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For meeting of October 10, 2024
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October 10, 2024

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
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Subject: AO 2024-14 (DSCC and Rosen for Nevada) - Draft D

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2024-14

2
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8 Suite 400

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DRAFT D

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11
12 Dear Counsel:

13 We are responding to the advisory opinion request you submitted on behalf of the
14 Democratic Senatorial Campaign Committee (“DSCC”) and Rosen for Nevada, regarding
15 the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the
16 “Act”), and Commission regulations to certain proposed hybrid television advertisements
17 that DSCC and Rosen for Nevada would like to disseminate for the upcoming 2024
18 general election. Requestors ask whether they may evenly split the cost of hybrid
19 television advertisements that clearly identify Senator Rosen and equally promote on a
20 time/space basis her candidacy for U.S. Senate and generic candidates of the Democratic
21 Party and, for three proposed advertisements, whether certain audio and visual
22 components of the advertisements serve as party or candidate advocacy.

23 The Commission concludes that DSCC and Rosen for Nevada may evenly split
24 the cost of hybrid television advertisements so long as the time and space devoted to
25 Senator Rosen does not exceed the time and space in the advertisement devoted to the
26 generically referenced candidates. The Commission further concludes that, regarding
27 advertisement (A), portions of the advertisement featuring Senator Rosen or narrated by
28 Senator Rosen must be treated as candidate advocacy. The Commission did not approve
29 a response to the questions regarding advertisements (B) and (C) by the required

affirmative vote of at least four Commissioners. *See* 52 U.S.C §§ 30106(c), 30107(a)(7);
see also 11 C.F.R. § 112.4(a).

Background

The facts presented in this advisory opinion are based on your letter received on
September 18, 2024, attached exhibits, and publicly available information.

DSCC is a national party committee of the Democratic Party, dedicated to
electing Democrats to the U.S. Senate.¹ Rosen for Nevada is the principal campaign
committee of U.S. Senator Jacky Rosen, who currently represents Nevada and is a
candidate for reelection in the 2024 general election.²

DSCC and Rosen for Nevada plan to split the costs of hybrid television
advertisements disseminated in Nevada (between September 18, 2024, and November 5,
2024). They do not provide specific scripts for such advertisements but they describe
them as advertisements that will clearly identify Senator Rosen and “equally promote” on
a time/space basis “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).”³ They plan to split the costs of such advertisements equally on

¹ *See* Advisory Opinion Request (“AOR”) at AOR003; DSCC, Statement of Organization, FEC Form 1 (June 25, 2024), <https://docquery.fec.gov/pdf/369/202406259652490369/202406259652490369.pdf>.

² *See* AOR003; Rosen for Nevada, Statement of Organization, FEC Form 1 (Sept. 5, 2024), <https://docquery.fec.gov/pdf/692/202409059675370692/202409059675370692.pdf>.

³ AOR004.

1 the “assum[ption] that the basic framework laid out in Advisory Opinion 2006-11
2 [(Washington Democratic State Central Committee)] applies.”⁴

3 Requestors also have provided proposed audio and visual scripts for three specific
4 advertisements. The proposed advertisements are reprinted in the tables below.

5 Table 1: Advertisement (A)⁵

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
I will always put our Seniors first and protect Medicare. <i>(spoken by Senator Rosen)</i>	Senator Rosen to camera

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⁴ *Id.*

⁵ *See* AOR008.

1 Table 2: Advertisement (B)⁶

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>	Pharmaceutical executives 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

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⁶ AOR009.

1 Table 3: Advertisement (C)⁷

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>

2
3 ***Questions Presented***
4

5 1. *May Requestors evenly split the cost of hybrid television advertisements that*
6 *clearly identify Senator Rosen and equally promote on a time/space basis Senator*
7 *Rosen’s candidacy for the U.S. Senate (either through advocacy for her or against*
8 *her opponent) and generic candidates of the Democratic party (either through*
9 *advocacy for generic Democratic candidates or against generic Republican*
10 *candidates)?*

11 2. *With respect to proposed Advertisement (A), do portions of the hybrid*

⁷ AOR010.

