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By Office of the Commission Secretary at 3:41 pm, Sep 23, 2024

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September 18, 2024

**BY ELECTRONIC MAIL DELIVERY**

Office of General Counsel  
Attn: Lisa J. Stevenson, Esq.  
Acting General Counsel  
Federal Election Commission  
1050 First Street NE  
Washington, DC 20463

**Re: Advisory Opinion Request**

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108, we seek an advisory opinion from the Federal Election Commission (“*FEC*” or the “*Commission*”) on behalf of DSCC and Rosen for Nevada, the principal campaign committee of Senator Jacky Rosen (the “*Request*”). The Request asks a series of questions regarding the applicability of the Federal Election Campaign Act of 1971, as amended (the “*Act*”), to certain proposed hybrid television advertisements that DSCC and Rosen for Nevada would like to disseminate for the upcoming 2024 general election.

In every election cycle since 2004, federal candidates and political party committees have spent tens of millions of dollars on hybrid television advertising. For the entirety of this nearly twenty-year period, the FEC implicitly blessed these advertisements without providing any form of binding guidance on their legality or scope. Most recently, half the current Commission declined to use the enforcement process to police the hybrid advertising, arguing that any guidance must come “in a way that gives the regulated community prior notice and clear guidance about what is and is not permitted.”<sup>1</sup> The advisory opinion process undoubtedly meets this standard.

Requestors ask the Commission to promptly answer this Request and finally provide some guidance to the regulated community. Given that DSCC and Rosen for Nevada want to run the proposed hybrid communications for this upcoming general election, we respectfully ask the Commission to act as soon as possible and no later than the twenty-day deadline imposed by the Act.<sup>2</sup>

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<sup>1</sup> FEC, MUR 7530 & 7627, Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor (Nov. 8, 2021), [https://www.fec.gov/files/legal/murs/7627/7627\\_28.pdf](https://www.fec.gov/files/legal/murs/7627/7627_28.pdf).

<sup>2</sup> 52 U.S.C. § 30108(a)(2) (providing that if “an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.”)

## I. LEGAL BACKGROUND

Under the Act, “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.”<sup>3</sup> Commission regulations set forth a three part test to determine whether an expenditure by a party committee for a communication is made “in cooperation, consultation or concert” with a candidate (“a **coordinated communication**”).<sup>4</sup> In relevant part, the test is met if: (1) the communication is “paid for by a political party committee or its agent”<sup>5</sup> (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 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**”);<sup>6</sup> 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 (“**conduct prong**”).<sup>7</sup> A coordinated communication paid for by a national party committee must be treated either as a contribution or a coordinated party expenditure, subject to the applicable limits.<sup>8</sup> Thus, in general, if a national party committee: (i) pays for a television advertisement; (ii) that advertisement clearly identifies a U.S. Senate candidate and runs in their jurisdiction less than 90 days before their general election; and (iii) coordinates with the candidate on the advertisement, the cost of that advertisement must be treated as an in-kind contribution or a coordinated party expenditure, subject to the limits.

Commission regulations provide an exception to this general rule for “hybrid phone banks” -- telephone calls that promote both a clearly identified federal candidate and a political party. Specifically, Commission regulations allow a political party and a candidate to evenly split the costs of a phone bank if the phone bank refers to one clearly identified federal candidate, does not solicit contributions, and “includes another reference that generically refers to other candidates of the Federal candidate’s party without clearly identifying them.”<sup>9</sup> A national party committee may pay for half the cost of a hybrid phone bank and treat it as a party expense, not subject to their contribution or coordinated party expenditure limit for the identified candidate.<sup>10</sup> The remaining half of the costs can either be paid for by the candidate or, if paid for by the party, treated as an in-kind contribution or coordinated party expenditure.<sup>11</sup>

The Commission considered whether to include other forms of communications within the hybrid phone bank regulation’s coverage but declined to do so “because each type of communication presents different issues that need to be considered in further detail before establishing new

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<sup>3</sup> 52 U.S.C. § 30116(a)(7)(B)(i).

<sup>4</sup> *Id.*; 11 C.F.R. § 109.37(a).

<sup>5</sup> 11 C.F.R. § 109.37(a)(1).

<sup>6</sup> *Id.* § 109.37(a)(2)(ii), (iii)(A).

<sup>7</sup> *Id.* §§ 109.37(a)(3); 109.21(d)(2).

