FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: **The Commission**

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

DATE: **October 1, 2024**

SUBJECT: **AOR 2024-14 (DSCC and Rosen for Nevada)**
Comment from Holtzman Vogel

Attached is AOR 2024-14 (DSCC and Rosen for Nevada) Comment from from Holtzman Vogel.

Attachment

Holtzman Vogel

HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC

September 30, 2024

Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Comments of the NRCC on Advisory Opinion Request 2024-14

Dear Commissioners:

These comments are submitted by the undersigned counsel on behalf of the NRCC in response to Advisory Opinion Request 2024-14 (DSCC/Rosen for Nevada). We urge the Commission to respond to Questions 1 and 3 in the affirmative. Question 2 should be answered in the affirmative in part and in the negative in part. Finally, with respect to Question 4, we urge the Commission to affirm that the proposed advertisement is permissible under the analysis applied in MURs 7169 *et al* (Santasiero for Congress).

The Request asks the Commission to "finally provide some guidance to the regulated community" on the permissibility of hybrid television advertising that both parties have distributed since 2004.[1] The Commission has repeatedly declined to find a violation of the Federal Election Campaign Act of 1971, as amended (the "Act"), when confronted with these types of advertisements. Extensive guidance on the topic is available in audit reports, enforcement matters, and various Commissioner statements issued over the years. In fact, three Commissioners recently explained in a controlling Statement of Reasons that the Commission "has allowed, through this informal guidance, the practice of allocating costs for hybrid television advertisements and other communications under a principle of 'that which is not prohibited is permitted.'"[2]

Nevertheless, the Requestors claim that no "binding guidance" exists, and they seek an advisory opinion to fill that void. We believe the Commission should take this opportunity to confirm that hybrid television advertisements are permissible under the Act and Commission regulations and clarify certain unresolved issues that have persisted over the years. In doing so, the Commission should proceed from the following basic premises:

- After permitting hybrid television advertisements for approximately 20 years, the Commission cannot prohibit the practice in an advisory opinion.
- Nothing in the Act or Commission regulations prohibits political party committees and their candidates from jointly paying for television advertisements that serve multiple purposes.

[1] Advisory Opinion Request ("AOR") at 1.

[2] MURs 7530 & 7627 (NRCC), Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, at 3.

- 11 C.F.R. § 106.8, which governs the allocation of expenses for political party phone banks, reflects the general proposition that political party committees and federal candidates may distribute mixed-purpose, jointly paid communications, while the basic allocation principles set forth at 11 C.F.R. § 106.1 provide guidance on how to attribute the costs of those communications.
- The so-called "generic party reference" requirement is not a content standard in and of itself, but rather, serves only to describe a political party committee's allocated portion of the advertisement. A political party committee may determine the content that it believes best advances the interests of the party's candidates generally.
- A properly allocated hybrid television advertisement is not a coordinated communication and does not yield an in-kind contribution from or to either payor.

Background: Hybrid Television Advertisements

Hybrid television advertisements are paid for jointly by a political party committee and a federal candidate. These ads include a portion that is attributable to a federal candidate and a portion that is attributable to a political party committee. The candidate portion of the ad either promotes the federal candidate or opposes his or her opponent. The political party committee's portion consists of advocacy that supports the party's candidates generally, or opposes the candidates of the other party generally. In established practice, a political party committee's portion of a hybrid television advertisement does not clearly identify any federal candidate, but instead includes what are referred to as "generic references" to the party's candidates along with discussion of issues and policy.

The first hybrid television advertisements were modeled on the Commission's 2003 phone bank regulation at 11 C.F.R. § 106.8, which describes and provides an allocation method for a very specific type of communication. The regulation was designed to codify the approach the Commission took when it considered the split payment, multi-purpose phone bank communications in the Bush-Cheney 2000 presidential audit.[3] To satisfy 11 C.F.R. § 106.8, a phone bank communication that is jointly paid for by a federal candidate and a political party committee must refer to a clearly identified candidate and "generically refer[] to other candidates of the Federal candidate's party without clearly identifying them."[4] So long as a phone bank communication meets the basic requirements of the regulation, it may be allocated on a 50/50 basis without regard to time or space considerations.