1 *advertisement that feature the clearly identified candidate direct to camera*

2 *and/or are narrated by the candidate need to be allocated as candidate advocacy?*

3 3. *With respect to Advertisement (B), is the phrase “greedy politicians” and the*
4 *visual of pharmaceutical executives in suits sufficient to serve as the audio and visual*
5 *references to generic candidates of the Republican Party, and thus, allocable as party*
6 *advocacy?*

7 4. *With respect to Advertisement (C), can audio or visual references to Donald*
8 *Trump qualify as a reference to generic candidates of the Republican Party, allocable as*
9 *party advocacy?*

10 ***Legal Analysis***

11 1. *May Requestors evenly split the cost of hybrid television advertisements that*
12 *clearly identify Senator Rosen and equally promote on a time/space basis Senator*
13 *Rosen’s candidacy for the U.S. Senate (either through advocacy for her or against*
14 *her opponent) and generic candidates of the Democratic party (either through*
15 *advocacy for generic Democratic candidates or against generic Republican*
16 *candidates)?*

17 Yes, Requestors may evenly split the cost of a hybrid television advertisement
18 that clearly identifies Senator Rosen and equally promotes on a time/space basis Senator
19 Rosen’s candidacy for the U.S. Senate (either through advocacy for her or against her
20 opponent) and generic candidates of the Democratic party (either through advocacy for
21 generic Democratic candidates or against generic Republican candidates) provided that

1 the time and space devoted to Senator Rosen will actually be equal to the time and space
2 devoted to the generically referenced congressional candidates.⁸

3 Commission regulations do not definitively address the appropriate allocation of
4 payments for the type of communication (hybrid television advertisements) proposed in
5 this request. Commission regulations at 11 C.F.R. part 106 include both general
6 allocation rules and rules for allocating specific types of expenses in particular
7 circumstances. Section 106.1(a) provides the general rule that expenditures made on
8 behalf of *more than one* clearly identified candidate “shall be attributed to each such
9 candidate according to the benefit reasonably expected to be derived.”⁹ For a broadcast
10 communication, the “attribution shall be determined by the proportion of space or time
11 devoted to each candidate as compared to the total space or time devoted to all
12 candidates.”¹⁰ A candidate is clearly identified if his or her name or likeness appears or
13 if his or her identity is apparent by unambiguous reference.¹¹ However, the expenditures
14 for the advertisements at issue here are being made on behalf of only one clearly
15 identified candidate, Senator Rosen, and the references to “Democrats” and
16 “Republicans” do not clearly identify any other specific candidates.¹² Thus, section
17 106.1 does not apply.

⁸ AOR004.

⁹ 11 C.F.R. § 106.1(a).

¹⁰ *Id.*

¹¹ *See* 52 U.S.C. § 30101(18); 11 C.F.R. §§ 106.1(d), 100.17.

¹² *See also* Advisory Opinion 2004-33 (Ripon Society) at 4 (determining, for purposes of electioneering communication regulation under 11 C.F.R. § 100.29(b)(2), that reference to “Republicans in

Commission regulations at 11 C.F.R. § 106.8 (which apply only to phone banks conducted by a party committee) do address the attribution required for a communication that possesses the same attributes as some of the broadcast advertisements described in the request (*i.e.*, reference to only one clearly identified federal candidate along with a generic reference to other party candidates; and no solicitation of funds).¹³ Under this regulation, a flat 50 percent of the costs of a phone bank communication must be attributed to the clearly identified candidate, and the other 50 percent must be attributed to the party committee, regardless of the amount of time devoted to each.¹⁴ However, the Commission’s Explanation and Justification (“E & J”) of this regulation specifically noted that the Commission had considered whether to include other forms of communications, such as broadcast media, within the regulation’s coverage but “decided to limit the scope of new section 106.8 to phone banks . . . because each type of communication presents different issues that need to be considered in further detail before establishing new rules.”¹⁵

Although neither section 106.1 nor section 106.8 definitively addresses the appropriate allocation of payments for the type of hybrid broadcast advertisements described in this request, the Commission previously addressed a similar issue in Advisory Opinion 2006-11 (Washington Democratic State Central Committee). There,

Congress” in advertisement did “not constitute an unambiguous reference to any specific Federal candidate”).

¹³ See 11 C.F.R. § 106.8(a).

¹⁴ See *id.* § 106.8(b).

¹⁵ Party Committee Telephone Banks, 68 Fed. Reg. 64517, 64518 (Nov. 14, 2003).

