

**FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL’S REPORT**

MUR 8071

DATE COMPLAINT FILED: Sept. 19, 2022

DATE OF NOTIFICATIONS: Sept. 26, 2022

DATE OF LAST RESPONSE: Dec. 21, 2022

DATE ACTIVATED: Jan. 9, 2023

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EXPIRATION OF SOL: Jan. 19, 2026 (earliest)
July 28, 2027 (latest)

ELECTION CYCLE: 2022

COMPLAINANTS:

Campaign Legal Center
End Citizens United

RESPONDENTS:

NRSC and Keith Davis in his official capacity as
treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30116(a), (f)

52 U.S.C. § 30125(a)

INTERNAL REPORTS CHECKED:

Disclosure Reports

AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint in this matter alleges that the NRSC and Keith Davis, in his official capacity as treasurer (the “NRSC”), violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by paying for “campaign activities” from its segregated account designated for election recounts and contests and other legal proceedings (“legal proceedings account”). Specifically, the Complaint points to twelve disbursements — nine disbursements for “media placement,” “media production,” “media,” and “direct mail production,” and three disbursements for “digital consulting,” and “research” — that it alleges were for campaign expenses.

The NRSC denies the allegations. It argues that the nine disbursements for “media placement,” “media production,” “media,” and “direct mail production” were permissible

1 fundraising expenses, made in the form of TV ads and direct mail, that were allowed to be paid
2 from the NRSC's legal proceedings account. It also argues that the three disbursements for
3 "digital consulting" and "research" were permissibly paid from that account because those
4 disbursements were for services related to recounts or preparations for potential legal
5 proceedings.

6 For the reasons set forth below, we recommend that the Commission find reason to
7 believe that the NRSC violated 52 U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1) by using funds
8 from its legal proceedings account to pay for campaign activities in the form of "media
9 placement," "media production," "media," and "research." We recommend that the Commission
10 find no reason to believe with respect to the complained-of disbursements for "digital
11 consulting" and "direct mail production." We intend to conduct a targeted investigation to
12 supplement the factual record and therefore recommend that the Commission approve
13 compulsory process.

14 **II. FACTUAL BACKGROUND**

15 The NRSC is a national committee of the Republican Party.¹ It is "solely devoted to
16 strengthening the Republican Senate Majority and electing Republicans to the United States
17 Senate."² Following the Consolidated and Further Continuing Appropriations Act, 2015 (the
18 "2015 Appropriations Act"), the NRSC established "[a] separate segregated account . . . which

¹ NRSC, Amended Statement of Organization (Nov. 10, 2022), <https://docquery.fec.gov/pdf/540/202211109546748540/202211109546748540.pdf>.

² NRSC, About Us, <https://www.nrsc.org/about-us/> (last visited Oct. 26, 2023).

1 is used to defray expenses incurred with respect to the preparation for and the conduct of election
2 recounts and contests and other legal proceedings.”³

3 **A. NRSC Finances During the 2021-2022 Election Cycle**

4 The Complaint cites a *New York Times* article that reported that the NRSC was short of
5 funds by September 2022.⁴ That article reported that at the start of the 2022 election cycle, the
6 NRSC had raised over \$181 million but by September 2022, weeks before the November 2022
7 midterm elections, it had spent 95% of the funds raised.⁵ In addition to reporting on the overall
8 state of the NRSC's finances, the *New York Times* reported that the NRSC's largest expense in
9 July 2022, a \$1 million media buy for advertisements, was paid from NRSC's legal proceedings
10 account.⁶

11 **B. The Complaint**

12 The Complaint identifies twelve disbursements (*see* Figure 1) which it alleges violated
13 52 U.S.C. § 30116(f) because they were made from the NRSC's legal proceedings account but
14 were for campaign activities and not any election recount, contest, or other legal proceeding.⁷
15 The purpose descriptions of these disbursements were “media placement,” “media production,”

³ Resp. at 2 (Dec. 21, 2022) (quoting the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2773 (2014)).

⁴ Compl. at 3 n.3 (Sept. 19, 2022) (citing Shane Goldmacher, *How a Record Cash Haul Vanished for Senate Republicans*, N.Y. TIMES (Sept. 3, 2022), <https://www.nytimes.com/2022/09/03/us/politics/senate-republican-committee-funds.html>). Other news outlets also reported on the NRSC's finances leading up to the 2022 midterm elections. *See* Isaac Aarnsdorf, *'It's a rip-off': GOP spending under fire as Senate hopefuls seek rescue*, WASH. POST (Aug. 16, 2022), <https://www.washingtonpost.com/politics/2022/08/19/gop-senate-rescue-midterms/>; Manu Raju & Alex Rogers, *'It concerns me a lot': Republicans anxious about cash-strapped NRSC amid Scott's feud with McConnell*, CNN POLITICS (Sept. 6, 2022), <https://www.cnn.com/2022/09/06/politics/rick-scott-mitch-mcconnell-republican-senate-fundraising/index.html>; Juliegrace Brufke, *Rick Scott stands by handling of NRSC in memo to donors*, WASH. EXAMINER (Sept. 8, 2022), <https://www.washingtonexaminer.com/news/campaigns/rick-scott-stands-by-handling-nrsc-memo-donors>.

⁵ Goldmacher, *supra* note 4.

⁶ *See id.*

⁷ Compl. at 8.

1 “media,” “direct mail production,” “digital consulting,” and “research.”⁸ In addition to relying
 2 on the *New York Times* article regarding the NRSC’s funds, the Complaint contends that the
 3 NRSC’s disbursements appear to be campaign expenses because the websites of the various
 4 recipients of the NRSC’s payments (*i.e.*, the vendors) do not show their available services as
 5 including election recount or other legal services.⁹

FIGURE 1 – Disbursements Identified in the MUR 8071 Complaint			
Date	Recipient	Disbursement Description	Amount
1/19/2021	TAG LLC	LEGAL PROC - DIGITAL CONSULTING	\$7,750.00
1/19/2021	AMERICA RISING LLC	LEGAL PROC - RESEARCH	\$27,709.00
3/26/2021	ON MESSAGE INC	LEGAL PROC - MEDIA PLACEMENT	\$999,982.00
4/7/2021	ON MESSAGE INC	LEGAL PROC - MEDIA	\$27,650.00
6/23/2021	ON MESSAGE INC	LEGAL PROC - MEDIA	\$223,978.00
4/22/2022	ON MESSAGE INC	LEGAL PROC - MEDIA PLACEMENT	\$1,067,235.00
5/10/2022	THE O'DONNELL GROUP	LEGAL PROC - MEDIA	\$19,995.00
5/18/2022	THE O'DONNELL GROUP	LEGAL PROC - MEDIA	\$11,154.00
6/8/2022	SRCP MEDIA INC.	LEGAL PROC - MEDIA PRODUCTION	\$2,618.00
6/8/2022	SIMIO CLOUD	LEGAL PROC - DIRECT MAIL PRODUCTION	\$3,250.00
6/22/2022	TAG LLC	LEGAL PROC - DIGITAL CONSULTING	\$207,852.00
7/28/2022	ON MESSAGE INC	LEGAL PROC - MEDIA	\$1,006,751.00
		TOTAL	\$3,605,924.00

6 C. The Response

7 The NRSC’s Response acknowledges that it used its legal proceedings account to make
 8 the disbursements identified in the Complaint.¹⁰ The NRSC identifies the disbursements for
 9 “media,” “media placement,” “media production,” and “direct mail production,” as being for

⁸ *Id.*

⁹ *Id.* at 4 (describing OnMessage Inc.’s website as advertising a variety of “campaign services,” such as “creative,” “digital,” “opinion research,” and “issue advocacy”), 5 (describing services provided by TAG, LLC as offering “consulting and advising,” “digital marketing and fundraising,” and “web design and development,” but “no legal or election recount-related services”), 6 n.15 (noting that “The O’Donnell Group” and “Simio Cloud” do not appear to have websites and that other committees have not reported payments to those vendors as being for legal services, but instead have reported payments for “travel,” “political consulting,” and “fundraising consulting,” and “list rental” or “list acquisition,” respectively).

¹⁰ Resp. at 11, 13 (stating the NRSC’s Legal Proceedings Account “properly paid for” the expenses).

1 eight television advertisements and one mailing. The NRSC contends that it was permitted to
2 pay for these communications from its legal proceedings account because they were not
3 campaign expenses. In support of its assertion that the ads were not campaign expenses, the
4 NRSC relies on what it characterizes as the “framework” established by Advisory Opinion 2022-
5 21 (DSCC, *et al.*).¹¹ The NRSC views that framework as permitting disbursements from its legal
6 proceedings account for solicitations to its legal proceedings account, unless the solicitations
7 qualify as party coordinated communications.¹² The NRSC then concludes that its complained-
8 of disbursements were not for party coordinated communications and are therefore permissible.¹³

9 The NRSC states that the two disbursements to TAG LLC were for a website that gave
10 voters information on how to cure ballots after the 2021 U.S. Senate runoff election in Georgia,
11 and for “digital and communication services rendered” to Doctor Oz for Senate in connection
12 with the 2022 Pennsylvania Republican U.S. Senate primary election recount.¹⁴ The NRSC
13 identifies the disbursement to America Rising LLC as being for research related to potential
14 litigation in connection with the 2021 Georgia runoff election.¹⁵ The NRSC’s Response includes
15 a declaration from its General Counsel attesting to details regarding each of the disbursements at

¹¹ *Id.* at 14.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 3.

¹⁵ *Id.*

1 issue,¹⁶ as well as the specific mail piece and scripts and on-screen descriptions of the television
2 ads at issue.¹⁷

3 **III. LEGAL BACKGROUND**

4 Under the Act, a “contribution” is “anything of value made by any person for the purpose
5 of influencing any election for Federal office.”¹⁸ An “expenditure” is similarly defined.¹⁹
6 Commission regulations state that “anything of value made with respect to a recount of the
7 results of a Federal election, or an election contest concerning a Federal election,” is not a
8 contribution or an expenditure.²⁰

9 **A. Historical Treatment of Recount Funds**

10
11 The Commission has long interpreted the Act to exclude donations to “cover costs of
12 recounts and election contests” because, though they are related to elections, recounts and
13 election contests are not federal elections as defined by the Act.²¹ That principle appears to have
14 been first applied in MUR 327. In that matter, the Commission found no reason to believe that a
15 candidate violated the Act by accepting \$10,000 from an unknown source as part of an effort to
16 win a recount.²² Because the Act’s definitions of “contribution,” “expenditure,” and “election”
17 excluded recounts, the Commission did not consider the donations for the purpose of an election

¹⁶ *Id.* at Ex. A (Declaration of NRSC general counsel Ryan Dollar).

¹⁷ *Id.* at pp. 4-7, Exs. A-J.

¹⁸ 52 U.S.C. § 30101(8)(A)(i).