Advisory Opinion 2006-11 (Washington Democratic State Central Committee) was requested and issued during the Commission's consideration of those first hybrid television ads in the 2004 presidential campaign audits. Through this advisory opinion, the Commission extended the hybrid advertising framework to mass mailings. Advisory Opinion 2006-11 acknowledged that

[3] *See* Memorandum from Lawrence H. Norton to Robert J. Costa (Dec. 2, 2002) (Final Audit Report on Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee, Inc.) (available at https://www.fec.gov/resources/legal-resources/enforcement/audits/2000/p00-02-05.pdf).

[4] 11 C.F.R. § 106.8(a)(3).

"[n]either the Act nor Commission regulations definitively address the appropriate allocation of payments for the type of mass mailings described in your request." However, the Commission applied "analogous" allocation regulations (Sections 106.1 and 106.8) along with the "'space or time' principles" of Section 106.1(a). In other words, Advisory Opinion 2006-11 adopted the approach and legal analysis advanced by the 2004 presidential campaigns in defense of their hybrid television ads, which was exactly what all involved intended. Two Commissioners explained at the time that they understood Advisory Opinion 2006-11 to address the underlying legal issues surrounding hybrid television advertisements in the two presidential audits:

> Although Advisory Opinion 2006-11 was issued in April 2006, long after the events of the Audit took place, this Advisory Opinion very clearly establishes that the attribution method of 11 CFR § 106.1 may be used by candidates and political party committees that distribute mutually beneficial, joint communications. *In fact, at the time this Advisory Opinion was approved, we understood it to settle the basic legal issue surrounding the "hybrid ads" in this Audit*.[5]

Notwithstanding the conclusions the Commission reached in Advisory Opinion 2006-11, the issue of hybrid television advertisements remained unsettled. Subsequent enforcement matters yielded divided votes, but the Commission has never voted to take enforcement action in a hybrid television advertisement matter. Still, a Commission majority has never explained exactly *how* 11 C.F.R. §§ 106.1 and 106.8 apply to hybrid television advertisements. However, we have understood the Commission's dismissals, and the controlling statements of reasons in those dismissals, to establish two basic rules.

First, 11 C.F.R. § 106.8 is specific to phone bank communications and its fixed attribution requirement has never been applied to hybrid television ads. Rather, the legal basis for the cost allocation for hybrid television advertising has always rested on 11 C.F.R. § 106.1. As two Commissioners explained in 2007:

> The basic principle behind two entities sharing the cost of a mutually beneficial, single communication is expressed in 11 CFR § 106.1, which states that "[e]xpenditures, including in-kind contributions, independent expenditures, and coordinated expenditures made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived. For example, in the case of a publication or broadcast communication, the attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time to all candidates." Although this regulation applies specifically to communications made jointly by two or more candidates, the Commission has

[5] *See* Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report on Bush-Cheney '04 Inc. at 7 (emphasis added).

> consistently and repeatedly applied the principle of § 106.1 to situations not explicitly captured by the language of the regulation.[6]

Relatedly, when a hybrid television advertisement is properly allocated under 11 C.F.R. § 106.1, the advertisement does not qualify as a coordinated communication, and no in-kind contribution is made by one payor to the other.[7]

Second, to the extent a "generic party reference" requirement applies to the party committee's allocated portion of a hybrid television advertisement, any such "requirement" has been applied "with the flexibility required to avoid dictating advertising content."[8] The Commission has never rejected a party committee's choice of terminology when generically referring to its candidates. Furthermore, the Commission's dismissals always have emphasized the cost

[6] Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky on Final Audit Report on Bush-Cheney '04, Inc. at 2.