1 the Commission considered hybrid mass mailings that expressly advocated for the
2 election of only one clearly identified federal candidate, as well as the election of
3 generically referenced candidates of the same party, but no other clearly identified
4 candidates.¹⁶ The Commission concluded that the mailings largely served the purpose of
5 influencing the election of the clearly identified federal candidate, no matter how much of
6 the space in the mailing was devoted to that candidate.¹⁷ The Commission further
7 concluded that “[a]dvocacy related to the election of the clearly identified candidate is the
8 most salient feature of such a communication, as compared to the generic reference to the
9 party’s candidates, which does not single out any particular candidate to the reader.”¹⁸
10 Accordingly, because the benefit reasonably expected to be derived favored the clearly
11 identified candidate, the Commission concluded that no less than 50 percent of the costs
12 of the mailings needed to be attributed to the candidate.¹⁹ Additionally, where the space
13 in the mailing devoted to the clearly identified candidate exceeded 50 percent, the
14 Commission concluded that the costs attributed to the candidate should reflect the relative
15 proportion of space devoted to the candidate.²⁰ Consequently, the Commission
16 concluded that the state party committee and the principal campaign committee of the
17 clearly identified federal candidate could each pay 50 percent of the costs of the mailing

¹⁶ See Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 4.

¹⁷ *Id.*; see also 52 U.S.C. §§ 30101(8)(A)(i), (9)(A)(i); 11 C.F.R. § 100.52(a); 11 C.F.R. § 100.111(a).

¹⁸ Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 4.

¹⁹ *Id.* at 2-3, 4.

²⁰ *Id.* at 3, 4.

1 “so long as the space devoted to the candidate in the mailing [did] not exceed the space in
2 the mailing devoted to the generically referenced candidates.”²¹

3 While Commission regulations and past Advisory Opinions do not directly
4 address hybrid television advertisements, the Commission has long understood that no in-
5 kind contribution results where two or more committees properly attribute the costs of a
6 given communication. Section 106.1 is a specific recognition of this general rule, which
7 flows from the Commission’s determination that in-kind contributions result from goods
8 or services provided “without charge or at a charge that is less than the usual and normal
9 charge for such goods or services.”²² Where, by contrast, each party bears its own costs
10 and appropriately allocates the expenses associated with a given communication, neither
11 party receives “anything of value”²³ from the other and no in-kind contribution results.

12 The Commission recently applied this rule in the context of public
13 communications. In Advisory Opinion 2024-07, the Commission concluded that where a
14 candidate committee pays its allocable share of the costs of a proposed joint fundraising
15 committee’s public communications, those communications did not meet the payment
16 prong of the coordinated communication test.²⁴ Similarly, in Advisory Opinion 2004-37,
17 the Commission considered whether a brochure expressly advocating the election of
18 several clearly identified candidates would be a “coordinated communication.” The
19 Commission concluded that the brochure would not be a coordinated communication

²¹ *Id.* at 2.

²² 11 C.F.R. § 100.52(d)(1).

²³ 52 U.S.C. 30101(8)(A)(i).

²⁴ Advisory Opinion 2024-07 (Team Graham) at 7; 11 C.F.R. § 109.21(a)(1).

1 because it would not satisfy the payment part of the coordinated communication test
2 where each of the candidates identified in the brochure reimbursed the full production
3 and distribution costs attributed to that candidate.

4 Here, Requestors seek to evenly split the cost of broadcast advertisements that
5 will “equally promote” on a time/space basis “Senator Rosen’s candidacy for the U.S.
6 Senate (either through advocacy for her or against her opponent) and generic candidates
7 of the Democratic party (either through advocacy for generic Democratic candidates or
8 against generic Republican candidates).”²⁵ The Commission concludes that the
9 framework utilized in Advisory Opinion 2006-11 (Washington Democratic State Central
10 Committee) provides an appropriate way to allocate the costs as proposed, given
11 Requestors’ assurance that the time/space balance in their proposed television
12 advertisements will be equally divided between the clearly identified federal candidate
13 (Senator Rosen) and the generically referenced candidates.

14 2. *With respect to proposed Advertisement (A), do portions of the hybrid*
15 *advertisement that feature the clearly identified candidate direct to camera and/or*
16 *are narrated by the candidate need to be allocated as candidacy advocacy?*

17 Yes the portions²⁶ of the advertisement that feature Senator Rosen narrating or
18 speaking directly to the camera, wherein she is clearly identified as a candidate for
19 Federal office, should be allocated as candidacy advocacy.

²⁵ AOR004.

