FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: **The Commission**

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

DATE: **October 3, 2024**

SUBJECT: **AOR 2024-14 (DSCC and Rosen for Nevada)**
Comment from Republican National Committee

Attached is AOR 2024-14 (DSCC and Rosen for Nevada) Comment from Republican National Committee.

Attachment

JONES DAY

51 LOUISIANA AVENUE, N.W. • WASHINGTON, DC 20001.2113
TELEPHONE: +1.202.879.3939 • JONESDAY.COM

DIRECT NUMBER: +1.202.879.3951
SCROSLAND@JONESDAY.COM

October 3, 2024

VIA EMAIL TO AO@FEC.GOV

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

Re: Republican National Committee Comment on AOR 2024-14

Dear Commissioners:

The Republican National Committee ("RNC"), by and through undersigned counsel, submits this comment in response to Advisory Opinion Request 2024-14 ("the Request" or "AOR"), which asks questions concerning cost allocations for so-called "hybrid television ads"—meaning political party television advertisements that promote a clearly identified federal candidate but also contain an unattributable generic reference(s) to other candidates or issues.

As an initial matter, the FEC's regime of party-speech regulation underlying the Request rests on constitutional thin ice. Indeed, the "confusion in the regulated community" that the Request asserts exists, AOR 3, is directly attributable to the Supreme Court's flawed decision in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II*"). It is *Colorado II* alone that—for now—allows the FEC to restrict political parties in doing exactly what the First Amendment entitles them to do: fully associate with and support their own candidates, including on political advertising.

Yet, as the Sixth Circuit Court of Appeals recognized just last month, *Colorado II* is a "legal last-man-standing,'" and in "several ways," "tension has emerged between the reasoning of *Colorado II* and the reasoning of later decisions of the Court." *Nat'l Republican Senatorial Comm. v. FEC*, --- F.4th ----, 2024 WL 4052976, *4 (2024); *see also id.* at *7 (Thapar, J., concurring) ("*Colorado II* … is an outlier in our First Amendment jurisprudence generally and in campaign-finance doctrine specifically. Indeed, even under *Buckley*'s ahistorical, tiers-of-scrutiny approach, coordinated-party spending limits pose grave constitutional concerns."). The limits on party speech underpinning the AOR's questions "run afoul of modern campaign-finance doctrine and burden parties' and candidates' core political rights," *id.* at *14 (Thapar, J., concurring). The RNC hopes the Supreme Court will soon right the wrongs of *Colorado II*; in so doing, it would resolve any concerns raised by the pending Request.

In any event, the RNC offers the following comments specific to the questions in the Request.

First, any Commission advisory opinion in the response to the Request should clarify that, in the absence of a specific regulation addressing the issue, costs of party advertisements are to be "attributed to [any identified] candidate according to the benefit reasonably expected to be derived" by the candidate(s) consistent with the FEC's "general rule[s]" set forth at 11 C.F.R. § 106.1. In the case of television or other "broadcast" advertising, this means that only the actual space or time "devoted" to any identified candidate should be attributed to the candidate. *See* 11 C.F.R. § 106.1(a)(1). While section 106.1(a)(1) addresses the attribution of expenditures for communications made on behalf of more than one clearly identified Federal candidate, it stands for an obvious default rule: generic references that do not clearly relate to any specific candidate cannot be attributed to any specific candidate. The paying political party—which has the right to control its own messaging—derives the benefit from the generic references supporting its broader ticket.