[7] The Commission has concluded in numerous instances that no in-kind contribution occurs in the case of a jointly funded advertisement when both entities pay their attributable share. So long as each payor pays its appropriate share of the total costs, the payment prong is not satisfied and there is no in-kind contribution from either payor to the other in the form of a coordinated communication. *See*, *e.g.*, 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."); Advisory Opinion 2007-24 (Burkee/Walz) ("Accordingly, expenses for advertisements must be attributed to each campaign committee according to the proportion of space or time devoted to that committee's candidate, as compared to the total space or time devoted to both candidates. If the campaign events and communications described in the request devote equal time and space to the two candidates, as is proposed, then Mr. Burkee and Mr. Walz must split the cost of the advertisements equally."); Advisory Opinion 2004-37 (Waters) ("In the present case, because you represent that each Federal candidate will be included in the brochure only if he or she reimburses the Waters Committee or PHP for the full production and distribution costs attributed to him or her, the proposed brochure would not satisfy the payment prong of the coordinated communication test."); Advisory Opinion 2004-29 (Akin) ("Therefore, the definition of 'coordinated communication' is met and consequently, payments for the advertisements will be in-kind contributions to the PCC. Because the cost of advertisements will likely exceed the contribution limits in 2 U.S.C. 441a(a) (and may also be from prohibited sources), the PCC must reimburse the sponsor of the advertisement for the attributable portion of the cost of these coordinated communications to avoid receiving an excessive or prohibited contribution."); Advisory Opinion 2004-01 (Bush-Cheney / Kerr) ("Expenditures, including in-kind contributions, made on behalf of one or more clearly identified Federal candidate are attributable to each such candidate according to the benefit reasonably expected to be derived.").

[8] Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report on Bush-Cheney '04 Inc. at 7; MURs 7530 & 7627 (NRCC), Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, at 4 ("We agree with past Commissioners who concluded that '[t]he Commission should apply any 'generic reference' requirement with the flexibility required to avoid dictating advertising content.'").

allocation of hybrid ads in terms of space and time, per 11 C.F.R. § 106.1, and declined to police the language choices of political party committees.[9]

Finally, it is important to keep in mind the bottom-line reason that the Commission has never found a hybrid ad violation: the Act and Commission regulations do not speak directly to hybrid television advertising, and nothing prohibits them. "Activities that do not violate any specific provision of the Federal Election Campaign Act, or a Commission regulation, do not require express approval from the Commission to make them lawful."[10]

Question 1: May Requestors evenly split the cost of hybrid television advertisements?

The answer to Question 1 must be "yes."

The Commission has answered this question in the affirmative since it first considered hybrid television advertisements in the 2004 presidential committee audits. As the Requestors note, "[i]n every election cycle since 2004, federal candidates and political party committees have spent tens of millions of dollars on hybrid television advertising."[11] In confirming what the regulated community has understood since 2006-2007, the Commission should include the caveat that allocation is to be determined according to the "space and time" calculation described in 11 C.F.R. § 106.1. If a hybrid television advertisement includes equal amounts of "candidate content" and "party content," then evenly splitting the costs of the advertisement is appropriate. (We read Question 1 of the Request to accept this premise.)

Any response that purports to prohibit hybrid television advertising would reverse 20 years of precedent and practice and establish a new rule of law through an advisory opinion in violation of 52 U.S.C. § 30108(b) and 11 C.F.R. § 112.4(e). The Act's "rule of law" provision requires

[9] *See generally* MURs 7530 and 7627 (NRCC et al.) and MUR 6685 (DCCC/Horsford). We note, however, that the Office of General Counsel's recommendations in these two matters were inconsistent and premised on a mistaken view of the law. OGC recommended dismissal in MUR 6685 but recommended finding reason to believe in MURs 7530 and 7627. Taken together, it appears that OGC takes the view that a hybrid television advertisement must include generic references to a party's candidates that include explicit terms such as "Democrat" and "Republican." In MURs 7530 and 7627, OGC took the position that the advertisement titled "'Progressive' does not contain a generic party reference either in its text or by the images displayed onscreen. It instead vaguely refers to progressives and progressive values. Therefore, the express language of section 106.1(a) does not apply because there is only one clearly identified candidate. Nor does the phone bank regulation apply, or its extension to mass mailers in AO 2006-11, because 'Progressive' lacks a generic party reference." This analysis is fundamentally inconsistent with years of Commission precedent and the Commissioners should take this opportunity to ensure that OGC's deeply misguided understanding of hybrid communications does not reappear.