²⁶ The Request describes Advertisement (A) as a hybrid ad. Because it is unclear whether the script that the Requestors provided represents the full ad, the Commission assumes, for the purposes of this advisory opinion, that there are parts of the ad that contain generic party references.

1 As Requestors acknowledge in their request,²⁷ these portions meet the content
2 prong of the Commission’s coordinated communications regulation.²⁸ Moreover, under
3 the Commission’s analysis in Advisory Opinion 2006-11 (Washington Democratic State
4 Central Committee), discussed in greater detail above, the “[a]dvocacy related to the
5 election of the clearly identified candidate is the most salient feature” of that portion of
6 the advertising.²⁹ In Respondents’ proposed Advertisement (A), the entire advertisement
7 is either narrated by or directly features the clearly identified candidate, Senator Rosen.³⁰

8 In the context of hybrid mass mailings, the Commission found that “[w]here the
9 space in the mailing devoted to the clearly identified Federal candidate exceeds the space
10 devoted to the generically referenced party candidates . . . it is appropriate to apply
11 analogous ‘space or time’ principles set out in 11 CFR § 106.1(a).”³¹ Similarly, the
12 Commission finds this method appropriate to apply in the instant matter. Thus, those
13 portions of the advertisement featuring Senator Rosen should be allocated as candidate
14 advocacy. Moreover, because Rosen for Nevada will “pay the full cost of the public
15 communications attributable to [Senator Rosen],” the proposed communication will “not

²⁷ AOR005 (“Both portions of the advertisement meet the content prong.”).

²⁸ 11 C.F.R. § 109.21(c)(4) (Content prong includes public communications “refer[ing] to a clearly identified House or Senate candidate and... publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the clearly identified candidate's general, special, or runoff election, or primary or preference election, or nominating convention or caucus.”).

²⁹ See Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 4.

³⁰ In *Hispanic Leadership Fund, Inc. v. FEC*, 897 F.Supp.2d 407, 430 (E.D. Va. 2012), a federal court found that a recording of President Obama’s voice, without further identification, was not a “contextually unambiguous reference to President Obama.” Here, by contrast, Senator Rosen’s narration precedes her appearance on camera. Accordingly, the Commission determines that Senator Rosen is a clearly identified candidate throughout the advertisement.

³¹ Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 4.

1 meet the payment part of the coordinated communication test and, therefore, will not be
2 [an] in-kind contribution[.]”³²

3 3. *With respect to proposed Advertisement (B), is the phrase “greedy*
4 *politicians” and the visual of pharmaceutical executives in suits sufficient to serve as the*
5 *audio and visual references to generic candidates of the Republican Party, and, thus,*
6 *allocable as party advocacy?*

7 The Commission did not approve a response to this question by the required
8 affirmative vote of at least four Commissioners. *See* 52 U.S.C §§ 30106(c), 30107(a)(7);

9 4. *see also* 11 C.F.R. § 112.4(a). *With respect to Advertisement (C), can audio or*
10 *visual references to Donald*
11 *Trump qualify as a reference to generic candidates of the Republican Party, allocable as*
12 *party advocacy.*

13 The Commission did not approve a response to this question by the required
14 affirmative vote of at least four Commissioners. *See* 52 U.S.C §§ 30106(c), 30107(a)(7);
15 *see also* 11 C.F.R. § 112.4(a). This response constitutes an advisory opinion concerning
16 the application of the Act and Commission regulations to the specific transaction or
17 activity set forth in your request.³³ The Commission emphasizes that, if there is a change
18 in any of the facts or assumptions presented, and such facts or assumptions are material to
19 a conclusion presented in this advisory opinion, then the requestor may not rely on that
20 conclusion as support for its proposed activity. Any person involved in any specific
21 transaction or activity which is indistinguishable in all its material aspects from the

³² Advisory Opinion 2024-07 (Team Graham) at 7; 11 C.F.R. § 109.21(a)(1).

³³ *See* 52 U.S.C. § 30108.

1 transaction or activity with respect to which this advisory opinion is rendered may rely on
2 this advisory opinion.³⁴ Please note that the analysis or conclusions in this advisory
3 opinion may be affected by subsequent developments in the law including, but not
4 limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions
5 cited herein are available on the Commission's website.

6 On behalf of the Commission,

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8 Sean J. Cooksey,
9 Chairman
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³⁴ See *id.* § 30108(c)(1)(B).