FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**

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

DATE: **January 30, 2025**

SUBJECT: **AOR 2025-01 (Mikie Sherrill) Comment from Campaign Legal Center**

Attached is AOR 2025-01 (Mikie Sherrill) Comment from Campaign Legal Center.

Attachment

RECEIVED
By Office of General Counsel at 10:15 am, Jan 30, 2025

RECEIVED
By Office of the Commission Secretary at 10:40 am, Jan 30, 2025

CLC
ADVANCING DEMOCRACY THROUGH LAW

January 30, 2025

Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First St. NE
Washington, DC 20463
ao@fec.gov

Re: Advisory Opinion Request 2025-01 (Sherrill)

Dear Ms. Stevenson:

Campaign Legal Center ("CLC") respectfully submits this comment on advisory opinion request 2025-01 (the "Request"), submitted to the Federal Election Commission (the "FEC" or "Commission") by Rep. Mikie Sherrill.[1] Rep. Sherrill proposes to "contribute funds . . . to one or more recipient political organizations that may accept unlimited contributions and that will spend the funds in connection with an election."[2] As a threshold matter, the Request fails to comply with the requirements for an advisory opinion request under the Federal Election Campaign Act (the "Act") and Commission regulations.[3] Because the Request does not identify the political organizations that Rep. Sherrill would contribute to or describe those organizations' relationship with Rep. Sherrill—facts that are crucial to determining whether a candidate has "directly or indirectly established financed, maintained or controlled" an entity under the Bipartisan Campaign Reform Act ("BCRA")—it fails to "set forth a specific transaction or activity"[4] and "include a complete description of all facts relevant to the specific transaction or activity," such that the Request presents a "general question of interpretation."[5]

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1 *See* Advisory Op. Request 2025-01 (Sherrill) (Jan. 17, 2025) (the "Request").

2 Request at 1.

3 52 U.S.C. § 30108; 11 C.F.R. § 112.1.

4 *Id.* § 112.1(b).

5 *Id.* § 112.1(b)–(c); *see, e.g.*, Advisory Op. 2003-37 (Americans for a Better Country) at 8 (declining to answer whether certain people would be agents of the requester because the issue of agency requires a case-by-case determination and the Commission lacked the necessary "specific information"), 21 (concluding the same with regard to a question about whether federal candidates or officeholders would be soliciting funds in connection with an

The Commission should reject what is essentially a rulemaking petition dressed up as an advisory opinion request,[6] which aims to substitute a rigid, numbers-based rule in place of the well-established multifactor test for determining when a federal candidate has "directly or indirectly established, financed, maintained or controlled" an entity for BCRA's purposes.[7]

In determining whether an entity is directly or indirectly established, financed, maintained, or controlled by a candidate or officeholder, the Commission must examine the factors set forth in its regulations "in the context of the overall relationship between sponsor and the entity."[8] The factor most relevant to whether a candidate or officeholder has "financed" an entity asks whether the candidate or officeholder "provides funds . . . in a significant amount,"[9] which the Commission has previously concluded could, *under the right circumstances*, be satisfied by providing even 25% of the recipient group's total receipts at the time of the donation.[10] The circumstances pertinent to that question, however, include the overall nature of the relationship between the candidate and the recipient group—including how the candidate's funds would factor into the group's overall funding and whether the candidate is otherwise involved in advancing the group's goals.

For instance, in Advisory Opinion 2006-04 (Tancredo for Congress), which the Request characterizes as the Commission's "clearest statement, to date" on this issue, the Commission determined that because the proposed recipient had only "received donations of $9,285.40" and the candidate was offering to contribute 25% of the group's funds to date, the candidate would effectively be supplying

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election other than an election for federal office when the requester did not "identify a candidate" or provide details about the proposed communications); Advisory Op. 2003-12 (Stop Taxpayer Money for Politicians Committee) at 17 (stating that the Commission does not have enough information to answer whether a consultant hired by the requester, a 527 organization, can discuss the requester's public communications with a consultant who is working for "any Federal candidate's authorized committee").

6 Reflecting the generality of the question presented, one commenter has urged the Commission to answer the Request by generally "conclud[ing] that the mere transfer of funds (regardless of amount, percentage, or timing) from a federal candidate's or officeholder's campaign committee or leadership PAC to a 'soft-money' entity does not trigger the so-called 'soft-money ban'" in BCRA. Comment on AOR 2025-01 at 1, Institute for Free Speech (Jan. 28, 2025), https://www.fec.gov/files/legal/aos/2025-01/202501C_1.pdf ("IFS Comment"). On top of the fact that an advisory opinion cannot revise the Commission's established reading of BCRA, this commentor's reading contradicts the plain meaning of the statutory phrase "established, financed, maintained or controlled," 52 U.S.C. § 30125(e)(1)(A), and relies heavily on an entirely inapposite Commission decision in MUR 8090, which it acknowledges "did not specifically address" the pertinent question of when a federal candidate has established, financed, maintained or controlled another entity. IFS Comment at 4.

7 Under BCRA, an entity "directly or indirectly established, financed, maintained, or controlled" by a federal candidate or officeholder may not solicit, receive, direct, transfer, or spend funds in connection with a federal election, including funds for federal election activity, unless those funds comply with FECA's limitations, prohibitions, and reporting requirements. 52 U.S.C. § 30125(e)(1)(A); *see* 11 C.F.R. § 300.2(c).

8 11 C.F.R. § 300.2(c)(2).

9 *Id.* § 300.2(c)(2)(vii).

10 Advisory Op. 2006-04 (Tancredo for Congress) at 4–5.

"substantial 'seed money'" for the group.[11] Moreover, in addition to providing funds, the candidate also planned to endorse and spend campaign funds advertising in support of the group's ballot initiative, and these endorsement ads were to be fashioned based on polling data the candidate received from the group. In short, the conclusion that this group was "financed" by the candidate relied not on a simple exercise in bean counting, but on a global evaluation of their deep ties.

Because "the question of what constitutes a significant amount" must be considered "in view of all the relevant circumstances,"[12] the Commission must know more than the Request offers about the proposed recipient(s) of Rep. Sherrill's contributions. By not identifying specific political organizations that Rep. Sherrill proposes contributing to, or explaining whether and to what extent Rep. Sherrill has an existing relationship with those organizations, the Request fails to provide key facts necessary for the Commission to determine whether the proposed contributions would result in Rep. Sherrill directly or indirectly establishing, financing, maintaining, or controlling those groups for BCRA's purposes.

This fatal flaw in the Request points to its true goal: to create a new, rigid rule, devoid of context, establishing how large a percentage of a group's funding a candidate or officeholder can supply without the group being "financed" by the candidate or officeholder for BCRA's purposes. The Commission, of course, wisely avoided such an approach—which could more readily be gamed by candidates looking to fund supportive political organizations while avoiding BCRA's soft money restrictions—when crafting its regulations implementing BCRA.

The Commission cannot simply rewrite those regulations through an advisory opinion. Accordingly, we respectfully urge the Commission to reject the Request's invitation to do so.

Respectfully submitted,

/s/ Saurav Ghosh

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[11] *Id.* at 4.

[12] *Id.*