¹⁹ *Id.* § 30101(9)(A)(i).

²⁰ 11 C.F.R. §§ 100.91, 100.151. In 2002, these regulations were recodified without substantive change from 11 C.F.R. §§ 100.7(b)(20), 100.8(b)(20). *See* Reorganization of Regulations on “Contribution” and “Expenditure,” 67 Fed. Reg. 50582 (Aug. 5, 2002); Federal Election Regulations, H. R. Doc. No. 44, 95th Cong., 1st Sess. at 40 (1977); Amendments to Federal Election Campaign Act Amendments of 1971; Regulations Transmitted to Congress, 45 Fed. Reg. 15080 (Mar. 7, 1980). Prior to 1980, similar provisions appeared at 11 C.F.R. §§ 100.4(b)(15), 100.7(b)(17). *See* 11 C.F.R. §§ 100.4(b)(15), 100.7(b)(17) (1977).

²¹ Federal Election Regulations, H. R. Doc. No. 44, 95th Cong., 1st Sess. at 40 (1977).

²² *See* Certification (“Cert.”) (Feb. 1, 1977), MUR 327 (Quincy Collins).

1 recount or otherwise contesting the results of an election as subject to the Act's contribution
2 limits or its disclosure requirements.²³

3 The Commission affirmed that view in Advisory Opinion 1978-92 (Miller) and Advisory
4 Opinion 1998-26 (Landrieu).²⁴ In those opinions, the Commission concluded that separate
5 entities established by a candidate's committee in order to fund recounts and election contests
6 were not subject to the Act's contribution limits or its disclosure requirements.²⁵ The
7 Commission advised, however, such recount funds could not be used to make contributions or
8 expenditures.²⁶

9 **B. Treatment of Recount Funds Following the Bipartisan Campaign Reform**
10 **Act**

11
12 In the years prior to the passage of the Bipartisan Campaign Reform Act of 2002
13 ("BCRA"), "certain corporations, labor unions, and wealthy individuals sought to bypass
14 [certain] contribution limits by making so-called 'soft money' contributions to political
15 parties."²⁷ The national parties used unlimited soft money donations, together with a proportion
16 of "hard money" raised pursuant to the Act's source and amount limits, for "mixed" activities
17 purportedly affecting both federal and state elections, including advertising that "did not

²³ First GCR at 1-2, MUR 327 (Quincy Collins) & Cert. (Feb. 1, 1977).

²⁴ Advisory Opinion 1978-92 (Miller) ("AO 1978-92") (funds received by separate entity established by the candidate solely for the purposes of funding a recount is not subject to the Act's contribution limitations, and does not trigger political committee status or reporting obligations, but is subject to the Act's prohibitions on contributions from labor organizations, corporations, and national banks); Advisory Opinion 1998-26 (Landrieu) ("AO 1998-26") (same as to separate entity established to fund election contests). These two advisory opinions were superseded, in part, by Advisory Opinion 2006-24 (NRSC, *et al.*) ("AO 2006-24"). Nevertheless, the Commission continued to cite AO 1978-92 for the proposition that a national party committee's recount funds may not be used for campaign activities. *See* Advisory Opinion 2010-14 at 5 (DSCC).

²⁵ AO 1998-26 at 3; AO 1978-92 at 2. The prohibitions on contributions from foreign nationals and corporations, labor organizations, and national banks still applied, however.

²⁶ AO 1998-26 at 3; AO 1978-92 at 3.

²⁷ *Rufer v. FEC*, 64 F. Supp. 3d 195, 199 (D.D.C. 2014).

1 expressly advocate the election or defeat of a federal candidate” but was in fact primarily
2 designed to affect federal elections.²⁸ In 1998, after an extensive investigation, the Senate
3 Committee on Governmental Affairs issued a report detailing the influence that soft money had
4 come to wield in the electoral and legislative processes.²⁹ The six-volume, 9,500-page report
5 concluded that the parties’ ability to solicit and spend soft money had completely undercut the
6 Act’s source-and-amount limitations.³⁰

7 As the Supreme Court described it, Congress’s response to the rise of soft money (and
8 other concerns) in BCRA took “national parties out of the soft-money business.”³¹ BCRA’s soft
9 money ban prohibits, among other things, national political parties from soliciting, receiving,
10 directing, donating, transferring, or spending funds unless the funds are subject to the limitations,
11 prohibitions, and reporting requirements of the Act.³² BCRA also prohibits candidates and
12 federal officeholders from soliciting, receiving, directing, transferring, or spending funds “in
13 connection with an election for Federal office” unless the funds are subject to the limitations,
14 prohibitions, and reporting requirements of the Act, or in connection with an election for
15 non-federal office unless the funds are subject to the limitations and prohibitions of the Act.³³

²⁸ *Republican Nat’l Comm. v. FEC*, 698 F. Supp. 2d 150, 153 (D.D.C. 2010), *aff’d*, 561 U.S. 1040 (2010).

²⁹ *McConnell v. FEC*, 540 U.S. 93, 129 (2003); S. REP. NO. 105-167 (1998).

³⁰ *McConnell*, 540 U.S. at 129-32.

³¹ *Id.* at 133 (2003); 147 CONG. REC. S2696 (daily ed. Mar. 22, 2001) (“The soft money ban is the centerpiece of this bill. Our legislation shuts down the soft money system, prohibiting all soft money contributions to the national political parties from corporations, labor unions, and wealthy individuals.”) (statement of Sen. Feingold); 147 CONG. REC. S3251 (daily ed. Apr. 2, 2001) (soft money ban is designed to ensure “that national parties, federal officeholders and federal candidates use only funds permitted in federal elections to influence federal elections”) (statement of Sen. Thompson); 148 CONG. REC. H409 (daily ed. Feb. 13, 2002) (“Because the national parties operate at the national level, and are inextricably intertwined with federal officeholders and candidates, who raise the money for the national party committees, there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process”) (statement of Rep. Shays).

³² Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 101(a), 116 Stat. 81, 84 (2002); 52 U.S.C. § 30125(a)(1).

³³ 52 U.S.C. § 30125(e)(1)(A)-(B).

1 In Advisory Opinion 2006-24 (NRSC), the Commission determined that BCRA's soft
2 money ban applied to a federal candidate's recount fund, as well as to a recount fund of a state
3 political party committee for use in federal elections. While the Commission acknowledged that
4 recounts themselves are not included in the Act's definition of "election," the Commission
5 concluded that funds in a recount fund are still raised and spent "in connection with" an election
6 for federal office and are therefore required to comply with the Act's amount limitations and
7 source prohibitions.³⁴ The Commission also reiterated its pre-BCRA finding that recount funds
8 "are not otherwise permitted to be used for campaign activity."³⁵

9 Subsequently, in Advisory Opinion 2009-04 (Franken/DSCC), the Commission advised
10 that a national party committee "may establish a recount fund, separate from its other accounts
11 and subject to a separate limit on amounts received, and use that fund to pay expenses incurred in
12 connection with recounts and election contests of Federal elections."³⁶ Then, in Advisory
13 Opinion 2010-14 (DSCC), the Commission reaffirmed that "recount activities paid for by the
14 [DSCC's] recount fund must have no relation to campaign activities."³⁷ In AO 2010-14, the
15 Commission recognized that some of the DSCC's expenses — such as expenses for "attorneys
16 and staff for the purpose of conducting research and making preparations for possible recounts
17 and election contests. . . . [and] the costs of soliciting donations to the recount fund" — may be

³⁴ See AO 2006-24 at 6, 8 (NRSC, *et al.*) (interpreting 2 U.S.C. § 441i(e), since recodified at 52 U.S.C. § 30125(e)). At the same time, the Commission distinguished between activity "in connection with an election" (not subject to coordinated spending limitations) and activity "in connection with a general election campaign" (subject to coordinated spending limitations). *Id.* at 9. The Commission concluded that the coordinated spending limits did not apply because recount funds "are not in connection with the general election campaign of the Federal candidate because the campaign has ended and because such funds are not otherwise permitted to be used for campaign activity." *Id.*

³⁵ *Id.* at 9.

³⁶ Advisory Opinion 2009-04 at 2-3 (Franken/DSCC) ("AO 2009-04") (citing AO 2006-24).

³⁷ Advisory Opinion 2010-14 at 5 (DSCC) ("AO 2010-14") (citing AO 1978-92 (Miller)).

1 attributable to more than one purpose.³⁸ The Commission approved the DSCC's proposal to use
2 the recount fund to pay recount-related expenses incurred before the general election; to defray
3 the costs of soliciting donations to its recount fund; and to hold fundraising events to raise both
4 contributions and recount funds, provided that the DSCC's recount solicitations *clearly stated*
5 *the purpose of the fund and noted that no donations to the fund will be used for the purpose of*
6 *influencing any Federal election.*³⁹

7 C. The 2015 Consolidated and Further Continuing Appropriations Act

8 The 2015 Appropriations Act, among other things, amended the Act by adding 52 U.S.C.
9 § 30116(a)(9)(C), which permits national party committees — such as the NRSC — to create a
10 separate segregated account “to defray expenses incurred with respect to the preparation for and
11 the conduct of election recounts and contests and other legal proceedings.”⁴⁰ Such accounts are
12 in addition to any other federal accounts maintained by a national party committee and are
13 subject to contribution limits equal to 300% of the otherwise-applicable contribution limit to
14 national party committees.⁴¹ In addition, disbursements from such accounts are not subject to
15 coordinated party expenditure limits.⁴²

16 Statements by House and Senate leaders made during the passage of the 2015
17 Appropriations Act explained that “Commission precedent” — specifically, the advisory
18 opinions discussed above, AO 2006-24 and AO 2009-04 — permitting the raising and spending

³⁸ AO 2010-14 at 6-7 (DSCC) (citing 11 C.F.R. § 9003.3(a)(1)(A) which requires solicitations by major party presidential candidates and nominees for a legal and accounting compliance fund to state, among other things, that “contributions will be used solely for legal and accounting services”).

³⁹ *Id.*

⁴⁰ Pub. L. No. 113-235, 101, 128 Stat. 2130, 2772-73 (2014) (codified at 52 U.S.C. § 30116(a)(9)(C)).

⁴¹ 52 U.S.C. § 30116(a)(1)(B), (2)(B).

⁴² 52 U.S.C. § 30116(d)(5); *see also* 11 C.F.R. §§ 109.30, 109.32(a)(1)).