[10] Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report on Bush-Cheney '04 Inc. at 5.

[11] AOR at 1.

that "[a]ny rule of law which is not stated in this Act" or Commission regulations may only be established through the formal rulemaking process.[12]

Question 3: With respect to advertisement 2, is the phrase "greedy politicians" and the visual of pharma execs in suits sufficient to serve as the audio and visual references to generic candidates of the Republican Party, and thus, allocable as party advocacy?

The Commission should answer Question 3 by affirming that the proposal is permissible.

The Request asks if the phrase "greedy politicians" coupled with "the visual of pharmaceutical executives in suits" is "sufficient to serve as the audio and visual references to generic candidates of the Republican party and thus, allocable as party advocacy." The Requestors explain that they "believe the generic reference requirement is met so long as the advertisement uses images or audio colloquially understood to be synonymous with generic candidates of a political party."[13]

In the 2004 presidential committee audits, the Commission considered terms and phrases including "our leaders in Congress," "Congressional leaders," "liberals in Congress," "liberal allies," "Democrats," "Democrats in Congress," "Republicans," "Republicans in Congress," and "right wing Republicans," and found that these terms met the generic reference requirement.[14] Likewise, in MURs 7530 and 7627, the terms "D.C. liberals," "liberal elites," "liberals," "two sides of a very liberal coin," "progressives," and "progressive values" were used, and the controlling bloc of Commissioners found that they constituted "generic party references."[15] During the current election cycle, the DCCC has used "MAGA extremists," "MAGA

[12] 52 U.S.C. § 30108(b); 11 C.F.R. § 112.4(e) ("Any rule of law which is not stated in the Act or in chapters 95 or 96 of the Internal Revenue Code of 1954, or in a regulation duly prescribed by the Commission, may be initially proposed only as a rule or regulation pursuant to procedures established in 52 U.S.C. 30111(d) or 26 U.S.C. 9009(c) and 9039(c) as applicable."); *see also* 1996 Presidential Audits, Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason, and Karl J. Sandstrom at 2, 3 (explaining that "Congress included an express prohibition in the FECA against the Commission using advisory opinions to establish rules of conduct" and "absent controlling regulations or the authoritative interpretations of the courts, the Commission's enforcement standard [must] be the natural dictate of the language of the statute itself."); MUR 7491 (American Ethane), Statement of Reasons of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, at 5 (noting that "FECA's 'rule-of-law' provision explicitly provides that we may only propose a rule by regulation; 'when the Commission is faced with a gap in our regulatory scheme, we are not permitted to fill it using our enforcement process.") (cleaned up); MUR 5642 (Soros), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II at 4 ("[T]he Commission, by statute and regulation, is prohibited from establishing new regulatory requirements through this or any enforcement matter").

[13] AOR at 6.

[14] *See* Report of the Audit Division on Bush-Cheney '04, Inc. and the Bush-Cheney '04 Compliance Committee, Inc.; Report of the Audit Division on Kerry-Edwards 2004, Inc. and Kerry-Edwards 2004, Inc. General Election Legal and Accounting Compliance Fund; Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report On Bush-Cheney '04 Inc.

[15] *See* MURs 7530 & 7627 (NRCC), Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, at 3-4.

teammates," "MAGA," "anti-abortion extremists," "far right politicians," "extremists," and "extreme right politicians" in its hybrid television advertisements.[16]

No provision of the Act or Commission regulations imposes any "generic reference" content standard on hybrid television advertisements. The "generic reference" language is drawn from 11 C.F.R. § 106.8(a)(3), which requires that a phone bank "communication includes another reference that generically refers to other candidates of the Federal candidate's party without clearly identifying them." Advisory Opinion 2006-11 incorporated that basic standard because the request specified that the proposed mass mailings would "contain a reference to a clearly identified federal candidate and a generic reference to other candidates of the party without clearly identifying them."[17] Still, the Commission's other allocation rules do not include a "generic reference" requirement for any other type of communication. Requestor's proposed "colloquially understood" standard appears to be consistent with longstanding practice and Commission precedent, but the better answer is that no "generic reference" content standard applies.

