FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: **The Commission**

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

DATE: **October 9, 2024**

SUBJECT: **AOR 2024-14 (DSCC & Rosen for Nevada Draft C) Comments from Ellis Law Group**

Attached are comments on AOR 2024-14 (DSCC & Rosen for Nevada Draft C) from Elias Law Group. This matter is on the October 10, 2024 Open meeting.

Attachment

RECEIVED
By Office of the Commission Secretary at 1:03 pm, Oct 09, 2024

RECEIVED
By Office of General Counsel at 11:58 am, Oct 09, 2024

ELIAS LAW GROUP

250 Massachusetts Ave NW, Suite 400 | Washington, DC 20001

October 9, 2024

Federal Election Commission
Office of the General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463
ao@fec.gov

Re: Advisory Opinion Request 2024-14 (DSCC and Rosen for Nevada)

Dear Commissioners:

We write as counsel to the DSCC and Rosen for Nevada (the "***Requestors***") regarding Draft C of Advisory Opinion Request 2024-14. Draft C would eliminate any requirement that a hybrid advertisement contain advocacy for or against generic candidates of a political party. Doing so would render hybrid advertisements no different than candidate advertising, yet still allow a party committee to finance half the costs. This approach would create a complete end run around the Federal Election Campaign Act's contribution limits. It is contrary to law and Requestors urge the Commission to reject it.

Under 52 U.S.C. § 30116(a)(7)(B)(i) "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***."[1] Thus, under the plain text of the Act, any payment made by a political 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***"). In relevant part, the test is met if: (1) the communication is "paid for by a political party committee or its agent" (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

[1] 52 U.S.C. § 30101(9)(A)(i), (11) (emphasis added).

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***"); 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 (the "***conduct prong***").

By definition, hybrid television advertising always meets the content and conduct prong – such advertising is a public communication that features a clearly identified candidate (or their opponent), runs in the candidate's jurisdiction in the direct lead up to their election, and is coordinated between the benefitting candidate and the party committee. The key question then is when hybrid advertising meets the payment prong. Drafts A, B and C all effectively conclude that the payment prong is not met when a political party committee and a campaign split the costs of a television advertisement that is equally divided on a time/space basis between advocacy for a clearly identified federal candidate and generic candidates of a party. Because the advertising devotes equal time and space to advocacy for the party through references to generic party candidates, the party derives separate and equal benefit from the advertisement. Therefore, it can pay for half the costs of the advertising without meeting the payment prong.

In answering Question 3, however, Draft C holds that the payment prong is not met *even when* an advertisement lacks *any reference to generic candidates of a party*. All that is required under Draft C's analysis for an advertisement to confer equal benefit to the party is for the advertisement to contain "themes" that define a party's platform and "convey the message the party committee has selected 'to garner support.'"[2] So essentially, any advertisement that features a clearly identified candidate and discusses some sort of policy issue. That is just a regular candidate advertisement.

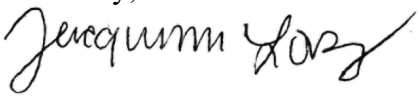
Draft C's analysis fails for multiple reasons. As Draft C itself acknowledges, "[a]dvocacy related to the election of the clearly identified candidate is the most salient feature" of a communication, even as compared to "the generic reference to the party's candidates, which does not single out any particular candidate to the reader."[3] Draft C ignores this in answering Question 3, permitting the "most salient" feature — candidate advocacy — without any other explicit feature, yet still enabling an allocation of derived benefit. To put it plainly, if a candidate is the only subject of the advertising – with no mention of generic candidates of a party or even the party itself – a policy discussion can only be reasonably understood by a viewer as promoting or opposing the featured candidate. There is, therefore, no "benefit to the party as a whole *in addition to* the candidate."[4] The only benefit to the party is promoting its candidate in coordination with the candidate, which is exactly the kind of spending 52 U.S.C. § 30116(a)(7)(B)(i) subjects to the

[2] Draft C at 16.
[3] Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 4; Draft C at 9.
[4] Draft C at 15 (emphasis added).

contribution limits. Draft C's analysis is contrary to the plain text of the Act and the Commission should decline to adopt it.

Finally, Requestors would like to express confusion on one specific issue regarding Question 4. Draft C concludes with respect to Question 4 that audio and visual references to Donald Trump can be considered party advocacy because they are intended as a contrast tool to encourage support for generic candidates of the Democratic Party.[5] However, the Draft does not explain why the plain text of 11 C.F.R. § 106.1(a) does not apply. 11 C.F.R. § 106.1(a) states that "expenditures, 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" and that "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 devoted to all candidates." Since President Trump is a current candidate for President, 11 C.F.R. § 106.1(a) dictates the advertisement be allocated only according to "the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates." Yet, Draft C does not explain why this rule is inapplicable.

Sincerely,



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[5] Draft C at 18.