

OFFICE OF  
GENERAL COUNSEL

October 12, 2018

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Federal Election Commission  
1050 First Street, NE  
Washington, D.C. 20463MUR # 7519

**Re: Complaint Against the Arizona Democratic Party (C00166710); Rick McGuire, in his capacity as Treasurer of the Arizona Democratic Party; and Katie Hobbs, a non-federal candidate**

To Whom It May Concern:

I write to call your attention to apparent violations of federal campaign finance laws by the Arizona Democratic Party ("ADP"), which has spent over \$1.8 million of prohibited soft money for public communications in connection with a federal election, in direct contravention of the Bipartisan Campaign Reform Act of 2002 ("BCRA") and the Commission's implementing regulations.

## FACTUAL BACKGROUND

ADP is a political party committee registered with the Commission; it also maintains a non-federal account that is governed by Arizona law and that reports its financial activities to the Arizona Secretary of State. Arizona law permits political parties to accept contributions from nearly any source—to include individuals, corporations, limited liability companies, and labor unions—in unlimited amounts. *See* Ariz. Rev. Stat. §§ 16-912(B), -914(D), -916(B). While political parties may not "contribute" corporate or union funds to candidates, *see id.* § 16-915(B), certain transactions are specifically exempted from the statutory definition of "contribution." Of relevance here, any "payment by a political party to support its nominee, including . . . coordinated political party expenditures," is not a "contribution." *Id.* §§ 16-911(B)(4), -922(E). The upshot is that political parties may make unlimited expenditures in coordination with their nominees for state and local offices using funds that do not comply with the source and amount restrictions prescribed by federal law.

Upon information and belief, on or around October 3, 2018 the ADP disbursed at least \$1,833,355 for an advertisement disseminated through broadcast television advocating the election of Katie Hobbs, the Democratic nominee for Arizona Secretary of State. The disclaimer accompanying the ad indicates that it was approved by (*i.e.*, coordinated with) Hobbs. The final seconds of the advertisement feature a video image of an individual marking Hobbs' name on a faux ballot. Prominently visible on the screen is a section of the ballot that reads: "For U.S. Senate. Vote for ONE," which is adjacent to the name "Kyrsten Sinema," ADP's nominee for the office of U.S. Senate in the November 6, 2018 general election.<sup>1</sup> The name of the Republican candidate for the same office, Martha McSally, is largely obscured.

Upon information and belief, the ADP paid the full cost of the advertisement from its non-federal account, which consists entirely or substantially of funds that do not comply with federal source and amount restrictions.

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<sup>1</sup>A screenshot of the relevant video frame of the advertisement is attached hereto as Exhibit A.

## VIOLATIONS OF BCRA'S "SOFT MONEY" RESTRICTIONS

Because the ADP's advertisement supported and promoted Sinema's candidacy, it constituted "federal election activity" that the ADP was required to finance exclusively with federally compliant funds. As a candidate for state office, Hobbs is likewise prohibited from authorizing or directing the use of non-federal funds for any public communication that promotes, attacks, supports, or opposes ("PASO") a federal candidate. Further, even if the advertisement did not PASO Sinema, its reference to her as a clearly identified federal candidate obligated the ADP to allocate at least a portion of the attendant costs to its federal account.

### **I. The ADP and Hobbs Impermissibly Used Soft Money to Finance Federal Election Activity**

In general, any "amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party . . . shall be made from funds subject to the limitations, prohibitions, and reporting requirements of" the Federal Elections Campaign Act of 1974. 52 U.S.C. § 30125(b)(1); *see also* 11 C.F.R. §§ 300.32(a)(2). "Federal election activity" ("FEA") encompasses any "public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)." 52 U.S.C. § 30101(20)(A)(iii); *see also* 11 C.F.R. § 100.24(b)(3). Although state party committees may pay costs associated with certain categories of FEA in part with so-called Levin funds, any public communication that PASOs a federal candidate must be financed exclusively with federally compliant dollars. *See* 52 U.S.C. § 30125(b)(2)(B)(i); 11 C.F.R. §§ 300.33(c); 300.32(c)(2).<sup>2</sup>