<sup>8</sup> *Id.* § 109.37(b). The DSCC is not given a coordinated party expenditure limit as a matter of law, but rather can receive an assignment of this authority from the Democratic National Committee or a state party. 52 U.S.C. § 30116(d)(1); 11 C.F.R. § 109.33(a).

<sup>9</sup> 11 C.F.R. § 106.8(a).

<sup>10</sup> *Id.* § 106.8(b).

<sup>11</sup> *Id.*

rules.”<sup>12</sup> In a 2006 advisory opinion, the Commission considered and approved of the concept of hybrid direct mail,<sup>13</sup> but added on a requirement that the portion of the mail dedicated to candidate advocacy take up no more than 50% of the mail on a time/space basis.<sup>14</sup> The Commission required that the candidate pay at least 50% of such a mailing even if the portion dedicated to the candidate was less than 50% on a time/space because “[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” and therefore “‘the benefit reasonably expected to be derived’ by the clearly identified candidate from the mass mailing is sufficient to require no less than a 50% attribution of costs to him.”<sup>15</sup> The Commission considered the application of the hybrid phone bank regulation to television advertising for the first time in 2007 as part of an audit of President Bush’s 2004 campaign committee.<sup>16</sup> In the 2004 cycle, Bush-Cheney ’04 and the Republican National Committee evenly split the costs of television advertising that referred to President Bush or Senator Kerry and also included references to either “Democrats” or “Republicans” or used terms like “our leaders in Congress,” “liberals in Congress” or “liberal allies.”<sup>17</sup> The advertisements appeared crafted to follow the rule the Commission laid out for hybrid direct mail – namely that the portion of the advertisement dedicated to advocacy for the clearly identified candidate take up no more than 50% on a time/space basis. The Commission did not garner the required four votes to find these hybrid television advertisements violated the Act.<sup>18</sup>

Since the 2006 advisory opinion and 2007 audit, party committees and candidates have routinely run hybrid television ads. Yet, the Commission has failed to provide any kind of affirmative guidance on such advertising. The biggest impact of this failure has been confusion in the regulated community on what kind of images or audio may be counted as generic party advocacy versus candidate advocacy for purposes of ensuring that the candidate advocacy portion take up no more than 50% of the advertisement.<sup>19</sup>

## II. QUESTIONS PRESENTED

DSCC is a national political party committee established pursuant to 52 U.S.C. § 30101(14). It is dedicated to electing Democrats to the U.S. Senate. Senator Rosen is a sitting Senator from Nevada and a current candidate in the 2024 general election for U.S. Senate in Nevada. Rosen for Nevada is her principal campaign committee.

DSCC and Rosen for Nevada plan to split the costs of hybrid television advertisements disseminated in Nevada between the date on this letter and November 5, 2024. Requestors ask a

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<sup>12</sup> Party Committee Telephone Banks, Final Rules, 68 FR 64517, 64518 (November 14, 2003).

<sup>13</sup> Direct mail that expressly advocates for one clearly identified federal candidate and “other generically referenced candidates” of the state party and does not contain a solicitation.

<sup>14</sup> FEC Adv. Op. 2006-11 (Washington Democratic State Central Committee).

<sup>15</sup> *Id.* at 4.

<sup>16</sup> FEC, Report of the Audit Division on Bush-Cheney ’04, Inc. and the Bush-Cheney ’04 Compliance Committee, Inc. (April 24, 2007) at 10–11.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> In 2007, the Commission held a hearing on proposed rules on hybrid communications. The Commission failed to adopt regulations after that hearing. Commenters urged the Commission to adopt clear rules to allow party committees flexibility in how they spend their money to benefit their candidates. *See* FEC, Hearing on proposed rules on hybrid ads (Sept. 1, 2007), <https://www.fec.gov/updates/hearing-on-proposed-rules-on-hybrid-ads/>.

series of questions, one in general and three with regard to specific proposed scripts, attached in Exhibit A.

Requestors assume that the basic framework laid out in Advisory Opinion 2006-11 applies and therefore a hybrid advertisement: (i) *may contain up to 50%* of content on a time/space basis that advocates for a clearly identified candidate or against their opponent (“*candidate advocacy*”); and (ii) *must contain at least 50%* of content that supports generic candidates of the party, either directly or by opposing generic candidates of a competing party (“*party advocacy*”). The questions below in large part turn on how to properly categorize proposed content – either as candidate or party advocacy.

