FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 8062
Andrew Garbarino, *et al.*	)	
	)	

STATEMENT OF REASONS OF VICE CHAIRMAN SEAN J. COOKSEY AND COMMISSIONERS ALLEN J. DICKERSON AND JAMES E. "TREY" TRAINOR, III

In this matter, we declined to support the Office of the General Counsel's ("OGC") recommendations to find reason to believe that Representative Andrew Garbarino and his federal and state campaign committees violated the soft-money restrictions in the Federal Election Campaign Act of 1971, as amended (the "Act"), in connection with various fundraising, disbursements, and transfers made by Garbarino's state committee during the 2020 calendar year.[1] We voted against OGC's recommendations, in part, because of significant and unresolved concerns we have regarding the application of the Act's dual-candidate exception—both to the facts of this case and in general. This statement explains those concerns and their impact on our vote in this matter.

I. Overview of the Act's Dual-Candidate Exception

The Act proscribes federal candidates and officeholders, and any entities that are established, financed, maintained, or controlled by them, from soliciting, receiving, or spending any funds in connection with a federal or non-federal election, unless such funds comply with the Act's contribution limits, source prohibitions, and reporting requirements.[2] However, the Act includes an exception to the general prohibition against raising or spending non-federal funds (that is, "soft money") in circumstances where a federal candidate or officeholder "is or was also a candidate for State or local office."[3] The dual-candidate exception permits a federal candidate or officeholder who is or was a state or local office candidate to solicit, receive, or spend non-federal funds if the solicitation, receipt, or spending: (1) is "solely in connection with such election for

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1 Certification (Aug. 8, 2023), MUR 8062 (Andrew Garbarino, *et al.*).

2 52 U.S.C. § 30125(e)(1); 11 C.F.R. §§ 300.61, 300.62.

3 52 U.S.C. § 30125(e)(2).

State or local office"; (2) "refers only" to him- or herself, to other candidates for the state or local office, or both; and (3) is permitted under applicable state law.[4]

The Commission has explained that the purpose of the dual-candidate exception 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 section [30125(e)] imposes on Federal candidates and officeholders."[5] Despite the laudable intentions behind the exception, it remains an underdeveloped part of the soft-money regime. This is at least partially attributable to the Commission's regulation implementing the dual-candidate exception, which fails to adhere to the plain language of the Act and greatly curtails the exception's scope. Moreover, the relatively small number of advisory opinions and enforcement cases in which the Commission has previously considered the dual-candidate exception offer little practical guidance on when candidates are eligible for the exception.

II. The Commission's Dual-Candidate Regulation Deviates from the Act

One of the greatest sources of confusion about the dual-candidate exception is the incongruity between the regulation and the underlying statute. The Commission's regulation implementing the dual-candidate exception, 11 C.F.R. § 300.63, contains a small but critical difference from the wording used in the Act. The regulation states that the Act's soft-money restrictions do not apply to the solicitation, receipt, or spending of non-federal funds by "a Federal candidate or individual holding Federal office who *is* a candidate for State or local office, if the solicitation, receipt or spending of funds is permitted under State law; and refers only to that State or local candidate, to any other candidate for that same State or local office, or both."[6] But in the Act, the dual-candidate exception extends to a federal candidate or officeholder "who is *or was* also a candidate for a State or local office . . . ."[7] Thus, the omission of "was" in the Commission's regulation improperly limits the dual-candidate exception to concurrent federal and state candidacies, in contravention of "the unambiguously expressed intent of Congress" in the Act.[8] If the regulation were challenged under the Administrative Procedure Act, a reviewing court would likely not give deference to the Commission regulation's limited construction of the dual-candidate exception.[9]

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4 52 U.S.C. § 30125(e)(2); Advisory Op. 2016-25 (Mike Pence for Indiana) at 2 .

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

6 11 C.F.R. § 300.63 (emphasis added).

7 52 U.S.C. § 30125(e)(2) (emphasis added).

8 *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842–44 (1984).

9 While the First General Counsel's Report did reference the Act's broader construction of the dual-candidate exception, OGC did not consider whether Garbarino's past status as a candidate for New York State Assembly, including most recently in 2018, was relevant to determining the lawfulness of the disbursements at issue. *See* First General Counsel's Report at 8–9, 10–11 (May 2, 2023), MUR 8062 (Andrew Garbarino, *et al.*).

