



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 7299
Wexton for Congress and Joan Kowalski)
in her official capacity as treasurer;)
Wexton for State Senate; Jennifer Wexton)
)

**STATEMENT OF REASONS OF COMMISSIONERS
SEAN J. COOKSEY AND JAMES E. “TREY” TRAINOR, III**

This matter asks what constitutes “spending” under the Commission’s dual-candidate exception to the soft-money ban. The Complaint centers on Congresswoman Jennifer Wexton’s 2018 campaign for the U.S. House of Representatives, during which she was also a sitting member of the Virginia State Senate running for reelection. It claims that her state campaign committee improperly spent non-federal funds in connection with Wexton’s congressional campaign by making contributions to other state-level committees in Virginia.¹ For the reasons set out below, however, we disagreed with the Complaint’s alleged violation and concluded, with minor exceptions, that Wexton’s state-level conduct falls within the dual-candidate exception for candidates simultaneously running for federal and state offices. Accordingly, we voted to find no reason to believe a violation occurred.²

I. Factual Background

In 2017, Jennifer Wexton was the sitting state senator for Virginia’s 33rd Senate District.³ She was also a declared candidate for reelection to that seat for Virginia’s 2019 election, and Wexton for State Senate (the “State Committee”) was her authorized state-level campaign committee.⁴ On April 20, 2017, Wexton filed a Statement of Candidacy to simultaneously run in the 2018 election for the U.S. House of Representatives in Virginia’s 10th Congressional District, and she designated Wexton for Congress (the “Federal Committee”) as her authorized federal

¹ Complaint (Dec. 5, 2017), MUR 7299 (Wexton for Congress, *et al.*).

² Certification (July 15, 2021), MUR 7299 (Wexton for Congress, *et al.*).

³ Response at 1 (Jan. 16, 2018), MUR 7299 (Wexton for Congress, *et al.*).

⁴ First General Counsel’s Report at 1–2 (Oct. 31, 2018), MUR 7299 (Wexton for Congress, *et al.*).

campaign committee.⁵ She subsequently won the primary and general elections for that congressional seat.⁶

Both before and after Wexton declared her federal candidacy, the State Committee continued to operate in furtherance of Wexton’s state-level reelection campaign. From January 1, 2016, through June 30, 2018, the State Committee received \$77,825 in itemized contributions.⁷ The State Committee also continued to make state-level expenditures and contributions. In the period after Wexton became a federal candidate, the State Committee made \$58,202 in disbursements, including two \$1,000 contributions to the Federal Committee and twenty-two contributions totaling \$34,900 to various Virginia state and local candidate and party committees.⁸

The Complaint alleges that the State Committee’s \$34,900 in contributions to other state-level committees violated the soft-money prohibitions of the Federal Election Campaign Act of 1971, as amended (the “Act”).⁹ The Respondents counter that the State Committee’s activity is subject to the Act’s dual-candidate exception and therefore not a soft-money violation.¹⁰

The Office of General Counsel (“OGC”) agreed with the Complaint. OGC recommended finding reason to believe that the Respondents violated the Act’s soft-money prohibitions based on the State Committee’s contributions.¹¹ But for the reasons that follow, we concluded that the State Committee’s contributions to other state-level committees fell under the dual-candidate exception. Consequently, the Commission failed to agree with OGC’s recommendations by the required four votes, and subsequently voted to close the file.¹²

II. Legal Analysis

Under the Act’s soft-money prohibition, federal candidates and officeholders may not “solicit, receive, direct, transfer, or spend funds” in connection with any federal or non-federal election, unless the funds are subject to federal limitations, prohibitions, and reporting requirements.¹³ The Commission’s regulations correspondingly prohibit “[t]ransfers of funds or

⁵ *Id.*

⁶ *See Virginia 10th Congressional District Election, 2018*, BALLOTPEDIA, available at https://ballotpedia.org/Virginia%27s_10th_Congressional_District_election, 2018.

⁷ First General Counsel’s Report at 2–3 (Oct. 31, 2018), MUR 7299 (Wexton for Congress, *et al.*).

⁸ *Id.*

⁹ Complaint (Dec. 5, 2017), MUR 7299 (Wexton for Congress, *et al.*).

¹⁰ Response at 2 (Jan. 16, 2018), MUR 7299 (Wexton for Congress, *et al.*).

¹¹ First General Counsel’s Report at 8 (Oct. 31, 2018), MUR 7299 (Wexton for Congress, *et al.*).