1 of recount funds would continue to apply to national party committee accounts established under
2 52 U.S.C. § 30116(a)(9)(C).⁴³

3 Consistent with that precedent, the Commission determined in Advisory Opinion 2019-
4 02 (Bill Nelson for Senate) that funds in the DSCC's legal proceedings account "could not be
5 used for the purpose of influencing a federal election."⁴⁴ Most recently, in Advisory Opinion
6 2022-21 (DSCC, *et al.*), the Commission advised that the DSCC must pay for television
7 advertisements that feature federal candidates and solicit donations to its legal proceedings
8 account subject to a reasonable cost allocation among the committee's accounts.⁴⁵ Relying on
9 Advisory Opinion 2010-14, the Commission required allocation to the extent the committee's
10 solicitations served more than one purpose — *i.e.*, a solicitation of funds for the committee's
11 legal proceedings account, which the opinion describes as "recount activities," as distinguished
12 from party coordinated communications, which the opinion considered as being within
13 "campaign activities."⁴⁶

14 **IV. LEGAL ANALYSIS**

15 The NRSC, as a national committee of a political party, may not solicit, receive, or direct
16 to another person a contribution,⁴⁷ donation,⁴⁸ or transfer of funds or any other thing of value, or
17 spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements

⁴³ 160 CONG. REC. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner); 160 CONG. REC. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid).

⁴⁴ AO 2019-02 at 4 (Bill Nelson for Senate).

⁴⁵ AO 2022-21 at 5, 8 (DSCC, *et al.*).

⁴⁶ *Id.*

⁴⁷ The term "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election to Federal office." 52 U.S.C. § 30101(8)(A).

⁴⁸ A "donation" means a "payment, gift, subscription, loan, advance, deposit, or anything of value given to a person, but does not include contributions." 11 C.F.R. § 300.2(e).

1 of the Act.⁴⁹ 52 U.S.C. § 30116(a) sets forth limits on how much a person may contribute to a
 2 national committee of a political party.⁵⁰ During the 2022 election cycle, persons could not
 3 contribute more than \$36,500 in a calendar year to NRSC,⁵¹ except that contributions up to the
 4 amount of \$109,500 were permitted to be made to the following two types of accounts:

5 A separate segregated account of a national committee of a
 6 political party (including a national congressional campaign
 7 committee of a political party) which is *used solely to defray*
 8 *expenses incurred with respect to the construction, purchase,*
 9 *renovation, operation, and furnishing of one or more headquarters*
 10 *buildings of the party . . .*

11 A separate segregated account of a national committee of a
 12 political party (including a national congressional campaign
 13 committee of a political party) which is *used to defray expenses*
 14 *incurred with respect to the preparation for and the conduct of*
 15 *election recounts and contests and other legal proceedings.*⁵²

16 Section 30116(f) prohibits, among other things, candidates and political committees from
 17 knowingly accepting any contribution or making any expenditure in violation of the limits set
 18 forth in 52 U.S.C. § 30116(a).⁵³ Furthermore, Commission regulations state that “anything of

⁴⁹ 52 U.S.C. § 30125(a)(1); 11 C.F.R. § 300.10(a)(1) and (2); *see also* 11 C.F.R. § 102.5(c) (national committees of a political party “are prohibited from raising and spending non-Federal funds” after December 31, 2002).

⁵⁰ 52 U.S.C. § 30116(a)(1)(B).

⁵¹ *Id.* § 30116(a)(1)(B) and 11 C.F.R. § 110.1(c); FEC, Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 86 Fed. Reg. 7867, 7869 (Feb. 2, 2021).

⁵² 52 U.S.C. § 30116(a)(9)(B)–(C) (emphases added).

⁵³ *Id.* § 30116(f). The word “knowingly,” as used in section 30116(f), turns on whether the committee had knowledge of the facts that make the conduct unlawful. *See FEC v. Friends of Jane Harman*, 59 F. Supp. 2d 1046, 1056 n.11 (C.D. Cal. 1999) (“A ‘knowing’ standard, as opposed to a ‘knowing and willful’ one, does not require knowledge that one is violating a law, but merely requires an intent to act.”) (quoting *FEC v. John A. Dramesi for Congress Comm.*, 640 F. Supp. 985, 987 (D. N.J. 1986)); *see also FEC v. Cal. Med. Ass’n*, 502 F. Supp. 196, 203–04 (N.D. Cal. 1980) (knowledge of the facts making conduct unlawful constitutes a knowing acceptance under the Act). Only one court appears to have ever interpreted “knowingly” as requiring actual knowledge of illegality. *See In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044, 1047 n.3 (D.D.C. 1979). The Commission does not appear to have ever supported that interpretation. *See, e.g.,* F&LA at 4, MUR 6919 (Canseco for Congress, *et al.*) (“The ‘knowing’ acceptance of a contribution requires knowledge of the underlying facts that constitute the prohibited act, but not knowledge that the act itself — such as acceptance of an excessive contribution — is unlawful.”); Gen. Counsel’s Report (“GCR”) at 6 n.5 (Oct. 5, 1995) (recommending Commission apply standard

1 value made with respect to a recount of the results of a Federal election, or an election contest
 2 concerning a Federal election,” is not a contribution or an expenditure.⁵⁴

3 **A. The Commission Should Find Reason to Believe that the NRSC Paid for at**
 4 **Least Some Campaign-Related Expenses From its Legal Proceedings**
 5 **Account in Violation of 52 U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1)**
 6

7 1. The NRSC's TV Ads
 8

9 a. The Portion of the NRSC's TV Ads Made for Purposes Other Than
 10 Those Described in 52 U.S.C. § 30116(a)(9)(B)-(C) Are by
 11 Definition Campaign Related and Must Be Paid From Funds
 12 Raised Under the \$36,500 Contribution Limit

13 Under BCRA and the 2015 Appropriations Act, national party committees like the NRSC
 14 may only spend funds that are subject to the limitations, prohibitions, and reporting requirements
 15 of the Act; meaning funds accepted pursuant to the \$36,500 contribution limit, or funds accepted
 16 pursuant to the \$109,500 contribution limit for the limited purposes described in 52 U.S.C.
 17 § 30116(a)(9)(B)-(C).⁵⁵

18 Here, it appears that the NRSC's TV ads were campaign related and for campaign
 19 activities, if not completely, then at least in large part. None of the NRSC's TV ads mention
 20 recounts or election challenges, or any legal proceedings.⁵⁶ Nor do any of the TV ads at issue
 21 explicitly state that the NRSC's request for funds was for its legal proceedings account. Instead,
 22 the ads included the following brief screen messages (in English or Spanish) at the end, “Text

articulated in *Dramesi* for “knowingly accept[ing]” excessive contributions) & Certification (“Cert.”) ¶ 1 (Dec. 6, 1995), MUR 3546 (Clinton for President Comm., *et al.*) (approving OGC's recommendations); GCR at 3 (July 14, 1978) (recommending *against* applying the criminal law definition of knowingly) & Cert. ¶1 (July 19, 1978) (finding reasonable cause to believe campaign committee knowingly accepted excessive contributions) & Conciliation Agreement ¶ 10, MUR 515 (Comm. of 1976 for Bates for Congress) (in the context of accepting excessive contributions, “the term ‘knowingly accepted’ only implies that Respondent was aware of the facts of the situation and not that Respondent was aware that a violation of the Act had occurred”).

⁵⁴ 11 C.F.R. §§ 100.91, 100.151.

⁵⁵ 52 U.S.C. §§ 30116(a)(1)(B)-(C), 30125(a)(1).

⁵⁶ Resp. Exs. C-J (scripts of TV ads).

1 with DONATE to 55404,” with the audio “Donate today.”⁵⁷ The NRSC described the on-screen
2 55404 “short code” as “written instructions to donate to the NRSC’s Legal Proceedings
3 Account.”⁵⁸

4 Most of the TV ads explicitly call for actions against or state an imperative critical of
5 Democratic Senate candidates directly before the “donate” request.⁵⁹ Although the NRSC
6 contends that these ads sought donations of a legal proceedings account,⁶⁰ the ads in fact appear
7 mostly or entirely designed to influence viewers to view their subjects negatively and raise funds
8 for unspecified use. For example, the ad “Quieren Más Poder” states “We need to stop Pelosi
9 and Mark Kelly’s political corruption before it’s too late.”⁶¹ The ad “Against Arizona” calls on
10 viewers to “Tell Senator Kelly: Stop voting with Biden and against Arizona.”⁶² The ad “Daño”
11 also directs viewers to “tell Senator Kelly to stop voting with Biden.”⁶³ Such language indicates
12 a purpose separate and apart from a solicitation of funds for recounts, contests, and other legal
13 proceedings.⁶⁴ Even the ad the NRSC’s response leads with (“Power Grab”), when viewed as
14 video or read as script, is plainly about why the named candidates are “corrupt[.]” and fails to
15 articulate, mention, or even suggest the idea of mounting a legal challenge to the voting

⁵⁷ *Id.* Exs. C-J.

⁵⁸ *Id.* at 19, Ex. A.

⁵⁹ The senators identified in the NRSC’s TV ads were all candidates for reelection in 2022 at the time the ads aired. *See* Catherine Cortez Masto, Statement of Candidacy (Jan. 31, 2022); Raphael Warnock, Statement of Candidacy (Jan. 18, 2021); Margaret Hassan, Statement of Candidacy (Dec. 16, 2020); Mark Kelly, Statement of Candidacy (Nov. 25, 2020); Michael Bennet, Statement of Candidacy (Feb. 21, 2020).

⁶⁰ *Id.* at 13-20.

⁶¹ *Id.* at Ex. C; NRSC, *Quieren Más Poder – Kelly*, YOUTUBE (Mar. 29, 2021), <https://www.youtube.com/watch?v=Wx9EZ5CRf7w>.

⁶² *Id.* at Ex. G; NRSC, *Against Arizona*, YOUTUBE (Apr. 25, 2022), <https://www.youtube.com/watch?v=kThe0xJE3mE>.

⁶³ *Id.* at Ex. H; NRSC, *Daño Damage*, YOUTUBE (Apr. 25, 2022), <https://www.youtube.com/watch?v=W3upxdl8Ic0>.

⁶⁴ *See* AO 2010-14 (DSCC).