#### **A. The ADP's Advertisement Promoted and Supported Sinema**

The advertisement's depiction of Sinema's name, accompanied by a notation "for U.S. Senate" promotes and supports—if not expressly advocates—Sinema's federal candidacy. To be sure, the mere identification of an individual who happens to be a federal candidate does not necessarily render the communication FEA. Indeed, in a series of advisory opinions, the Commission has forged what may be characterized as a quasi-safe harbor for communications that reference federal candidates solely for the purpose of conveying his or her support for a specific non-federal candidate. *See, e.g.*, Adv. Op. 2007-34 (state candidate could use soft money to pay for billboard touting federal candidate's endorsement); 2003-25 (Weinzapfel) (same conclusion with respect to TV ad sponsored by state candidate in which a federal candidate provided his endorsement). In other words, when a federal candidate appears or is depicted in a public communication not in his or her capacity as a federal candidate but rather only to impart support for a non-federal candidate, the communication does not constitute FEA. Importantly, in none of the communications approved by the Commission as non-FEA was the featured individual identified to the audience as a federal candidate; his or her federal candidate status was merely incidental to advocacy undertaken in connection with a non-federal election.

<sup>2</sup> An advertisement disseminated through broadcast television or through cable or satellite transmission is a "public communication." 11 C.F.R. § 100.26.



ADP's advertisement falls well outside the ambit of non-PASO communications delineated in these advisory opinions. To the contrary, Sinema is invoked not as an endorser or supporter of Hobbs, but rather appears as a federal candidate *qua* federal candidate. In an analogous context, the Commission found that a mailer referencing Barack Obama's and Hillary Clinton's presidential candidacies likely satisfied the PASO standard, even though Obama and Clinton were invoked in the context of promoting a candidate for state office. See MUR 6019 (In re Dominic Caserta for Assembly Committee, *et al.*), Factual & Legal Analysis at 5-6. As the Commission reasoned, "[s]ignificantly, those AOs [involving endorsements by federal candidates] addressed the use of federal candidate's name and likeness and did not address the specific reference to the federal candidacy ('for President') and [a] statement of support." *Id.*<sup>3</sup>

The ad's allusion to Sinema—however fleeting—was unambiguously electoral in character. Sinema's name was introduced not as an ancillary incident to the advocacy of Hobbs' candidacy; she was explicitly identified as a candidate for the office of U.S. Senate whom viewers should support. In context, the image of Sinema's name juxtaposed with the phrase "For U.S. Senate, Vote for ONE" likely constitutes express advocacy of her candidacy—and at the very least is within the undisputedly broader rubric of communications that "promote" or "support" a federal candidate. See MUR 6683 (In re Fort Bend County Democratic Party, *et al.*), Factual & Legal Analysis at 7 (page of voter guide that stated, "How Do I Vote a Straight Democratic Ticket?," accompanied by the Obama campaign's logo, was express advocacy that must be financed with federal funds); Explanation & Justification, Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35295 (July 6, 1995) (noting that Commission's definition of express advocacy in 11 C.F.R. § 100.22(a) encompasses "[t]he expressions enumerated in *Buckley v. Valeo*, such as 'vote for,'" which "have no other reasonable meaning than to urge the election or defeat of clearly identified candidates"); Explanation & Justification, Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49070 (July 29, 2002) (noting that the PASO classification "extend[s] beyond communications expressly advocating a vote for or against a candidate").

That the advertisement's promotion of Sinema's candidacy was brief (in both absolute and relative terms) does not detract from its character as FEA. In promulgating the controlling regulations, the Commission notably declined to devise any exemption from federal financing strictures for activities entailing only a nominal nexus to a federal election. See generally Explanation & Justification, *supra*, 67 Fed. Reg. at 49068 (rejecting proposed "de minimis exception" to the FEA designation for get-out-the-vote activities). The inclusion of *any* content that promotes or supports Sinema's candidacy renders the advertisement FEA and obligated ADP to sponsor its cost entirely with federally compliant funds. Its apparent failure to do so supplies ample reason to believe that ADP violated BCRA's soft money prohibition.

## **B. Hobbs May Not Authorize or Direct the Expenditure of Soft Money for FEA**

Although a candidate for non-federal office, Hobbs likewise is enjoined by BCRA from spending any funds for a public communication that promotes, attacks, supports, or opposes a federal candidate,

<sup>3</sup> Citing the small amount of the relevant disbursement (approximately \$4,300), the Commission dismissed the matter in the exercise of its prosecutorial discretion. The soft money expenditure by ADP in this matter, by contrast, is more than 418 times greater than the sum at issue in MUR 6019.