¹² *See* Certification (July 15, 2021), MUR 7299 (Wexton for Congress, *et al.*). All Commissioners agreed that there was reason to believe the Respondents violated 11 C.F.R. § 110.3(d) based on the State Committee’s two contributions to the Federal Committee totaling \$2,000. The Commission could not, however, agree to proceed with enforcement on that violation alone. *Id.*

¹³ 52 U.S.C. § 30125(e)(1); 11 C.F.R. §§ 300.61, 300.62.

assets from a candidate’s campaign committee or account for a nonfederal election to his or her principal campaign committee or other authorized committee for a federal election.”¹⁴

At the same time, the Act and Commission regulations also provide an exception to this prohibition for candidates who are simultaneously running for federal and state offices.¹⁵ This so-called dual-candidate exception states:

[The soft-money prohibition] does not apply to the solicitation, receipt, or spending of funds by [a federal candidate or officeholder] who is or was also a candidate for a State or local office solely in connection with such election for State or local office if the solicitation, receipt, or spending of funds is permitted under State law and refers only to such State or local candidate, or to any other candidate for the State or local office sought by such candidate, or both.¹⁶

The dual-candidate exception’s purpose is to “provide an equitable basis for a Federal officeholder or candidate to conduct his or her campaign for non-Federal office so that he or she is not financially disadvantaged when competing with a non-Federal opponent who may raise and spend funds without the same restrictions that [the Act] imposes on Federal candidates and officeholders.”¹⁷ In other words, while the soft-money prohibition is intended to prevent a state committee from unduly benefiting a federal campaign, the dual-candidate exception’s intent is to avoid the opposite problem: unduly burdening a state campaign because of a simultaneous federal candidacy or office.

Consider, for example, a congresswoman who declares her candidacy for her state’s office of attorney general. Suppose it is a state, like Oregon,¹⁸ that imposes no limits on campaign contributions to state-level candidate committees and that allows corporate contributions to candidates. Under the Act’s soft-money prohibition, the congresswoman would be barred from raising state campaign funds outside of federal contributions limits and prohibitions. Her opponents, by contrast, would be free to solicit and accept contributions outside of federal amount and source limitations. The disadvantage to the congresswoman’s state campaign would be enormous. Consequently, the dual-candidate exception seeks to avoid this handicap by exempting the state campaigns of federal candidates and officeholders from the soft-money prohibition, so long as the state campaign’s fundraising and spending is “solely in connection” with the state election, consistent with state law, and refers only to the state candidacy.

The Respondents invoke this exception in defense of the State Committee’s contributions to other Virginia state committees, and we agree that it applies. First, the contributions were a kind of spending covered by the dual-candidate exception. “Spending” is not a defined term under the Act or Commission regulations, but the word’s plain meaning and the context of its use throughout

¹⁴ 11 C.F.R. § 110.3(d).

¹⁵ 52 U.S.C. § 30125(e)(2); 11 C.F.R. § 300.63.

¹⁶ 52 U.S.C. § 30125(e)(2).

¹⁷ Advisory Op. 2007-26 (Schock) at 6.

¹⁸ Or. Rev. Stat. §§ 260.160–260.174.

the Act make apparent that it encompasses all sorts of campaign committee disbursements.¹⁹ Not only do expenditures for goods and services by a state committee constitute “spending,” but so do a state committee’s contributions or donations of campaign funds.

Second, the available information indicates the contributions were “solely in connection” with Wexton’s reelection campaign for the Virginia State Senate.²⁰ As an incumbent state senator, an important part of campaigning for reelection includes supporting, and earning the support of, other state-level committees and candidates by making contributions to them. There is no allegation or evidence that these contributions were made in furtherance of Wexton’s federal candidacy or that her federal campaign directly received anything of value in exchange for the contributions from her State Committee.

Finally, the State Committee’s contributions were consistent with the statute and regulation’s other requirements. They were permitted under Virginia state law.²¹ And because the spending was in the form of contributions—as opposed to an expenditure for public communications or other advertising—it does not implicate the requirement that it refer only to Wexton’s state candidacy.²²

Moreover, permitting dual candidates to make state-level contributions through their state committees furthers the purpose of the dual-candidate exception: to avoid rendering the candidate “financially disadvantaged when competing with a non-Federal opponent.”²³ Contributing to other committees is a critical component of state retail politics, and it is a common practice by candidates to gain access, favor, and support from local and state party organizations. To bar one candidate from being able to make such contributions as part of a state campaign, while his or her non-federal opponents are free to do so, would place the candidate at a severe electoral disadvantage. Such a rule would create a substantial barrier to candidates attempting to run at both the state and federal level, and it would impose a particularly heavy burden in jurisdictions like Virginia, where state elections do not neatly align with federal election cycles.²⁴ Consequently, we concluded that the dual-candidate exception should apply here, and that the State Committee’s contributions to other state-level committees did not violate the Act’s soft-money prohibition.

OGC reasoned that the dual-candidate exception should not apply and recommended that the Commission pursue enforcement against Wexton. Specifically, relying on several of the

¹⁹ See Statement of Reasons of Vice Chair Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor III at 2–4, MUR 7243 (CITGO Petroleum Corp., *et al.*) (relying on the plain meaning of the Commission’s regulatory text).

²⁰ Cf. Advisory Op. 2009-06 (Risch) at 3 (concluding that a federal candidate’s solicitations to retire state-level campaign committee debts are “solely in connection” with state candidacy); Advisory Op. 2007-01 (McCaskill) at 4 (same).

²¹ See Va. Code §§ 24.2-945–24.2-953.5.

²² Advisory Op. 2016-25 (Mike Pence for Indiana) at 3 (reasoning that spending on legal and accounting expenses does not “refer” to any candidate).