The "generic reference" provision of Section 106.8 need not be imported into the Commission's analysis, and, in fact, the Commission dispensed with it altogether in 2016 when it dismissed MURs 7169 *et al*. and treated the DCCC's advertisements not as hybrid advertisements, but as multiple-candidate advertisements subject to Section 106.1. (MUR 7169 *et al*. is discussed in more detail below.)

For many years, the Commission's dismissals either have treated the "generic reference" as a standardless standard or ignored it entirely. The Commission should recall the basic understanding set forth by Vice Chairman Mason and Commissioner von Spakovsky in 2007:

> [I]t should be remembered that the 'generic reference' standard is intended primarily to indicate that it does not benefit any particular candidate, but instead benefits generally a group of candidates. We see no reason then, why only a generic reference that includes the name of a political party should be viewed as potentially beneficial to a political party. If a political party believes that it is benefited most by promoting "our leaders in Congress," why should the Commission object? And while the phone bank regulation requires the generic reference to be "to other candidates of the Federal candidate's party," it is also true that casting aspersions on "liberals in Congress" would be viewed by many as beneficial to a Republican party committee. The Commission should apply

[16] *See*, *e.g.*, DCCC/Bynum, Restricting Access, host2.adimpact.com/admo/viewer/1ff1be2e-84c0-4031-9898-452d952c27d8; DCCC/Cotter Smasal, Teammates, host2.adimpact.com/admo/viewer/5e0d6a69-46c4-4534-b773-2dacaac70315; DCCC/Wild, Life and Death, host2.adimpact.com/admo/viewer/33f128d3-e335-4c33-9d85-8cf0bd86d91c; DCCC/Hertel, Stephanie, host2.adimpact.com/admo/viewer/e09fcc84-609d-4e63-9195-b2ec585a3091.

[17] Advisory Opinion 2006-11, Request at 1.

> any "generic reference" requirement with the flexibility required to avoid dictating advertising content.[18]

As the Request notes, "[d]ating back to the 2004 election cycle, the Commission has declined to find a violation of the Act where the party portion of a hybrid advertisement references generic candidates of the opposing party."[19] That is correct, and if the DSCC believes that paying for part of a television advertisement that discusses "greedy politicians" benefits the Democratic Party and its candidates generally, "why should the Commission object?" Nothing in the Act prohibits the DSCC from using the phrase "greedy politicians," just as nothing in the Act or Commission regulations requires the DSCC to only use the terms "Republican" and "Democrat."

The Commission should respond to Question 3 by making clear that the "generic reference" standard specifically applies to the phone bank communications described in Section 106.8, not to hybrid television advertisements. In practice, the "generic reference" standard has been applied in a manner that effectively allows the party committee to use whatever language it believes is most beneficial to the party. The Commission has never found a violation on the basis that a hybrid advertisement lacks a sufficient generic party reference. A recent Statement of Reasons suggests the Commission will never do so absent a rulemaking.[20]

Question 2: With respect to advertisement 1, do portions of a hybrid television advertisement that feature a clearly identified candidate direct to camera and/or are narrated by the candidate need to be allocated as candidate advocacy?

Question 4: With respect to advertisement 3, can audio or visual references to Donald Trump qualify as a reference to generic candidates of the Republican party, allocable as party advocacy?

Question 2 should be answered "yes" in part and "no" in part. Question 4 should be answered "yes."

Requestors' Questions 2 and 4 are presented as inquiries about proposed advertisements, but in both cases, similar advertisements have been distributed in the past.

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[18] *See* Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report on Bush-Cheney '04 Inc. at 7; *see also* MURs 7530 & 7627 (NRCC), Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, at 4 ("We agree with past Commissioners who concluded that '[t]he Commission should apply any 'generic reference' requirement with the flexibility required to avoid dictating advertising content.'").