“unless the funds are subject to the limitations, prohibitions, and reporting requirements of” federal law. 52 U.S.C. § 30125(f)(1). This restriction applies “regardless of whether a candidate for State or local office is also mentioned or identified,” 11 C.F.R. § 300.71, and also binds “an agent acting on behalf of any such candidate or individual,” *id.* § 300.70.<sup>4</sup> Although the monies used to sponsor the television ad originated from ADP’s non-federal account, they were disbursed—as the disclaimer discloses—at Hobbs’ request or direction. Hobbs’ substantial participation in the financing and distribution of the ad presents reason to believe that she or her campaign committee violated Section 30125(f)(1) and its implementing regulations.

## **II. Even if the Ad is Not FEA, ADP Was Required to Allocate a Portion of the Cost to Its Federal Account**

Even if the Commission concludes that the advertisement’s conspicuous depiction of Sinema’s name on an ersatz “ballot” did not promote or support her U.S. Senate candidacy, the ad’s unmistakable reference to a clearly identified federal candidate (*i.e.*, Sinema) obligated ADP to apportion the cost between its federal and non-federal accounts. Among the “general principles” animating BCRA is the precept that “State, district, and local party committees that make expenditures and disbursements for activities other than Federal election activities in connection with both Federal and non-Federal elections must either use only Federal funds for these purposes or must establish separate Federal and non-Federal accounts and allocate expenditures between or among those accounts.” Explanation & Justification, *supra*, 67 Fed Reg. at 49078.

To this end, Commission regulations provide that “State, district, and local party committees that make expenditures and disbursements in connection with both Federal and non-Federal elections for activities that are not Federal election activities pursuant to 11 CFR § 100.24 may use only funds subject to the prohibitions and limitations of the Act, or they may allocate such expenditures and disbursements between their Federal and their non-Federal accounts.” 11 C.F.R. § 106.7(b); *see also id.* § 104.17(a) (requiring state parties to use all federal funds or a properly allocated combination of federal and non-federal monies for “expenditures and disbursements on behalf of one or more clearly identified Federal and one or more clearly identified non-Federal candidates where the activity is not a Federal election activity”); *cf. id.* § 300.32(c)(2) (providing that Levin funds may not be used to “pay for any part of the costs of any broadcasting, cable, or satellite communication, other than a communication that refers solely to a clearly identified candidate for State or local office”).

In drawing exclusively on non-federal funds to underwrite the full cost of a public communication that explicitly references a clearly identified federal candidate, ADP stands in contravention of BCRA’s allocation mandates.

\* \* \*

For the foregoing reasons, there is reason to believe that (1) ADP unlawfully financed federal election activity with “soft money” funds in violation of 52 U.S.C. § 30125(b)(1), or, alternatively, failed to properly allocate costs that were in connection with both a federal election and a non-federal election;

<sup>4</sup> An agent, in this context, is “any person who has actual authority, either express or implied,” “to spend funds for a public communication” on behalf of a state candidate. 11 C.F.R. § 300.2(b)(3).

and (2) Hobbs and/or her state campaign committee improperly authorized or directed such disbursements in violation of 52 U.S.C. § 30125(f)(1). I respectfully request that the Commission initiate an investigation and assess all appropriate civil penalties.

I know the allegations of this Complaint to be true, except the matters stated therein on information and belief, which I believe to be true.

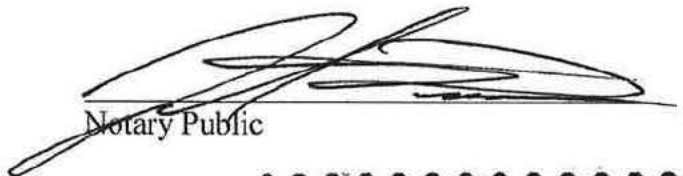
Signed under penalty of perjury this 13<sup>th</sup> day of October, 2018.



Anthony Kern

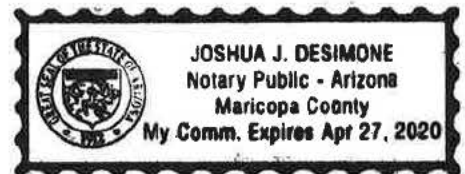
Glendale, Arizona 85304

Subscribed and sworn to before me this 13<sup>th</sup> day of October, 2018.

  
Notary Public

My Commission Expires:

Apr. 27<sup>th</sup>, 2020



## **Exhibit A**