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

**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 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?

**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?

### III. LEGAL ANALYSIS

#### Question 1:

Requestors ask the Commission to expressly confirm that the Act and Commission regulations permit Requestors to evenly split the costs of hybrid television advertising. Specifically, may Requestors evenly split the costs of television advertisements that will clearly identify Senator Rosen and run in Nevada between the date of this letter and the 2024 general election, provided that such advertisements equally promote Senator Rosen’s candidacy for the U.S. Senate (either through advocacy for her or against her opponent) and generic candidates of the Democratic party (either through advocacy for generic Democratic candidates or against generic Republican candidates) on a time/space basis?

The Commission and the Commission’s office of the general counsel have implicitly blessed hybrid television advertising for nearly twenty years.<sup>20</sup> Requestors ask the Commission to now do so expressly.

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<sup>20</sup> FEC, Report of the Audit Division on Bush-Cheney ’04, Inc. and the Bush-Cheney ’04 Compliance Committee, Inc. (April 24, 2007) at 10–11; First General Counsel’s Report at 5–9 (June 19, 2019), MUR 7530 (NRCC, et al.); First General Counsel’s Report at 9–14 (March 19, 2020), MUR 7627 (NRCC, et al.); FEC, MURs 7530 and 7267 (NRCC), Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor (Nov. 8, 2021), [https://www.fec.gov/files/legal/murs/7530/7530\\_16.pdf](https://www.fec.gov/files/legal/murs/7530/7530_16.pdf).

### Question 2:

Requestors seek Commission guidance as to whether portions of a hybrid television advertisement that feature a clearly identified candidate direct to camera and/or are narrated by the candidate constitute candidate advocacy. Specifically, must both of these portions of advertisement 1 be treated as candidate advocacy?

Audio	Visual
Democrats passed Medicare 60 years ago and are still protecting it today.  Giving our seniors a safety net if they get sick and need care.  <i>(spoken by Senator Rosen)</i>	Senior citizens in doctor's office; pharmacy
Republicans like Sam Brown? They will prioritize big pharma and gut Medicare.  Profits over care. No more safety net if you get sick.  <i>(spoken by Senator Rosen)</i>	Senator Rosen to camera  Images of big pharma execs, profit charts

Requestors assume the answer to this question is yes. Both portions of the advertisement meet the content prong. Further, although the audio discusses Democrats generally and mentions "*Republicans like Sam Brown*," under the Commission's analysis in Advisory Opinion 2006-07, the "[a]dvocacy related to the election of the clearly identified candidate is the most salient feature" of that portion of the advertising. Requestors therefore seek to specifically confirm that footage that meets the content prong must be treated as candidate advocacy on a time/space basis.

### Question 3:

With respect to advertisement 2, is the phrase "greedy politicians" and the visual of pharmaceutical executives in suits sufficient to serve as the audio and visual references to generic candidates of the Republican party and thus, allocable as party advocacy?

Audio	Visual
Greedy politicians don't care. They will prioritize big pharma's profits and won't fight to lower your costs.  <i>(spoken by generic non-candidate voiceover)</i>	Phara execs in suits; graphs of profit margins.

The underlying rationale of hybrid advertising is that the advertising promotes the party's generic candidates.<sup>21</sup> The type of language and images that promote or attack generic candidates of a party is inextricably linked to the broader political landscape. As that landscape changes, so does the type of messaging that a political party uses to garner support. Therefore, the requirement to reference generic party candidates should be applied with flexibility.<sup>22</sup> In the current environment, traditional terms like "Democrat" and "Republican" are rarely used. Instead, both parties tend to communicate using issue themes that define the core platform of each party. Requestors 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. However, Requestors are unsure if a vague phrase like "greedy politicians" alongside images of pharmaceutical representatives meets that threshold.

#### Question 4:

Can the audio and visual references to Trump in the third block below count as party advocacy?