This difference in the dual-candidate exception's scope may have significant legal consequences for committees, including the Respondents in this matter. Garbarino was, at a minimum, a former state candidate and officeholder, and his state committee used non-federal funds for "campaign consultant," "campaign literature," "fundraising," and "print ads."[10] Indeed, the First General Counsel's Report points out that the state committee had previously made payments to one of the same major vendors for "fundraising" in 2018 and 2019, during and immediately after Garbarino's last reelection campaign for New York State Assembly, "which could suggest that the 2020 payments were related to Garbarino's state office."[11]

III. The Commission Has Not Formulated a Workable Standard for Determining Who is a State or Local Candidate Under the Dual-Candidate Exception

While the Respondents did not put forth evidence to substantiate that Garbarino was running for state or local office at the time of the disbursements at issue, their insistence that "nothing [] precluded State Representative Garbarino from getting his name on the ballot to retain his state seat" highlights another ambiguity in the dual-candidate exception:[12] Neither the Act nor the Commission regulations define when someone is a candidate for state or local office eligible for the exception. In past enforcement cases, the Commission has largely relied on state-law definitions of candidacy to determine whether an individual was a candidate for state or local office. Yet there are significant differences in how the 50 states, along with numerous local jurisdictions, define the term "candidate."[13] A case-by-case approach that hinges on state law creates wide variations in the scope and application of the exception, and poses practical difficulties as the Commission, lacking expertise in state law, works to fairly and consistently evaluate whether a person is seeking a state or local office.

For example, in MURs 7106 and 7108 (Chappelle-Nadal for Congress, *et al.*), the Commission essentially accepted at face value the respondent's assertion that she was a state-office candidate in Missouri, and thus eligible for the dual-candidate exception, because she had amended her state committee's registration in January 2015 to indicate that she was running for an unspecified "statewide office" in the 2020 election, which was more than five years away at the

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10 *Id.* at 17.

11 *Id.* at 18; *see also Final Results of General Election on Tuesday, November 6, 2018*, Suffolk County Board of Elections, https://apps2.suffolkcountyny.gov/boe/eleres/18ge/default.htm.

12 Response at 2 (Nov. 22, 2022), MUR 8062 (Andrew Garbarino, *et al.*).

13 *E.g., compare* Md. Code Ann., Elec. Law § 1-101(l)(1) (defining "candidate" as "an individual who files a certificate of candidacy for a public or party office."), *with* Wash. Rev. Code § 42.17A.005(8) (defining "candidate" as "any individual who seeks nomination for election or election to public office," and providing further that "[a]n individual seeks nomination or election when the individual first: (a) Receives contributions or makes expenditures or reserves space or facilities with intent to promote the individual's candidacy for office; (b) Announces publicly or files for office; (c) Purchases commercial advertising space or broadcast time to promote the individual's candidacy; or (d) Gives consent to another person to take on behalf of the individual any of the actions in (a) or (c) of this subsection.").

time.[14] Meanwhile, New York appears to offer at least three distinct routes for candidates to obtain ballot access in its state and local elections, including through independent nominating petitions, party nominating petitions, and party primaries or caucuses.[15] The Respondents in this matter argued that Garbarino could still have qualified for the ballot in New York state elections in the event that he lost his federal primary in June 2020, and the Commission lacked the requisite familiarity with New York's election laws and procedures to verify or refute that assertion.[16]

To avoid these kinds of tricky questions of state law, and to better ensure the uniform treatment of respondents in similar enforcement matters going forward, the Commission needs to devise its own objective standard so that it can independently and reliably ascertain when an individual is a state or local office candidate for purposes of the dual-candidate exception.

IV. The Commission Has Not Squarely Defined Permissible "Spending" under the Dual-Candidate Exception

Although the Commission has approved disbursements by federal candidates and officeholders for a variety of purposes related to non-federal elections under the dual-candidate exception,[17] the Commission has sent mixed signals about whether federal officeholders and candidates who are also seeking state or local office may contribute to other state or local committees using state-committee funds. As we have explained elsewhere, many of the Commission's past advisory opinions involve different questions or facts that do not squarely address the issue.[18] In at least one advisory opinion, however, the Commission seemed to indicate that contributions to state and local candidates and party committees may be permitted under the dual-candidate exception. Advisory Opinion 2005-05 (LaHood) addressed how a former state

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[14] First General Counsel's Report at 3–4 (Jan. 31, 2017), MURs 7106 & 7108 (Chappelle-Nadal for Congress, *et al.*). The First General Counsel's Report also disclaimed, in a footnote, that "To any extent that the Complaints are alleging that Chappelle-Nadal acted wrongfully in declaring her intent to run for statewide office, without specifying which position she is seeking, that is a matter of Missouri law and outside the Commission's jurisdiction." *Id.* at 4 n.5.

[15] *See Running for Office*, New York State Board of Elections, https://www.elections.ny.gov/RunningOffice.html.

[16] *See* First General Counsel's Report at 19 n.78 (May 2, 2023), MUR 8062 (Andrew Garbarino, *et al.*) (outlining New York's candidate-nominating procedures).