[19] AOR at 6 n.21.

[20] MURs 7530 & 7627 (NRCC), Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, at 3 (the Commission "has allowed, through this informal guidance, the practice of allocating costs for hybrid television advertisements and other communications under a principle of 'that which is not prohibited is permitted.'").

With respect to Question 2, the DCCC aired at least two hybrid television advertisements in past election cycles that included a political party committee portion that was narrated by a federal candidate. In one ad, the federal candidate, Antonio Delgado, narrated the DCCC's portion of a hybrid ad, although he did not appear on screen during these portions of the ad. The ad featured Delgado's voice stating, "Washington Republicans would take away protections for pre-existing conditions," and "The Washington Republican plan would pave the way for an age tax on seniors." In a second ad, the federal candidate, Debbie Mucarsel-Powell, narrated the entirety of a hybrid advertisement paid for by her campaign and the DCCC. During one portion of the ad in which Mucarsel-Powell does not appear on screen, she says, "Democrats will stand up to the NRA to protect our families." In another off-screen segment, she says "But Carlos Curbelo and Republicans deceived us. They said they would protect our community but took thousands of dollars from the NRA, while voting to make it easier for people with mental illnesses to buy guns." The latter portion was (presumably) allocated between the Mucarsel-Powell campaign and the DCCC.

The Act and Commission regulations do not prohibit this practice. The Commission should approve a response to this question confirming that a federal candidate whose campaign jointly pays for a hybrid television advertisement with a political party committee may narrate the party committee's portion so long as that portion does not include any reference to, or identification of, that federal candidate or his/her opponent. This conclusion is consistent with past practice (see above) and is supported by court precedent. In *Hispanic Leadership Fund, Inc. v. FEC*, the court held that incorporating an audio clip of President Obama, who is not otherwise identified, does not constitute a "contextually unambiguous reference to President Obama," and therefore, the President's voice alone is not a reference to a clearly identified candidate.[21] If a candidate's unidentified voice is not a reference to a clearly identified candidate, then there is no legal distinction between the candidate's (unidentified) voice and any other person's voice.

On the other hand, if the federal candidate appears on screen "direct to camera" in a hybrid television advertisement, as the Request proposes, it is our understanding that party committees on both sides of the aisle have always allocated such material to the federal candidate on the grounds that the distinguishing feature of the candidate's allocable portion of a hybrid advertisement is that it references that candidate or his/her opponent. We have no objection to maintaining this bright-line distinction.

With respect to Question 4, we believe the Request asks the wrong question and that the Commission should instead respond as it did in MUR 7169 *et al*. As detailed above in response to Question 3, what matters is not whether "audio or visual references to Donald Trump qualify as a reference to generic candidates of the Republican party," but whether the DSCC (or any other political party committee) pays the appropriate allocated share of the costs for its portion of the advertisement.

[21] *Hispanic Leadership Fund, Inc. v. FEC*, 897 F.Supp.2d 407, 430 (E.D. Va. 2012).

The Commission considered advertisements like the one proposed in Question 4 in a series of MURs involving television advertising paid for by the DCCC and 14 of its U.S. House candidates in 2016.[22] These advertisements were jointly paid for by the DCCC and its federal candidates, and "supported the election of the named Democratic congressional candidates, and … opposed the election, actions, or policies of Donald J. Trump."[23] Prior to the Commission's consideration of these matters, the advertisements at issue were universally understood to be hybrid ads. *Politico* reported at the time that "more than a dozen Democratic challengers are benefiting from such 'hybrid' advertising.... The technique has been a small but consistent part of Democratic strategy in recent years, but new legal guidance has also allowed Democrats to share costs on ads linking their opponents to Trump on policy.... Increasingly, some of the ads are naming Trump directly instead of linking GOP incumbents to generic 'Washington Republicans.'"[24]