Second, any Commission advisory opinion should make clear that a time/space analysis requires a holistic review of any party broadcast communication, and that there is no ceiling on the benefit potentially deemed derived by a party committee through its advertisements. The Request therefore is wrong to suggest that the framework imposed on the party mailers at issue in Advisory Opinion 2006-11 (Washington Democratic State Central Committee) may apply to the advertisements here. In that earlier advisory opinion, the Commission imposed a 50% limit on the amount of a mailer that could be allocated as benefitting the party committee. The Commission, offering nothing but a "*Cf.*" citation to a since-vacated regulation as its support, asserted that "[a]dvocacy related to the election of the clearly identified candidate is the most salient feature of such a communication, as compared to the generic reference to the party's candidates, which does not single out any particular candidate to the reader." Advisory Op. 2006-11 at 4 (citing 11 C.F.R. § 106.6(f), *vacated by* Final Order, *Emily's List v. FEC*, No. 05-0049 (D.D.C. Nov. 30, 2009)). That could be true in the case of *some* party advertisements, but it cannot—and should not—be considered a rule of general applicability to *all* party committee communications.[1]

Third, any Commission advisory opinion should make clear that the portion of a party advertisement attributable to the party, not the identified candidate, is any speech that does not relate directly to the identified candidate but instead objectively "benefits generally a group of [unidentified] candidates," Statement of Comm'rs Mason and von Spakovsky on Final Audit Report on Bush-Cheney '04 Inc. at 7. This would be consistent with "'the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message,'" *FEC v. Wisc. Right to Life*, 551 U.S. 449, 449 n.9 (2007) (quoting *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)), as

[1] Even the flat 50% attribution rule under the Commission's party phone bank regulation, 11 C.F.R. § 106.8, would be more appropriate than the sliding-scale, but-no-lower-than-50% standard that the Commission invented in Advisory Opinion 2006-11.

well as Commissioners' prior admonitions that the Commission must "avoid dictating advertising content" in party committee speech, MURs 7530 & 7627 (NRCC), Statement of Reasons of Comm'rs Dickerson, Cooksey & Trainor at 4. Thus, we also agree with the Request's assertion that "the type of language and images that promote or attack generic candidates of a party is inextricably linked to the broader political landscape," and that "[a]s that landscape changes, so does the type of messaging that a political party uses to garner support." AOR 6.

But the Request's "vague," *id.*, content in proposed "advertisement 2"—regarding "[g]reedy politicians" coupled with images of "[p]hara [*sic*] execs in suits" and "graphs of profit margins," *id.*—hardly can objectively be deemed to stand as a proxy for Republican candidates.[2] A far better example of a non-allocable communication that viewers in today's "broader political landscape," *id.*, would reasonably understand to generically refer to an unidentified group of (Democrat) candidates, might be this:

Audio	**Visual**
The Hamas supporters don't care. They will prioritize Hamas's interests over America's and won't fight for you.	Hamas militants; Palestinian protests in the United States. References: *Republicans are more likely than Democrats to see Israel as a US ally: AP-NORC poll*, AP (Oct. 2, 2024); *Liberal Democrats Urge 'No' Vote on Israel Aid to Pressure Biden on Gaza*, N.Y. Times (Apr. 19, 2024); *Democratic senators demand Biden halt military aid to Israel*, The Hill (Mar. 3, 2024); *Kamala Harris Warned Israel of 'Consequences' If It Invaded Rafah, Where Hamas Just Murdered an American Hostage*, National Review (Sept. 1, 2024).

[2] To the contrary, data on *OpenSecrets* shows that this cycle alone, Democrats have raised millions more than Republicans from companies that deal in "pharmaceutical/health products," *See Pharmaceuticals/Health Products*, OpenSecrets (last visited Oct. 3, 2024), https://www.opensecrets.org/industries/contrib?cycle=2024&ind=H04, and according to a study earlier this year, "[b]etween the 2016 and 2022 election cycles, the top 10 pharma firms gave $29 million to Democrats and just $24 million to Republicans," Ryan King, *Dems Raking in More Cash from Big Pharma than GOP Despite Drug Price Crackdown*, N.Y. Post (Feb. 6, 2024), https://nypost.com/2024/02/06/news/dems-raking-in-more-cash-from-big-pharma-than-gop-despite-drug-price-crackdown.

Thank you for this opportunity to comment on the Request.

Respectfully,

E. Stewart Crosland

Counsel for the Republican National Committee