²³ Advisory Op. 2007-26 (Schock) at 6.

²⁴ See Va. Code §§ 24.2-210, 24.2-214–24.2-215 (setting off-year elections for statewide and legislative offices); *see also, e.g.*, La. Rev. Stat. § 18:402(A) (establishing off-year elections for governor and other officials).

Commission’s past advisory opinions, OGC concluded that a state candidate committee’s contributions to other state candidates and to political party organizations are not “in connection with” the candidate’s own state election.²⁵

But those advisory opinions—in addition to being inappropriately used as the basis for enforcement²⁶—do not support that conclusion. In Advisory Opinion 2005-02 (Corzine II), for example, the question at issue was whether a dual candidate could engage in fundraising on behalf of other state-level candidates and committees—something the Commission concluded was not “solely in connection” with then-Senator John Corzine’s own state-level candidacy.²⁷ Similarly, in Advisory Opinion 2006-38 (Casey State Committee), Senator Robert Casey asked whether or how his former state committee could contribute excess funds. But there, the Commission did not analyze how the dual-candidate exception applied because Senator Casey was not a dual candidate—he was seeking to spend money raised during his past state campaigns, not one he was currently running in.²⁸

Finally, OGC relies on Advisory Opinion 2007-26 (Schock), where the Commission advised that Representative Aaron Schock could not transfer state-committee funds to other state-level committees under the dual-candidate exception. But Representative Schock was not, in fact, running for state-level office at the time he was considering making the contributions, and so he was not a true dual candidate entitled to the exception.²⁹ None of these advisory opinions answers the specific question in this case, which is whether a current dual candidate may make contributions to other state-level committees in furtherance of her state campaign.

In a statement of reasons, our colleagues rely on MUR 7106 (Citizens for Maria Chappelle-Nadal) as a precedent for finding reason to believe in this matter.³⁰ First, it is noteworthy that OGC did not see fit to rely on that case in its First General Counsel’s Report. But more importantly, the factual differences and doubtful reasoning in that matter undermine any precedential value it may carry. Much like the requestors in the advisory opinions discussed above, Maria Chappelle-Nadal was not actually a dual candidate. While she had a state committee and had indicated plans to run for an unnamed statewide office sometime in the future, she had not declared her candidacy for

²⁵ First General Counsel’s Report at 5 (Oct. 31, 2018), MUR 7299 (Wexton for Congress, *et al.*).

²⁶ *See, e.g.*, 1996 Presidential Audits, Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason, and Karl J. Sandstrom at 3 (“Where the law is of uncertain application, advisory opinions cannot be used as a sword of enforcement.”); Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 2, n.3 (May 14, 2010), MUR 5625 (Aristotle International, Inc.) (“Of course, it is well-established that advisory opinions cannot be used as a sword, but instead merely a shield from burdensome Commission enforcement action.”).

²⁷ Advisory Op. 2005-02 (Corzine II) at 3–4 (answering whether then-Senator Corzine may raise funds “for the campaigns of other New Jersey State and local candidates, State PACs, and the non-Federal accounts of State and local party committees”).

²⁸ Advisory Op. 2006-38 (Casey State Committee) at 2–5.

²⁹ Advisory Op. 2007-26 (Schock) at 6 (advising that Rep. Schock may not rely on the dual-candidate exception to contribute his state committee funds to another candidate’s campaign for Schock’s former state-level office).

³⁰ Statement of Reasons of Chair Shana M. Broussard and Commissioner Ellen L. Weintraub at 4 (Sept. 3, 2021), MUR 7299 (Wexton for Congress, *et al.*).

any specific office or election at the time of the spending at issue.³¹ As a result, it was not necessary for the Commission to decide—and it did not directly analyze—whether contributions may be “solely in connection” with a candidate’s ongoing state campaign.³² Any general statements about that issue therefore appear to be dicta. That stands in contrast to this matter, where the Commission considered a true dual candidate simultaneously running for two discrete offices at the state and federal levels, and whose State Committee spending was more directly in furtherance of her state race.

Consequently, we believe it is better to rely on the Act’s and regulation’s texts, which reflect the underlying purpose of the dual-candidate exception. Both support finding no reason to believe in this case. What’s more, even if the question were more uncertain, regulatory ambiguity around the scope of the dual-candidate exception should be interpreted in favor of candidates’ rights to engage in political speech and association.³³ For all the foregoing reasons, we voted accordingly, and after the Commission failed to find reason to believe any violation occurred by the necessary four votes, we voted to close the file.³⁴



 Sean J. Cooksey
 Commissioner

April 14, 2022

 Date



 James E. “Trey” Trainor, III
 Commissioner

April 14, 2022

 Date

³¹ Factual & Legal Analysis at 1–2 (Apr. 24, 2018), MUR 7106 (Citizens for Maria Chappelle-Nadal, *et al.*).

³² *Id.* at 6.

³³ See *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 474 (2007) (“Where the First Amendment is implicated, the tie goes to the speaker.”).

³⁴ See Certification (July 15, 2021), MUR 7299 (Wexton for Congress, *et al.*).