1 legislation referenced in the ad, Senate Bill 1.⁶⁵ “Goes Along,” with its message of how Senator
 2 Bennet “goes along” with President Biden, described in text and conveyed in imagery converting
 3 the face of the former into the face of the latter, cannot plausibly be described as a request for
 4 funds election recounts, contests, or other legal proceedings.⁶⁶

5 The NRSC Response’s descriptions of the ads acknowledge their dual purpose, stating
 6 that “the fundraising communications at issue *discussed incumbent officeholder positions on*
 7 *policy issues* in an effort to motivate the audience to donate.”⁶⁷ But that supposed motivation to
 8 donate is itself grounded in viewers’ negative reactions to the officeholder/candidate’s positions
 9 on the issues identified, and not to any discussion of recounts or election contests, as shown
 10 below in the NRSC’s own description of the ads:

- 11 • **“Power Grab” Ad** — “focused on a discrete policy issue . . . then-pending
 12 Senate Bill 1 [referred to as the Kelly/Warnock/Cortez Masto/Hassan] Pelosi
 13 plan and its corrupting influence”⁶⁸
 14
- 15 • **“Quieren Más Poder” Ad** — “Spanish-language version of the ‘Power Grab’ . . .
 16 . [but with] spoken message in Spanish stating “We need to stop Pelosi and
 17 [Kelly/Cortez Masto]’s political corruption before it’s too late.”⁶⁹
 18
- 19 • **“Welfare for Politicians” & “No One” Ad** — “focused on the discrete issue of
 20 the then-pending S.B. 1 . . . focused on the expenses and perceived wastefulness
 21 of S.B. 1” and called on viewers to “help us stop Warnock’s welfare for
 22 politicians plan” or “help us [i.e., the NRSC] stop the Hassan plan.”⁷⁰
 23
- 24 • **“Against Arizona” Ad** — “appealed[ed] to a . . . policy issue[] . . . focused on
 25 Senator Kelly’s record of supporting President Biden on several immigration

⁶⁵ *Id.* at Ex. C; NRSC, *Power Grab – Hassan*, YOUTUBE (Mar. 29, 2021),
<https://www.youtube.com/watch?v=SpxvYVEffR0>.

⁶⁶ *Id.* at Ex. J; NRSC, *Goes Along – CO*, YOUTUBE (Aug. 4, 2022),
<https://www.youtube.com/watch?v=0yR8un4JM80>.

⁶⁷ Resp. at 2 (emphasis added).

⁶⁸ *Id.* at 16-17.

⁶⁹ *Id.*

⁷⁰ *Id.* at 17-18.

1 issues, specifically ‘sanctuary cities,’ ‘benefits to illegals,’ and the ‘border
 2 wall’”⁷¹

- 3
- 4 • **“Daño” Ad** — “took a similar approach [to ‘Against Arizona’] . . . Daño focused
 5 on Senator Kelly’s record of supporting President Biden on several policy issues,
 6 specifically ‘the border,’ ‘crime,’ and ‘overcrowded schools’”⁷²
 - 7
 - 8 • **“Gullible” Ad** — “dr[ew] attention to Senator Hassan’s voting record on issues
 9 including ‘drilling for natural gas’ and the ‘Keystone Pipeline’”⁷³
 - 10
 - 11 • **“Goes Along” Ad** — “highlight[ed] the voting records of Senator Murray and
 12 Senator Bennet . . . focused on the frequency with which each Senator ‘goes along
 13 with Biden’ on policy matters like inflation, and ‘economic recession looming,’
 14 the ‘baby formula shortage,’ ‘empty shelves,’ and more ‘crime in our streets’”⁷⁴

15 Funds raised by the NRSC pursuant to the Act’s base national party \$36,500 per year
 16 limit may be used for any purpose, but funds raised pursuant to the higher \$109,500 limit for its
 17 legal proceedings account are restricted for the purposes of defraying expenses for the conduct of
 18 election recounts and contests and other legal proceedings.⁷⁵ The NRSC itself acknowledges that
 19 the TV ads focus on subjects *other than* recounts, election contests and other legal proceedings.
 20 Assuming that the ads addressed policy issues, the NRSC’s payments for them is, “by definition,
 21 campaign related.”⁷⁶ As a result, because the NRSC used its legal proceedings account to pay the

⁷¹ *Id.* at 18.

⁷² *Id.* at 18-19.

⁷³ *Id.* at 19.

⁷⁴ *Id.* at 19-20.

⁷⁵ 52 U.S.C. § 30116(a)(9)(C); 160 CONG. REC. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner) (“[I]t is the intent of the amendments contained herein that expenditures made from the accounts described in [52 U.S.C. § 30116(a)(9)], many of which (such as recount and legal proceeding expenses) are not for the purpose of influencing federal elections, do not count against the coordinated party expenditure limits.”); 160 CONG. REC. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid) (same).

⁷⁶ *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (“Expenditures of candidates and of ‘political committees’ so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.”); *FEC v. GOPAC*, 871 F. Supp. 1466, 1470-71 (D.D.C. 1994) (“*Buckley* authoritatively establishes that *any* payment of \$1,000 or more by an organization whose major purpose has been determined to be the nomination or election of an identified candidate for federal office . . . is, ‘by definition, campaign related’ and hence, constitutes an ‘expenditure’”); Memorandum, *Ohio Democratic Party v. FEC*, No. 98-0991 (D.D.C. June 25, 1998) (denying Plaintiff’s motion for preliminary injunction which sought to pay for “issue advocacy

1 entire cost of the TV ads (\$3,359,363), it appears that the NRSC spent funds not subject to the
 2 \$36,500 limit on campaign activities. And to any extent that a portion of such funds related to
 3 legal proceedings by virtue of the requests for donations was allocable, it appears that any such
 4 allocation would at most be lopsidedly against an allocation to the legal proceedings account.⁷⁷

5 b. The NRSC's TV Ads PASO Federal Candidates and are Therefore
 6 Campaign Activity

7 Following BCRA, the Commission provided guidance on the types of activities that are
 8 "in connection" with an election for federal office under 52 U.S.C. § 30125(e). Such activities
 9 include, but are not limited to: (1) contributing to a candidate committee; (2) contributing to a
 10 political party organization; (3) soliciting funds for a candidate committee; (4) expending funds
 11 to obtain information that will be shared with a candidate committee; (5) expressly advocating
 12 the election or defeat of a candidate; and (6) "federal election activity," as defined by the Act,
 13 which includes public communications referring to a clearly identified federal candidate and that
 14 promote, support, attack, or oppose a candidate for that office.⁷⁸ The four verbs "promote,"
 15 "support," "attack," and "oppose," are collectively referred to as "PASO."

advertisements" with nonfederal funds, thereby indicating agreement with the Commission's determination in Advisory Opinion 1995-25 (RNC) that issue advocacy by national party committees is campaign-related); *see also* *McConnell*, 540 U.S. at 170 n.64 ("actions taken by political parties are presumed to be in connection with election campaigns"); *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) ("when an *organization* controlled by a candidate or the major purpose of which is election-related makes disbursements, those disbursements will presumptively be *expenditures*"); *vacated on other grounds*, 524 U.S. 11 (1998)).

⁷⁷ *E.g.*, Statement of Commissioner Shana M. Broussard Regarding Advisory Opinion 2022-21 (DSCC, *et al.*) at 2.

⁷⁸ Factual & Legal Analysis ("F&LA") at 6, MUR 7954 (Kevin Mullin for Congress, *et al.*) (citing F&LA at 3, MUR 7106 (Citizens for Maria Chappelle-Nadal) (citing among others AO 2009-26 at 5 (Coulson))). The Commission has twice proposed but not adopted definitions for PASO. *See* Prohibited and Excessive Contributions, 67 Fed. Reg. 35,654, 35,681 (May 20, 2002) (Notice of Proposed Rulemaking); Coordination, 74 Fed. Reg. 53,893, 53,898-900 (Oct. 21, 2009) (Notice of Proposed Rulemaking). Nevertheless, the Supreme Court has stated that the use of PASO in 52 U.S.C. § 30101(20)(A)(iii) does not render the provision unconstitutionally vague, because they "clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision," and they "provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003).

1 As described below, each of the NRSC's TV advertisements PASOs federal candidates,
 2 each of whom was up for election in the upcoming 2022 midterms:

- 3 • **“Power Grab” and “Quieren Más Poder”** — attacks the Democratic party
 4 and/or federal candidates Maggie Hassan and Mark Kelly as engaging in
 5 “political corruption” and “fraud.”⁷⁹
 6
- 7 • **“Welfare for Politicians”** — attacks federal candidate Raphael Warnock as
 8 destroying jobs and small businesses in Georgia⁸⁰
 9
- 10 • **“No One”** — attacks federal candidate Maggie Hassan as a supporter of
 11 government waste⁸¹
 12
- 13 • **“Against Arizona”** — attacks federal candidate Mark Kelly for saying one thing
 14 in Arizona, but voting “against Arizona” in Washington, D.C.⁸²
 15
- 16 • **Daño** — attacks federal candidate Mark Kelly for saying one thing in Arizona,
 17 but “chicken[ing] out” and voting against Arizona in Washington, D.C. and says
 18 he is “damaging the families of Arizona.”⁸³
 19
- 20 • **“Gullible”** — attacks federal candidate Maggie Hassan as someone who is trying
 21 to “fool” her constituents⁸⁴
 22
- 23 • **“Goes Along”** — attacks federal candidate Michael Bennet as someone who does
 24 not stand up for his constituents' welfare when it comes to increases in their cost
 25 of living and crime⁸⁵
 26

27 By virtue of the Supreme Court's observation in *Buckley v. Valeo* that all expenditures by
 28 a political committee are “by definition, campaign related,” the NRSC's payment for TV ads for
 29 any purpose other than the purposes set forth in 52 U.S.C. § 30116(a)(9)(B)-(C) is campaign

79 Resp. at Exs. C, D.

80 *Id.* at Ex. E.

81 *Id.* at Ex. F.

82 *Id.* at Ex. G.

83 *Id.* at Ex. H.

84 *Id.* at Ex. I.

85 *Id.* at Ex. J.

1 related.⁸⁶ The textual differences between the Act's soft money prohibition as it relates to
 2 national party committees and candidates/federal officeholders reinforces this conclusion,⁸⁷ as
 3 does the Commission's allocation requirement for solicitation costs that are attributable to a
 4 purpose other than defraying expenses incurred with respect to the preparation for and the
 5 conduct of election recounts and contests and other legal proceedings.⁸⁸

6 But even if the NRSC's status as a national party committee alone fails to render the TV
 7 ads as campaign related (because they focus on subjects *other than* recounts, election contests
 8 and other legal proceedings), the NRSC's TV ads still may not be paid entirely from the NRSC's
 9 legal proceedings account because they PASO federal candidates.⁸⁹ Accordingly, it appears that

⁸⁶ *Supra* note 76.

⁸⁷ *Compare* 52 U.S.C. § 30125(a)(1) (prohibiting national party committees from spending *any* funds that are not subject to the limitations, prohibitions, and reporting requirements of the Act), *with* 52 U.S.C. § 30125(e)(1)(A) (prohibiting candidates, federal officeholders and entities directly or indirectly established, financed, maintained or controlled by or acting on behalf of a candidate or federal officeholder from spending such funds only if spent *in connection with* an election for federal office); *see also* AO 2006-24 at 11 (“As the Explanation and Justification for 11 CFR [3]00.10 makes clear,” the soft money prohibition at 52 U.S.C. § 30125(a)(1) “applies regardless of whether such funds are ‘in connection with’ a Federal election or for any other purpose”) (citing Explanation and Justification for Final Rule on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49089 (July 29, 2002)).

⁸⁸ AO 2022-21 at 8 (describing a possible coordinated communication referred to as “Solicitation 2”) (footnote omitted).