In response to the complaints, the DCCC and its candidates contended that the ads were not hybrid ads that replaced what had been a typical generic party reference with references to Donald Trump, but rather, were multiple candidate ads that were properly allocated under 11 C.F.R. § 106.1, even if they served exactly the same function as hybrid ads.[25] The Commission explained that "[t]he portion of each ad that addressed Trump was paid for by the DCCC. The portion of each ad that addressed the Republican congressional candidate was either paid for in full by the corresponding Democratic congressional candidate or split between that Democratic candidate and the DCCC spending under its coordinated party expenditure limit."[26] Importantly, while the Office of General Counsel ("OGC") and the Commission presented this matter as one in which the express terms of 11 C.F.R. § 106.1 applied, the portions of the advertisements that were paid for by the DCCC and that referenced Donald Trump without expressly advocating his defeat were *not* required to be attributed to Hillary Clinton's campaign, and instead were allocated to the DCCC. Section 106.1 provides that "expenditures … made on behalf of more

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[22] *See* MURs 7169, 7170, 7171, 7172, 7173, 7174, 7175, 7176, 7177, 7178, 7179, 7182, 7187, and 7188 (Santasiero for Congress).

[23] MURs 7169 *et al*. (NRCC), Response of DCCC *et al*. The Response explained that if the party-allocated portion of the ad expressly advocated the defeat of Donald Trump, the DCCC reported the cost as an independent expenditure, but if the party-allocated portion of the ad did not contain express advocacy, the DCCC reported the costs as operating expenditures. *Id*. at 10.

[24] MUR 7169 *et al*. (NRCC), Complaint at 2-3 (citing Scott Bland, Politico, *Dems use loophole to pump millions into fight for House* (Oct. 18, 2016), https://www.politico.com/story/2016/10/democrats-house-campaign-money-229957).

[25] For example, the Respondents argued that "as a national party committee, the DCCC had an interest both in urging Donald Trump's defeat and criticizing his policies, above and beyond its central mission of supporting House candidates. Donald Trump was at the top of the ticket and the face of the Republican Party. He advocated policies and took actions strongly opposed by Democratic Party adherents. By expressly advocating Donald Trump's defeat, and by criticizing policy positions he espoused, that were strongly identified with him in the public mind, the DCCC alternatively promoted his defeat and mobilized Democratic opposition to his policies, the latter of which also helped support the ticket as a whole." MURs 7169 *et al*. (NRCC), Response of DCCC et al. at 2 (emphasis added).

[26] MURs 7169 *et al*. (NRCC), Factual and Legal Analysis at 5.

than one clearly identified Federal candidate *shall be attributed to each such candidate* according to the benefit reasonably expected to be derived." So, the Commission asserted that Section 106.1 controlled but then applied it to *both* candidates and parties. In other words, the Commission applied the same allocation method it had previously used for hybrid television advertisements while concluding that the ads were *not* actually hybrid advertisements.

Regardless of how these advertisements were labeled, they looked just like any other hybrid television ad, were paid for in the same manner as any other hybrid television ad, and served the same function as any other hybrid television ad. Nevertheless, both OGC and the Commission accepted the DCCC's arguments and did not treat these advertisements as hybrid television ads. It appeared at the time that this choice allowed the Commission to avoid the issue of whether a reference to Donald Trump constituted a "generic party reference." In hindsight, however, the rationale for dismissing these matters should be viewed as a unanimous 5-0 Commission vote in favor of dispensing with the "generic party reference" requirement for hybrid television advertising altogether. From the 2004 presidential audits to the present day, the Commission has always applied the allocation method of 11 C.F.R. § 106.1 to evaluate mixed-purpose advertisements that are jointly paid for by political party committees and federal candidates and declined to engage in second-guessing with respect to what qualifies as a "generic party reference."

MUR 7169 *et al*. provides the appropriate legal framework for analyzing *all* mixed-purpose communications that are jointly paid for by a political party committee and a federal candidate, whether the communication is labeled a hybrid advertisement or not.

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Thank you for your consideration.

Sincerely,

Jessica F. Johnson Michael Bayes Matthew S. Petersen

Counsel to NRCC