Audio	Visual
Republicans pushed for the overturn of Roe v. Wade.	Video of anti-abortion protests; newspaper headlines on abortion bans

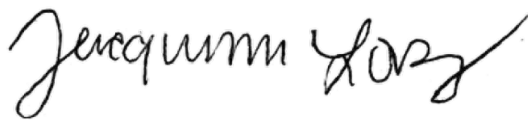
<sup>21</sup> The hybrid phone bank regulation requires a reference to "other candidates of the Federal candidate's party without clearly identifying them." 11 C.F.R. § 106.8(a). Dating back to the 2004 election cycle, the Commission has declined to find a violation of the Act where the party portion of a hybrid advertisement references generic candidates of the opposing party. Many of the advertisements at issue in the Bush-Cheney '04 audit referenced generic candidates of the Democratic Party, using terms like "the liberals in Congress" or "liberal allies." Similarly, in an enforcement action against the NRCC closed in 2021, the Commission failed to garner four votes to find the use of terms like "progressives" and "Washington liberals" were insufficient generic party references. FEC, MURs 7530 and 7267 (NRCC), Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor (Nov. 8, 2021), [https://www.fec.gov/files/legal/murs/7530/7530\\_16.pdf](https://www.fec.gov/files/legal/murs/7530/7530_16.pdf).

<sup>22</sup> FEC, MURs 7530 and 7267 (NRCC), Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor (Nov. 8, 2021), [https://www.fec.gov/files/legal/murs/7530/7530\\_16.pdf](https://www.fec.gov/files/legal/murs/7530/7530_16.pdf).

Now, women's reproductive rights are under attack.  <i>(spoken by generic non-candidate voiceover)</i>	
Sam Brown? He's just another vote for a nationwide abortion ban.  <i>(spoken by generic non-candidate voiceover)</i>	Newspaper headlines on proposed national abortion ban; image of Sam Brown
Don't let Sam Brown and Donald Trump take away your rights.  <i>(spoken by generic non-candidate voiceover)</i>	Photos of Sam Brown and Donald Trump

Requestors acknowledge that President Trump is a current federal candidate. However, Requestors wish to use his name or likeness solely in the context of promoting generic Democratic candidates, not to encourage voters to vote for or against Donald Trump himself. President Trump is the head of the Republican Party and defines the issues that many Republican candidates support, including restrictions on abortion. The issue of abortion has become a defining, if not the defining, policy difference between the Republican and Democratic parties in the 2024 election. The use of President Trump's name and likeness is therefore a powerful contrast tool to encourage support for generic candidates of the Democratic Party. Requestors ask the Commission to confirm that use of his name and likeness may qualify as party advocacy.

Very truly yours,



Jacquelyn K. Lopez  
Jonathan A. Peterson  
Emma R. Anspach  
*Counsel to DSCC and Rosen for Nevada*

## EXHIBIT A

### Advertisement 1:

Audio	Visual
<p>Democrats passed Medicare 60 years ago and are still protecting it today.</p> <p>Giving our seniors a safety net if they get sick and need care.</p> <p><i>(spoken by Senator Rosen)</i></p>	<p>Senior citizens in doctor's office; pharmacy</p>
<p>Republicans like Sam Brown? They will prioritize big pharma and gut Medicare.</p> <p>Profits over care. No more safety net if you get sick.</p> <p><i>(spoken by Senator Rosen)</i></p>	<p>Senator Rosen to camera</p> <p>Images of big pharma execs, profit charts</p>
<p>I will always put our Seniors first and protect Medicare.</p> <p><i>(spoken by Senator Rosen)</i></p>	<p>Senator Rosen to camera</p>



**Advertisement 2:**

Audio	Visual
Pharmaceutical costs are through the roof, making it hard to afford basic care. <i>(spoken by generic non-candidate voiceover)</i>	Doctor and patient in hospital setting
Greedy politicians don't care. They will prioritize big pharma's profits and won't fight to lower your costs. <i>(spoken by generic non-candidate voiceover)</i>	Phara execs in suits; graphs of profit margins.
Senator Rosen will always fight for you, voting to cap insulin prices and fighting against big pharma to protect your care. <i>(spoken by generic non-candidate voiceover)</i>	B-roll of Senator Rosen with seniors

### Advertisement 3

Audio	Visual
<p>Republicans pushed for the overturn of Roe v. Wade.</p> <p>Now, women's reproductive rights are under attack.</p> <p><i>(spoken by generic non-candidate voiceover)</i></p>	<p>Video of anti-abortion protests; newspaper headlines on abortion bans</p>
<p>Sam Brown? He's just another vote for a nationwide abortion ban.</p> <p><i>(spoken by generic non-candidate voiceover)</i></p>	<p>Newspaper headlines on proposed national abortion ban; image of Sam Brown</p>
<p>Don't let Sam Brown and Donald Trump take away your rights.</p> <p><i>(spoken by generic non-candidate voiceover)</i></p>	<p>Photos of Sam Brown and Donald Trump</p>