⁸⁹ In the political committee status context, the Commission has used the term “federal campaign activity.” Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) (“Supplemental E&J”). Although Commissioners have not always based major purpose analyses on such spending, the 2007 Supplemental E&J's description of spending that constitutes “federal campaign activity” appears on its face to encompass PASO communications. *See id.* at 5605 (citing MUR 5511 (Swift Boat Veterans and POWs for Truth) where the organization's spending on communications that “attack[] *or* expressly advocat[e]” against John Kerry indicated the organization's major purpose was federal campaign activity) (emphasis added); *id.* (citing MUR 5754 (MoveOn.org Voter Fund) where organization's spending on advertisements that “opposed” or “criticized” George W. Bush established political committee status); *see also* Conciliation Agreement IV.14, MUR 5487 (Progress for America Voter Fund) (concluding that organization qualified for political committee status (*i.e.*, having federal campaign activity as its major purpose) because it spent 60% of its funds on communications that “praised George W. Bush's leadership as President and/or criticized Senator Kerry's ability to provide similar leadership”).

Moreover, many of those cited enforcement matters (and others not cited) relied on *Richey v. Tyson*, a district court case which stated that the requisite major purpose for political committee status under the Act is “the nomination or election of a candidate,” or simply ‘campaign activity,’ terms that comfortably reach beyond explicit directions to vote a particular way.” 120 F. Supp. 2d 1298, 1311 n.11 (S.D. Ala. 2000); *see also* F&LA at 11, MUR

- 1 the NRSC paid \$3,359,363 for TV ads that are “federal campaign activity” with funds from its
- 2 legal proceedings account (*i.e.*, funds not subject to the \$36,500 limit).

5754 (MoveOn.org); F&LA at 17, MUR 5753 (League of Conservation Voters 527, *et al.*); Conciliation Agreement IV.5, MUR 5752 (Environment2004, Inc. *et al.*); Conciliation Agreement IV.5, MURs 5577 & 5620 (National Association of Realtors – 527 Fund); Conciliation Agreement IV.3, MUR 5542 (Texans for Truth); Conciliation Agreement IV.6, MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth); Conciliation Agreement IV.6, MUR 5487 (Progress for America Voter Fund); Conciliation Agreement at IV.6, MUR 5440 (The Media Fund).

Some Commissioners have objected to including PASO communications as federal campaign activity — at least in the context of corporations organized under section 501(c) of the Internal Revenue Code — out of concern for protecting issue discussion by groups that may not even be political committees. *See, e.g.*, Statement of Reasons at 14-16, Commr’s Hunter & Petersen, MUR 6596 (Crossroads GPS). But that concern is not present here, since the PASO ads were made by a national party committee whose spending is “by definition, campaign related.” *Buckley*, 424 U.S. at 79; *supra* note 76.

1 c. The NRSC's Arguments Are Unavailing

2 i. *Advisory Opinion 2022-21 (DSCC, et al.) Did Not Purport*
3 *to Limit the Universe of Party Committee Communications*
4 *Considered "Campaign Related" to Party Coordinated*
5 *Communications*

6 The NRSC argues that Advisory Opinion 2022-21 (DSCC, *et al.*) established a
7 "framework" that permits disbursements from its legal proceedings account for solicitations to its
8 legal proceedings account, so long as the solicitations do not qualify as party coordinated
9 communications.⁹⁰ But the NRSC's focus on party coordinated communications is misconceived
10 because Advisory Opinion 2022-21 (DSCC, *et al.*) did not limit the universe of political party
11 communications considered campaign-related — and thus ineligible to be paid from funds from
12 the NRSC's legal proceedings account — to party coordinated communications.⁹¹ Rather, that
13 Advisory Opinion applied the pre-existing principle articulated in Advisory Opinion 2010-14
14 (DSCC) that national party committee activities may have more than one purpose, and that
15 allocation is an appropriate way to fund such activities.⁹² Because party coordinated
16 communications are, by definition, for the purpose of influencing a federal election (*i.e.*, they are
17 treated as in-kind *contributions* or coordinated party *expenditures*), the DSCC could not pay for
18 them entirely with funds in the DSCC's legal proceedings account.⁹³

⁹⁰ *Supra* pp. 4-5.

⁹¹ The presence of express advocacy is not necessary for the NRSC's ads to be "campaign related" or "in connection with" an election for federal office. *See supra* Part IV.A.1.a-b. Because AO 2022-21 (DSCC, *et al.*) did not limit the universe of political party communications considered campaign-related to party coordinated communications, the NRSC's argument that none of the TV ads at issue expressly advocated the election or defeat of federal candidates, and therefore did not meet the criteria for a party coordinated communication, is irrelevant.

⁹² AO 2022-21 at 5, 8.

⁹³ *See* 11 C.F.R. § 109.37 (treating coordinated party communications as an in-kind *contribution* or coordinated party *expenditure*).

1 It is a false dichotomy to contend that because the NRSC's TV ads are not party
2 coordinated communications, they must be exclusively solicitations to the NRSC's legal
3 proceedings account. That reasoning would suggest that hard-hitting "issue ads" that PASO a
4 federal candidate could be construed as legal proceedings account solicitations by virtue of a
5 tacked-on "donate" imperative, undermining the soft money prohibitions Congress added in
6 BCRA and respected in the 2015 Appropriations Act.

7 ii. *It Is Doubtful that Raising Funds for the Purpose of*
8 *Challenging S.B. 1 Constitutes a Permissible Use of Funds*
9 *in the NRSC's Legal Proceedings Account*

10 The NRSC also argues that the TV ads "Power Grab" and "Quieren Más Poder" "sought
11 to raise funds which might have been used to challenge S.B. 1 in court."⁹⁴ That contention about
12 what "might" have been done with funds raised is not supported by the ads themselves, which
13 make no effort to clarify that the requested donations might be used for this purpose. But even if
14 the ads clearly indicated that they were for the purpose of raising funds to mount a legal
15 challenge to S.B. 1, it is doubtful that this purpose constitutes a permissible use of funds in the
16 NRSC's legal proceedings account.

17 The phrase "other legal proceedings" in the statutory language is limited by the more
18 specific terms that precede it, namely "election recounts and contests." Under the canon of
19 *ejusdem generis*, where, as here, "general words follow an enumeration of two or more things,
20 they apply only to persons or things of the same general kind or class specifically mentioned."⁹⁵
21 This statutory interpretation principle presumes that "[w]hen the initial terms all belong to an
22 obvious and readily identifiable genus . . . [the] writer has that category in mind for the entire

⁹⁴ Resp. at 17.

⁹⁵ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 199 (2012).

1 passage.”⁹⁶ It also ensures that the general term will not render the prior enumeration of terms
2 meaningless.⁹⁷ Applying the principle here, the phrase “other legal proceedings” in 52 U.S.C.
3 § 30116(a)(9)(C), in the context of the words it follows, means legal proceedings similar to
4 “election recounts and contests.”⁹⁸ Election recounts are governed by state law and are
5 conducted after an election (either automatically if the results are within a specified margin, or
6 because someone asks for a recount).⁹⁹ Election contests are also governed by state law and are
7 conducted after an election, with most states having enacted statutes specifying a date by which a
8 candidate or campaign may sue to contest the outcome of an election.¹⁰⁰

9 Clearly, 52 U.S.C. § 30116(a)(9)(C) does not encompass payments for *any* “legal
10 proceeding,” since that would render the words “election recounts and contests” meaningless.
11 But it is also doubtful that payments for potential legal challenges to federal legislation such as
12 S.B. 1 come within the meaning of “other legal proceedings,” since such challenges do not
13 appear to be similar to election recounts or contests. The results of election recounts and election

⁹⁶ *Id.*

⁹⁷ *Id.* at 199-200.

⁹⁸ *Id.* at 197; *United States v. Mackay*, 757 F.3d 195, 197 (5th Cir. 2014) (“The words ‘other’ or ‘any other’ following an enumeration of particular classes ought to be read as ‘other such like’ and to include only those of like kind or character.”) (quoting *In re Bush Terminal Co.*, 93 F.2d 659, 660 (2d Cir. 1938)) (internal quotation marks removed). The Supreme Court addressed similar statutory language in *Washington Department of Social & Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003). There, the Court evaluated a provision of the Social Security Act that protects social security payments from “execution, levy, attachment, garnishment, or other legal process.” *Id.* at 382. Applying the statutory interpretation canon of *ejusdem generis* — *as well as the related canon of noscitur a sociis, meaning that words are known “by their companions”* — the Court unanimously held that the term “other legal process” did not mean any legal process but only a “process much like the processes of execution, levy, attachment, and garnishment.” *Id.* at 384-85.

⁹⁹ See National Conference of State Legislatures, Election Recounts, <https://www.ncsl.org/elections-and-campaigns/election-recounts> (last visited Oct. 26, 2023).

¹⁰⁰ See National Conference of State Legislatures, Canvass, Certification and Contested Election Deadlines and Voter Intent Laws, <https://www.ncsl.org/elections-and-campaigns/canvass-certification-and-contested-election-deadlines-and-voter-intent-laws> (listing various states’ deadlines to initiate a lawsuit contesting the results of an election and linking to the applicable state law); see also 26 Am. Jur. 2d Elections § 381 (2d. Ed. 2019) (defining “election contest” as a “suit in which the validity of an election . . . is made the subject matter of litigation” or “a special proceeding . . . to provide a remedy for elections tainted by fraud, illegality, or other irregularity”).

1 contests impact elections that have already taken place, whereas legislation such as S.B. 1, if
2 enacted, impact *future* elections.¹⁰¹ In addition to their different temporal impact on elections,
3 the nature of their impact on elections is different. To use a baseball analogy — election
4 recounts and contests resemble arguments aimed at gaining an advantage within the confines of
5 existing rules, such as arguing balls and strikes, whether a hit ball is fair or foul, or whether a
6 baserunner is safe or out. A court challenge to S.B. 1, to the extent it touches on elections,
7 involves potential changes to the rules of the game itself.