[17] *See, e.g.*, Advisory Op. 2016-25 (Mike Pence for Indiana) (concluding that federal officeholder may use non-federal funds remaining in state campaign account to pay for storage of state campaign's assets, and for legal and accounting expenses necessary to comply with state disclosure requirements and to wind down state campaign); Advisory Op. 2007-01 (McCaskill) (concluding that federal candidate may solicit non-federal funds to retire debts of prior state campaign); Advisory Op. 2005-12 (Fattah) (concluding that federal officeholder and his exploratory committee for local office may raise and spend non-federal funds in connection with local candidacy).

[18] *See* Statement of Reasons of Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, at 4–5 (Apr. 14, 2022), MUR 7299 (Wexton for Congress, *et al.*); *see also* Advisory Op. 2007-26 (Schock) at 6 (concluding that dual-candidate exception does not permit a federal candidate who was formerly a candidate for state office to donate state campaign's non-federal funds to "successor Republican party candidate" for state office).

candidate and current federal officeholder could spend excess funds in his state committee's account, specifically asking whether the state committee's funds could be contributed to other state or local candidates and parties or to charitable organizations.[19] Although the requestor maintained that all his state-committee funds were federally permissible, the Commission noted that, notwithstanding this representation, "the Act specifically provides an exception that permits Federal candidates or officeholders who are also candidates for a State or local office to solicit, receive, and spend funds outside the limitations and prohibitions of the Act if the funds are solicited, received and spent solely in connection with their State or local campaigns and refer only to themselves, their opponents, or both."[20] This observation suggests that the Commission viewed the dual-candidate exception as further grounds for allowing the requestor to make the contemplated contributions to state and local candidates and parties.

On the other hand, MURs 7106 and 7108 (Chappelle-Nadal for Congress, *et al.*) provided some guidance in the other direction, but that matter too is marred by ambiguity because of the equivocal candidate-status of the respondent. There, the Commission found reason to believe that a federal candidate, who also had filed to run as a candidate for an unspecified statewide office in Missouri, along with her state committee, violated 52 U.S.C. § 30125(e)(1)(B) by making over $104,006 in disbursements from her state committee's funds, including $91,300 in direct contributions, for the benefit of other state and local candidates and political party organizations.[21] But because the candidate had organized a state committee and filed a statement of organization to run for an unnamed statewide office in the 2020 election and had not actually declared her candidacy for any particular office at the time of the disbursements in question, her status as a genuine "dual candidate" is debatable.[22]

A narrow reading of the dual-candidate exception, in addition to being in serious tension with First Amendment principles,[23] fails to take into account that contributing to like-minded campaigns and committees at the state and local level advances the very purpose of the dual-candidate exception— to provide "an equitable basis" for federal officeholders and candidates to run for state or local office without disadvantaging them vis-a-vis their opponents in non-federal races.[24] As we have said previously, "an important part of campaigning . . . includes supporting, and earning the support of, other state-level committees and candidates by making contributions

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19 *See* Advisory Op. 2005-05 (LaHood) at 2.

20 *Id.* at 2 n.2.

21 *See* Certification (Mar. 6, 2018), MUR 7106 (Citizens for Maria Chappelle-Nadal, *et al.*); Factual & Legal Analysis at 5 (Apr. 24, 2018), MUR 7106 (Citizens for Maria Chappelle-Nadal, *et al.*).

22 Factual & Legal Analysis at 6 (Apr. 24, 2018), MUR 7106 (Citizens for Maria Chappelle-Nadal, *et al.*).

23 *See, e.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 203 (2014) ("[T]he First Amendment safeguards an individual's right to participate in the public debate through political expression and political association. When an individual contributes money to a candidate, he exercises both of those rights: The contribution 'serves as a general expression of support for the candidate and his views' and 'serves to affiliate a person with a candidate.'") (citation omitted).

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

to them." [25] To deny some candidates equal financial footing in a state election on the basis of their status as a federal candidate or officeholder therefore undermines the principal aim of the dual-candidate exception.

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The dual-candidate exception is a sorely underdeveloped feature of federal campaign-finance law. The Commission has failed to draft an implementing regulation that adheres to the Act, and it has compounded that problem by offering at best ambiguous guidance on when and under what circumstances the exception applies. This lack of clarity creates significant risk for inconsistent and arbitrary enforcement against respondents, like Representative Garbarino, who are entitled to due process and fair notice about the limits of permissible conduct prior to civil enforcement—not after. For those reasons, we could not support a finding of reason to believe in this matter.

Sean J. Cooksey
Vice Chairman

September 13, 2023
Date

Allen J. Dickerson
Commissioner

September 13, 2023
Date

James E. "Trey" Trainor, III
Commissioner

September 13, 2023
Date

[25] Statement of Reasons of Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, at 4 (Apr. 14, 2022), MUR 7299 (Wexton for Congress, *et al.*).