribution, the representative does not ask for money and then immediately recite the full notice. As in the case above, the notice is included in written materials provided subsequently or on a webpage that the donor visits.

In other words, 11 C.F.R. § 102.17(c)(2) has *never* been understood to require recitation or display of the full notice at the very moment the solicitation "ask" is made. Rather, the notice is required "to be included with every solicitation," meaning it must accompany the solicitation viewed as a whole, which is widely understood to include the donor reply materials. The regulatory language does not require the notice to appear *on the face* of every solicitation, or to immediately follow every solicitation. We are unaware of any Commission precedent suggesting otherwise and are concerned that Requestors' counsel's reading of the regulation would render virtually the entire regulated community in violation of the notice requirement since it was promulgated in 1983.

If the Commission were to accept the Requestors' counsel's view of the law, it would place the Harris Victory Fund, among many other joint fundraising committees, in legal jeopardy. A visitor to the Harris Victory Fund webstore (https://store.kamalaharris.com/) is met with the following solicitation: "*Donate to elect Kamala Harris, Tim Walz, and Support Democrats Nationwide*." The visitor can click any of several amount buttons to make a contribution. At the bottom of the webpage, the visitor is advised that "Contributions or gifts to Harris Victory Fund are not tax deductible," and the webpage includes a "paid for by" disclaimer. But the joint fundraising notice that Requestors' counsel insists is required by 11 C.F.R. § 102.17(c) is nowhere to be seen. If one clicks on the button to donate $5, a pop-up screen indicates, "A donation has been added to your cart!" This pop-up screen does not contain a joint fundraising notice. If one then goes back to the webpage and clicks to view the cart contents, one sees his or her contribution listed, but still no joint fundraising notice is displayed. If the visitor then clicks on "checkout," he or she is taken to yet another webpage. This webpage solicits another contribution, and the joint fundraising notice is *still* not displayed. After the visitor begins entering his or her email address, name, address, and payment information, the webpage expands, and the fundraising notice finally can be viewed upon scrolling down the page.

If the Requestors' counsel's reading of the notice requirement is correct, then Harris Victory Fund violates the law multiple times during its online contribution process. Similarly,

Hillary Victory Fund's 2016 online advertisements violated the notice requirements, as did every advertisement containing a solicitation that is included in Exhibits 1 – 4 of the comments submitted by the NRSC.

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Thank you for your consideration.

Sincerely,

/s/

Jill H. Vogel
Jason Torchinsky
Matthew S. Petersen
Michael Bayes
Jessica F. Johnson
Steve Roberts
Andrew Watkins
Andrew Pardue