8 Legislative history appears to support a limited reading of “other legal proceedings.”¹⁰²
9 The inclusion of that phrase in the statute dovetails with the language in Advisory Opinion 2006-
10 24, specifically cited in the legislative history, which permitted the proposed use of recount funds
11 for expenses relating to “‘recount[s], election contest[s], counting of provisional and absentee
12 ballots and ballots cast in polling places,’ as well as for expenses relating to ‘post-election
13 litigation and administrative-proceeding expenses concerning the casting and counting of ballots

¹⁰¹ The Commission’s decision in Advisory Opinion 2023-03 (Colorado Republican State Central Committee) is not to the contrary. There, a state committee sought to establish a legal fund solely for the purpose of challenging the constitutionality of a state law that changed the process for political parties to nominate a candidate for a general election. AO 2023-03 at 1-2. Relying on Advisory Opinion 2003-15 (Majette), the Commission concluded that donations to the proposed legal fund “would not constitute contributions or expenditures under the Act because such donations and disbursements would not be made ‘for the purpose of influencing any election for Federal office.’” *Id.* at 4. But constitutional challenges to state laws by state committees (to which 52 U.S.C. § 30116(a)(9)(C) does not apply) are not the same as a national party committee’s challenge to a federal election law. Indeed, one of the advisory opinions upon which AO 2023-03 relied explicitly noted that “legal expense funds established by national committees of political parties or related entities are subject to a different legal standard under [52 U.S.C. § 30125(a)].” Advisory Opinion 2003-15 at 4 n.4 (Majette) (“AO 2003-15”). In the case of national party committees, *all* spending must be with hard money because their activities “are presumed to be in connection with election campaigns.” *McConnell*, 540 U.S. at 170 n.64; 52 U.S.C. § 30125(a)(1). Thus, the relevant question is not whether Commission advisory opinions have found legal account expenses for constitutional challenges of election laws to be for the purpose of influencing an election, but whether such challenges are similar to election recounts and contests. Neither AO 2023-03 nor the advisory opinions upon which it relies support that proposition. *See* Advisory Opinion 2003-15 at 1 (involving a candidate seeking to use legal account funds to defend against litigation seeking to undo the results of her own primary and general election victories by challenging Georgia’s open primary election system); Advisory Opinion 2010-03 (National Democratic Redistricting Trust) (involving request for members of Congress to solicit soft money to a trust in order to defray its pre-litigation and litigation costs in connection with legislative redistricting).

¹⁰² 160 CONG. REC. H9286; 160 CONG. REC. S6814.

1 during the Federal election, fees for the payment of staff assisting the recount or election contest
2 efforts, and administrative and overhead expenses in connection with recounts and election
3 contests.”¹⁰³

4 Because the expense of a court challenge to S.B. 1 appears to fall outside the scope of
5 “other legal proceedings,” we do not believe the NRSC may use its legal proceedings account to
6 pay for TV ads soliciting funds for that purpose.

7 But even if a court challenge to S.B.1 could be considered an “other legal proceeding”
8 under 52 U.S.C. § 30116(a)(9)(C), the NRSC’s “Power Grab” and “Quieren Más Poder” TV ads
9 do not appear to just be raising funds for that purpose.¹⁰⁴ The contrast between “Power Grab”
10 and “Quieren Más Poder” and the NRSC’s mail piece discussed *infra* further supports the notion
11 that the costs of “Power Grab” and “Quieren Más Poder” are, if not completely, then at least in
12 large part, attributable to campaign activities.

13 *iii. The NRSC Did Not Lack Fair Notice that Its TV Ads Were*
14 *Campaign Related*

15 The NRSC argues, in the alternative, that the Commission should dismiss this matter
16 pursuant to its prosecutorial discretion because it has not provided national party committees
17 “meaningful guidance, let alone notice of any potential restrictions on the method, mode, or
18 content of fundraising communications for segregated accounts.”¹⁰⁵ To do otherwise, the NRSC
19 argues, would raise “very serious fair notice, due process, and First Amendment concerns.”¹⁰⁶

¹⁰³ AO 2006-24 at 2-3.

¹⁰⁴ *See supra* pp. 13-20.

¹⁰⁵ Resp. at 20-21.

¹⁰⁶ *Id.* at 21 (citing *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)).

1 “[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform
2 his or her conduct to the law.”¹⁰⁷ “[A] party has fair notice when, ‘by reviewing the regulations
3 and other public statements issued by the agency,’ it can ‘identify, with ascertainable certainty,
4 the standards with which the agency expects parties to conform.’”¹⁰⁸ Put another way, fair notice
5 is provided if the agency’s interpretation is “reasonably comprehensible to people of good
6 faith.”¹⁰⁹

7 The NRSC’s fair notice argument is not persuasive. Congress passed BCRA to prohibit,
8 among other things, the national parties’ use of soft money. Moreover, the Commission has
9 publicly stated for decades that recount funds may not pay for campaign activities.¹¹⁰ Thus, the
10 NRSC had fair notice that its use of legal proceedings account funds for campaign activities is
11 not permitted.¹¹¹

12 Furthermore, the hallmarks indicative of a lack of fair notice are not present. There has
13 been no “change” in the Commission’s longstanding position with respect to the use of recount
14 funds for campaign activity.¹¹² Nor has the Commission been silent in the face of widespread

¹⁰⁷ *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (plurality opinion).

¹⁰⁸ *Northstar Wireless, LLC v. FCC*, 38 F.4th 190, 216 (D.C. Cir. 2022) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)).

¹⁰⁹ *General Elec. Co.*, 53 F.3d at 1330 (quoting *McElroy Elecs. Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993)).

¹¹⁰ *See supra* Part III.A-C.

¹¹¹ Advisory opinions are among the types of public statements that provide fair notice. *See FEC v. Arlen Specter '96*, 150 F. Supp. 2d 797, 813-14 (E.D. Pa. 2001) (rejecting Specter ‘96’s argument that it lacked fair notice because, among other public statements, the Commission’s advisory opinions “state the Commission’s interpretation clearly and consistently, and that these materials were available to the public”).

¹¹² *See Fox Television Stations*, 567 U.S. at 254 (“The Commission’s lack of notice to Fox and ABC that its interpretation had *changed* . . . fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.”) (emphasis added) (internal quotations omitted)).

1 violative conduct.¹¹³ And the NRSC chose not to inquire about whether the costs for its ads
2 would need to be allocated.¹¹⁴ Instead, the NRSC bases its fair notice argument on the lack of
3 Commission regulations specifically addressing legal proceedings accounts.¹¹⁵ But the NRSC
4 itself argued against new regulations following the 2015 Appropriations Act, stating that it saw
5 “little reason to undertake a comprehensive, time- and resource-consuming rulemaking” because
6 “[t]he Appropriations Act *did not introduce any new concepts to the law*, and the national party
7 committees have extensive experience with convention funding, building and legal funds.”¹¹⁶
8 The NRSC was correct when it further stated “the current state of the law reflects decades of
9 precedent and practice.”¹¹⁷ That precedent is discussed above and applies here.

10 This matter is also fundamentally different than MUR 7358 and MUR 7390, two recent
11 matters in which the Commission dismissed allegations of improper payments from a national
12 party committee’s legal proceedings account. In those matters, the Commission noted that it had

¹¹³ See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157 (2012) (finding “unfair surprise” where industry had engaged in “decades-long practice” before the Department of Labor first announced its regulatory interpretation in an enforcement proceeding).

¹¹⁴ See, e.g., *Howmet Corp. v. EPA*, 656 F. Supp. 2d 167, 174 (D.D.C. 2009) (failure to inquire is a relevant consideration in determination of fair notice to regulated party) (citing *Tex. E. Prods. Pipeline Co. v. Occupational Safety & Health Rev. Comm’n*, 827 F.2d 46, 50 (7th Cir. 1987)), *aff’d* 614 F.3d 544 (D.C. Cir. 2009). Cf. *U.S. Civil Service Commission v. National Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 580 (1973) (rejecting a vagueness challenge to the Hatch Act, in part, because “the Commission ha[d] established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law . . .”).

¹¹⁵ Resp. at 20 (“the Commission has yet to commence a rulemaking to provide guidance or impose any restrictions whatsoever on the operation of these segregated accounts”).

¹¹⁶ Comment of NRCC and NRSC (Jan. 30, 2017), Notice 2016-10 (Rulemaking Petition: Implementing the Consolidated and Further Continuing Appropriations Act, 2015) (emphasis added). The NRSC stated that any questions regarding the legal proceedings accounts “may be resolved more efficiently through the advisory opinion process.” *Id.*

¹¹⁷ *Id.* Put differently, the relevant legal landscape has not been recently “remade.” See *Campaign Legal Ctr. v. FEC*, 312 F. Supp. 3d 153, 166 (D.D.C. 2018) (finding decision by three Commissioners to dismiss allegations because of fair notice concerns was not contrary to law where matters involved “an issue of first impression, in a campaign finance environment remade by *Citizens United*, where existing Commission regulations and precedent offered few helpful clues about how the straw donor prohibition applied”), *aff’d*, 952 F.3d 352 (D.C. Cir. 2020).

1 not provided guidance on the permissible scope of payments from a national party committee's
2 legal proceedings account.¹¹⁸ But the Commission *has* provided guidance on the use of legal
3 proceedings accounts — termed recount funds prior to the 2015 Appropriations Act — for
4 campaign activities. As shown above, the Commission has since the 1970s consistently stated
5 that campaign activities may not be paid for with recount funds. The payments in MURs 7358
6 and 7390, unlike here, were for quintessential legal services: legal representation of an
7 individual in a defamation lawsuit (MUR 7358) and for legal representation in connection with a
8 Department of Justice and congressional investigation into potential violations of federal law
9 (MUR 7390).¹¹⁹

10 By contrast, the NRSC's TV ads appear to be conventional attack ads. The only aspect of
11 the ads that assertedly brings them into the realm of permissible funding from the NRSC's legal
12 proceedings account is the “short code” that makes no express mention of recounts or other legal
13 proceedings. Therefore, the concern that animated the Commission's dismissal decisions in
14 MURs 7358 and 7390 (*i.e.*, lack of guidance as to the scope of *legal* expenses that may be paid
15 from a national party committee's legal proceedings account) is not present here. To the extent
16 that the reporting by the *New York Times* and others correctly captured an issue with the NRSC
17 spending down its general account funds too quickly in the runup to the 2022 midterms, and
18 prompting a pivot to spending from the legal proceedings account despite the risk of that being

¹¹⁸ F&LA at 9, MUR 7390 (Republican National Committee); F&LA at 6, MUR 7358 (Rosen for Nevada, *et al.*).

¹¹⁹ See F&LA at 12, MUR 7934 (Xochitl for New Mexico, *et al.*) (law firm's representation of an individual in a lawsuit is a “quintessential legal service”).

1 found illegal, one could infer from the circumstances that the NRSC knew of and assumed that
2 risk, undermining the fairness concerns it has articulated in its Response.¹²⁰

3 Finally, even if the NRSC was correct that enforcement in this context would raise due
4 process concerns, such concerns are relevant to remedy, not liability.

5 2. Payments to America Rising LLC for “Research” and TAG LLC for
6 “Digital Consulting”
7

8 The NRSC’s payments to America Rising LLC and TAG LLC present a closer question.
9 Commission regulations state that the provision of anything of value with respect to “a recount
10 of the results of a Federal election, or an election contest concerning a Federal election” is not a
11 “contribution” or an “expenditure.”¹²¹ The Commission has explained that recounts and election
12 contests “though they are related to elections, are not Federal elections as defined by the Act.”¹²²
13 By contrast, a “runoff election” is an “election.”¹²³

14 In Advisory Opinion 2006-24 (NRSC), the Commission approved of the use of recount
15 funds for post-election litigation insofar as it concerned “the casting and counting of ballots.”¹²⁴
16 Advisory Opinion 2006-24 is specifically cited in the legislative history for 52 U.S.C.
17 § 30116(a)(9)(C), and because *legal* research is an integral part of any litigation, the NRSC may
18 use its legal proceedings account to pay for legal research in connection with post-election
19 litigation concerning the casting and counting of ballots.

¹²⁰ See *supra* note 4.

¹²¹ See 11 C.F.R. § 100.91 (“A gift, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election, is not a contribution except that the prohibitions of 11 CFR 110.20 and part 114 apply.”); 11 C.F.R. § 100.151 (same as to expenditures).

¹²² Explanation and Justification of 1976 Amendments to Federal Election Campaign Act of 1971, H.R. Doc. No. 95-44, at 40 (Jan. 12, 1977).

¹²³ 52 U.S.C. § 30101(1)(A).

¹²⁴ AO 2006-24 at 2.

1 At this stage, the question of whether the record indicates that the NRSC's January 19,
2 2021 disbursement to America Rising LLC for "research" was a legal proceedings expense, or a
3 campaign expense is a close one. The Response includes a sworn declaration from the NRSC's
4 general counsel stating that this disbursement was for "research services rendered to the NRSC
5 related to preparing for potential litigation in connection with the January 5, 2021 Georgia U.S.
6 Senate runoff election."¹²⁵ Unlike the TV ads discussed above, these expenditures were reported
7 as being made after the January 5, 2021 runoff election.

8 Nevertheless, we believe that the available information supports finding reason to believe
9 that the NRSC's January 19, 2021 disbursement to America Rising may have been for campaign
10 activities. First, America Rising is neither a law firm nor a *legal* research firm. Instead, it is an
11 opposition research firm.¹²⁶ The specific types of "research" it advertises are research reports on
12 candidates' backgrounds¹²⁷ and "opposition research books."¹²⁸ The Commission concluded in
13 MURs 7291 & 7449 that the apparent opposition research at issue in those matters was not

¹²⁵ Resp. at Ex. A.

¹²⁶ See America Rising, About Us, <https://americarisingcorp.com/about-us/> (last visited Oct. 26, 2023) ("America Rising LLC is a research and communications firm whose mission is to produce the content necessary to wage effective earned and paid media strategies"); see also Katie Zezima, *America Rising to help Republicans make inroads with independent female voters*, WASH. POST (July 7, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/07/07/america-rising-to-help-republicans-make-inroads-with-independent-female-voters/>; Zeke J. Miller, *For-Profit GOP Opposition Research Group Reports Major Haul*, TIME (Jan. 31, 2014), <https://time.com/3348/for-profit-gop-opposition-research-group-reports-major-haul/>.

¹²⁷ See America Rising, Services, <https://americarisingcorp.com/services/> (select "Rapid Response & Research Support") ("Our team produces comprehensive research reports that provide our clients with ready-made content for use in message testing, digital strategies, earned media, and traditional paid media. Our reports provide a full spectrum understanding of a candidate's background utilizing legal documents, personal financial disclosures, business records, news accounts, other open source or subscription-based datasets, as well as proprietary information.").

¹²⁸ *Id.* (select "Opposition Research Books") ("No research report can be considered complete relying exclusively on online content. [America Rising] has the ability to quickly pull primary documents from libraries, court houses, governmental agencies, and other record keepers across the country; and has an in-house attorney who specializes in Freedom of Information Act and state-specific public records requests. This information brings original source material to unreported or underreported narratives.").

1 accurately described as legal services.¹²⁹ Second, the NRSC did not report its \$27,709 payment
2 to America Rising as being for *legal* research.¹³⁰ In fact, the Commission has no record of any
3 committee having ever reported disbursements to America Rising for “legal research” or any
4 other legal-related purpose. And while America Rising “has an in-house attorney who
5 specializes in Freedom of Information Act and state-specific public records requests,” that
6 service appears to be part and parcel of its opposition research on candidates.¹³¹ Finally, the
7 NRSC has not provided details on *how* America Rising’s research related to preparing the NRSC
8 for potential litigation.¹³² Because the NRSC’s January 19, 2021 disbursement to America
9 Rising appears to have been for opposition research and not legal research, it does not appear to
10 fall within the scope of 52 U.S.C. § 30116(a)(9)(C).

11 The NRSC identified its January 19, 2021 disbursement to TAG LLC of \$7,750 as being
12 for “the creation of a website that provided voters with information on how to cure their absentee
13 ballots after the January 5, 2021 runoff election.”¹³³ The NRSC argues that in AO 2006-24, the
14 Commission permitted the NRSC’s recount fund to pay for “recount activities,” including
15 “expenses resulting from . . . counting of provisional and absentee ballots” in addition to “post-
16 election . . . administrative-proceeding expenses concerning the casting and counting of ballots

¹²⁹ F&LA at 7-9 (finding reason to believe the DNC misreported the purpose of its disbursements to the law firm Perkins Coie by reporting payments for opposition research as “legal services”) & Cert. MURs 7291 & 7449 (DNC) (Dec. 16, 2021) (finding probable cause the DNC violated 52 U.S.C. § 30104(b)(5)(A), (b)(6)(B)(v), and 11 C.F.R. § 104.3(b)(3)(i) by failing to report the proper purpose of the funds it paid to the law firm Perkins Coie for opposition research performed by Fusion GPS).

¹³⁰ See F&LA at 8, MURs 7291 & 7449 (DNC) (“The fact that the DNC’s initial payment to Perkins Coie for services supported by Fusion disclosed the purpose of ‘Research Consulting,’ indicates that the DNC was aware that ‘research’ was the specific purpose of this and later disbursements to Perkins Coie for its work supported by Fusion.”).

¹³¹ *Supra* note 128.

¹³² See F&LA at 8, MURs 7291 & 7449 (DNC) (noting that “the Committee has not provided details on how Fusion’s research supported Perkins Coie’s legal work”).

¹³³ Resp. at 12.

1 during the Federal election.”¹³⁴ The NRSC appears to be correct that a disbursement for the
2 creation of a website to inform voters how to cure their absentee ballots after a runoff election is
3 similar to “post-election . . . administrative-proceeding expenses concerning the casting and
4 counting of ballots during the Federal election,” which the Commission advised *could* be paid
5 for with recount funds.¹³⁵

6 TAG’s website advertises that it offers “web design and development” services, and
7 numerous committees have reported disbursements to TAG for “web”-related services, such as
8 “website development and hosting” and “web development/marketing.”¹³⁶ And unlike America
9 Rising, TAG appears to be a marketing firm, and not an opposition research firm.¹³⁷ Thus, the
10 available information indicates that the NRSC’s January 19, 2021 disbursement to TAG was for
11 the creation of a website and is consistent with the statement in the NRSC’s general counsel’s
12 declaration that the website “provided voters who cast absentee ballots in the January 5, 2021
13 Georgia U.S. Senate runoff election with information on how to cure their absentee ballots after
14 the runoff election.”¹³⁸

15 With respect to the NRSC’s June 22, 2022 disbursement to TAG of \$207,852, the NRSC
16 states that the disbursement was for “digital and communication services rendered” to Doctor Oz

¹³⁴ *Id.*

¹³⁵ AO 2006-24.

¹³⁶ TAG Strategies, <https://tagstrategies.co/services/> (“TAG’s in-house web development team produces cutting-edge websites with stable and trusted site hosting. Tailored to your organization and goals, our team designs and creates beautiful and effective custom websites to tell your story and reach your audience.”); *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&two_year_transaction_period=2024&min_date=01%2F01%2F2023&max_date=12%2F31%2F2024 (last visited Oct. 26, 2023) (search recipients for “TAG”).

¹³⁷ *Id.*

¹³⁸ Resp. at 12, Ex. A.

1 for Senate in connection with the 2022 Pennsylvania Republican Primary recount.¹³⁹ We have
 2 no further information what the NRSC means by “digital and communication services.” Absent
 3 additional information, and because TAG appears to be a marketing firm, and not an opposition
 4 research firm, the record does not indicate that this disbursement falls outside the scope of
 5 52 U.S.C. § 30116(a)(9)(C).

6 3. Payment to Simo Cloud for “Direct Mail Production”

7 The NRSC identified its June 8, 2022 disbursement of \$3,250 to Simo Cloud as being for
 8 “a direct mail fundraising appeal for the Legal Proceedings Account.”¹⁴⁰ The NRSC’s also
 9 included a copy of the mailing with its Response.¹⁴¹ In sharp contrast to the NRSC’s TV ads
 10 discussed above, the mailing clearly requests funds for the NRSC’s legal proceedings account:
 11 “I’m asking you to support the NRSC’s Legal Fund today,” “send your most generous gift to the
 12 NRSC Legal Fund,” “[y]our generous support of the NRSC Legal Fund.”¹⁴² The mailing does
 13 not appear to be for any purpose other than raising funds for the NRSC’s legal proceedings
 14 account. Accordingly, it appears that the entirety of the direct mailing’s costs may properly be
 15 paid from the NRSC’s legal proceedings account.

16 * * *

17 Taken together, 52 U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1) prohibit the NRSC
 18 from spending its Legal Proceedings Account funds for campaign related expenses. Under the
 19 guidance provided in Advisory Opinions 2010-14 and 2022-21, expenses attributable to more
 20 than one purpose may be paid from the NRSC’s legal proceedings account if the payments for

¹³⁹ *Id.* at 3, Ex. A.

¹⁴⁰ *Id.* at 4, Ex. A.

¹⁴¹ *Id.* at Ex. B.

¹⁴² *Id.*

1 campaign activities are properly allocated.¹⁴³ Here, the NRSC's TV ads appear to have been
2 campaign related, if not completely then at least in part, given their focus on opposing
3 candidates. As a result, the \$3,390,321 the NRSC paid for the TV ads should not have been
4 entirely from the NRSC's legal proceedings account." Further, the NRSC's \$27,709
5 disbursement to America Rising LLC appears to have been a campaign related expense that was
6 paid from the NRSC's legal proceedings account. Accordingly, we recommend that the
7 Commission find reason to believe that the NRSC violated 52 U.S.C. § 30116(f) and 52 U.S.C.
8 § 30125(a)(1) by knowingly paying for campaign expenses from its legal proceedings account.¹⁴⁴
9 We also recommend that the Commission find no reason to believe that the NRSC's
10 disbursements to TAG LLC on January 19, 2021 and June 22, 2022 for digital consulting
11 violated 52 U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1) because the record does not indicate
12 those payments were not for permissible legal expenses. Finally, because the NRSC's June 8,
13 2022 payment to Simio Cloud appears to be for a mailing clearly soliciting funds for the NRSC's
14 legal proceedings account and not for campaign activities, we recommend that the Commission
15 find no reason to believe that the NRSC's payment to Simio Cloud for direct mail production
16 violated 52 U.S.C. §§ 30116(f) and 30125(a)(1).

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¹⁴³ AO 2006-24; AO 2010-14.

¹⁴⁴ Because this matter involves the expenditure of its own legal proceedings account funds, it appears that the NRSC had knowledge of the facts that made its conduct unlawful. *See supra* note 53 (reviewing "knowingly" standard as used in 52 U.S.C. § 30116(f)).

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10 **VI. RECOMMENDATIONS**

- 11 1. Find reason to believe that the NRSC and Keith Davis in his official capacity as
12 treasurer violated 52 U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1) by disbursing
13 funds from its legal proceedings account under 52 U.S.C. § 30116(a)(9)(C) to
14 OnMessage Inc., SRCP Media Inc., and The O'Donnell Group for "media
15 placement," "media production," and "media," and to America Rising, LLC for
16 "research";
17
- 18 2. Find no reason to believe that the NRSC and Keith Davis in his official capacity as
19 treasurer violated 52 U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1) by disbursing
20 funds from its legal proceedings account under 52 U.S.C. § 30116(a)(9)(C) to TAG
21 LLC for "digital consulting" and to Simio Cloud for "direct mail production";
22
- 23 3. Authorize the use of compulsory process;
24
- 25 4. Approve the attached Factual and Legal Analysis; and
26
- 27 5. Approve the appropriate letters.
28

29 Lisa J. Stevenson
30 Acting General Counsel

31
32
33 *Charles Kitcher*

34 October 26, 2023
Date

35 Charles Kitcher
36 Associate General Counsel for
Enforcement

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Mark Allen

Mark Allen
Assistant General Counsel

Christopher S. Curran

Christopher S. Curran
Attorney

Attachment:

1. Factual and Legal Analysis for NRSC

1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**
3

4 **RESPONDENTS:** NRSC and **MUR: 8071**
5 Keith Davis in his official
6 capacity as treasurer
7

8 **I. INTRODUCTION**

9 The Complaint in this matter alleges that the NRSC and Keith Davis, in his official
10 capacity as treasurer (the “NRSC”), violated the Federal Election Campaign Act of 1971, as
11 amended (the “Act”), by paying for “campaign activities” from its segregated account designated
12 for election recounts and contests and other legal proceedings (“legal proceedings account”).
13 Specifically, the Complaint points to twelve disbursements — nine disbursements for “media
14 placement,” “media production,” “media,” and “direct mail production,” and three disbursements
15 for “digital consulting,” and “research” — that it alleges were for campaign expenses.

16 The NRSC denies the allegations. It argues that the nine disbursements for “media
17 placement,” “media production,” “media,” and “direct mail production” were permissible
18 fundraising expenses, made in the form of TV ads and direct mail, that were allowed to be paid
19 from the NRSC’s legal proceedings account. It also argues that the three disbursements for
20 “digital consulting” and “research” were permissibly paid from that account because those
21 disbursements were for services related to recounts or preparations for potential legal
22 proceedings.

23 For the reasons set forth below, the Commission finds reason to believe that the NRSC
24 violated 52 U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1) by using funds from its legal
25 proceedings account to pay for campaign activities in the form of “media placement,” “media
26 production,” “media,” and “research.” The Commission finds no reason to believe with respect
27 to the complained-of disbursements for “digital consulting” and “direct mail production.”

1 **II. FACTUAL BACKGROUND**

2 The NRSC is a national committee of the Republican Party.¹ It is “solely devoted to
3 strengthening the Republican Senate Majority and electing Republicans to the United States
4 Senate.”² Following the Consolidated and Further Continuing Appropriations Act, 2015 (the
5 “2015 Appropriations Act”), the NRSC established “[a] separate segregated account . . . which
6 is used to defray expenses incurred with respect to the preparation for and the conduct of election
7 recounts and contests and other legal proceedings.”³

8 **A. NRSC Finances During the 2021-2022 Election Cycle**

9 The Complaint cites a *New York Times* article that reported that the NRSC was short of
10 funds by September 2022.⁴ That article reported that at the start of the 2022 election cycle, the
11 NRSC had raised over \$181 million but by September 2022, weeks before the November 2022
12 midterm elections, it had spent 95% of the funds raised.⁵ In addition to reporting on the overall
13 state of the NRSC’s finances, the *New York Times* reported that the NRSC’s largest expense in

¹ NRSC, Amended Statement of Organization (Nov. 10, 2022), <https://docquery.fec.gov/pdf/540/202211109546748540/202211109546748540.pdf>.

² NRSC, About Us, <https://www.nrsc.org/about-us/> (last visited Oct. 26, 2023).

³ Resp. at 2 (Dec. 21, 2022) (quoting the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2773 (2014)).

⁴ Compl. at 3 n.3 (Sept. 19, 2022) (citing Shane Goldmacher, *How a Record Cash Haul Vanished for Senate Republicans*, N.Y. TIMES (Sept. 3, 2022), <https://www.nytimes.com/2022/09/03/us/politics/senate-republican-committee-funds.html>). Other news outlets also reported on the NRSC’s finances leading up to the 2022 midterm elections. See Isaac Aarnsdorf, *It’s a rip-off’: GOP spending under fire as Senate hopefuls seek rescue*, WASH. POST (Aug. 16, 2022), <https://www.washingtonpost.com/politics/2022/08/19/gop-senate-rescue-midterms/>; Manu Raju & Alex Rogers, *‘It concerns me a lot’: Republicans anxious about cash-strapped NRSC amid Scott’s feud with McConnell*, CNN POLITICS (Sept. 6, 2022), <https://www.cnn.com/2022/09/06/politics/rick-scott-mitch-mcconnell-republican-senate-fundraising/index.html>; Juliegrace Brufke, *Rick Scott stands by handling of NRSC in memo to donors*, WASH. EXAMINER (Sept. 8, 2022), <https://www.washingtonexaminer.com/news/campaigns/rick-scott-stands-by-handling-nrsc-memo-donors>.

⁵ Goldmacher, *supra* note 4.

1 July 2022, a \$1 million media buy for advertisements, was paid from NRSC’s legal proceedings
 2 account.⁶

3 **B. The Complaint**

4 The Complaint identifies twelve disbursements (*see* Figure 1) which it alleges violated
 5 52 U.S.C. § 30116(f) because they were made from the NRSC’s legal proceedings account but
 6 were for campaign activities and not any election recount, contest, or other legal proceeding.⁷
 7 The purpose descriptions of these disbursements were “media placement,” “media production,”
 8 “media,” “direct mail production,” “digital consulting,” and “research.”⁸ In addition to relying
 9 on the *New York Times* article regarding the NRSC’s funds, the Complaint contends that the
 10 NRSC’s disbursements appear to be campaign expenses because the websites of the various
 11 recipients of the NRSC’s payments (*i.e.*, the vendors) do not show their available services as
 12 including election recount or other legal services.⁹

FIGURE 1 – Disbursements Identified in the MUR 8071 Complaint			
Date	Recipient	Disbursement Description	Amount
1/19/2021	TAG LLC	LEGAL PROC - DIGITAL CONSULTING	\$7,750.00
1/19/2021	AMERICA RISING LLC	LEGAL PROC - RESEARCH	\$27,709.00
3/26/2021	ON MESSAGE INC	LEGAL PROC - MEDIA PLACEMENT	\$999,982.00
4/7/2021	ON MESSAGE INC	LEGAL PROC - MEDIA	\$27,650.00
6/23/2021	ON MESSAGE INC	LEGAL PROC - MEDIA	\$223,978.00
4/22/2022	ON MESSAGE INC	LEGAL PROC - MEDIA PLACEMENT	\$1,067,235.00
5/10/2022	THE O'DONNELL GROUP	LEGAL PROC - MEDIA	\$19,995.00
5/18/2022	THE O'DONNELL GROUP	LEGAL PROC - MEDIA	\$11,154.00

⁶ *See id.*

⁷ Compl. at 8.

⁸ *Id.*

⁹ *Id.* at 4 (describing OnMessage Inc.’s website as advertising a variety of “campaign services,” such as “creative,” “digital,” “opinion research,” and “issue advocacy”), 5 (describing services provided by TAG, LLC as offering “consulting and advising,” “digital marketing and fundraising,” and “web design and development,” but “no legal or election recount-related services”), 6 n.15 (noting that “The O’Donnell Group” and “Simio Cloud” do not appear to have websites and that other committees have not reported payments to those vendors as being for legal services, but instead have reported payments for “travel,” “political consulting,” and “fundraising consulting,” and “list rental” or “list acquisition,” respectively).

6/8/2022	SRCP MEDIA INC.	LEGAL PROC - MEDIA PRODUCTION	\$2,618.00
6/8/2022	SIMIO CLOUD	LEGAL PROC - DIRECT MAIL PRODUCTION	\$3,250.00
6/22/2022	TAG LLC	LEGAL PROC - DIGITAL CONSULTING	\$207,852.00
7/28/2022	ON MESSAGE INC	LEGAL PROC - MEDIA	\$1,006,751.00
		TOTAL	\$3,605,924.00

1 **C. The Response**

2 The NRSC’s Response acknowledges that it used its legal proceedings account to make
 3 the disbursements identified in the Complaint.¹⁰ The NRSC identifies the disbursements for
 4 “media,” “media placement,” “media production,” and “direct mail production,” as being for
 5 eight television advertisements and one mailing. The NRSC contends that it was permitted to
 6 pay for these communications from its legal proceedings account because they were not
 7 campaign expenses. In support of its assertion that the ads were not campaign expenses, the
 8 NRSC relies on what it characterizes as the “framework” established by Advisory Opinion 2022-
 9 21 (DSCC, *et al.*).¹¹ The NRSC views that framework as permitting disbursements from its legal
 10 proceedings account for solicitations to its legal proceedings account, unless the solicitations
 11 qualify as party coordinated communications.¹² The NRSC then concludes that its complained-
 12 of disbursements were not for party coordinated communications and are therefore permissible.¹³

13 The NRSC states that the two disbursements to TAG LLC were for a website that gave
 14 voters information on how to cure ballots after the 2021 U.S. Senate runoff election in Georgia,
 15 and for “digital and communication services rendered” to Doctor Oz for Senate in connection

¹⁰ Resp. at 11, 13 (stating the NRSC’s Legal Proceedings Account “properly paid for” the expenses).

¹¹ *Id.* at 14.

¹² *Id.*

¹³ *Id.*

1 with the 2022 Pennsylvania Republican U.S. Senate primary election recount.¹⁴ The NRSC
 2 identifies the disbursement to America Rising LLC as being for research related to potential
 3 litigation in connection with the 2021 Georgia runoff election.¹⁵ The NRSC’s Response includes
 4 a declaration from its General Counsel attesting to details regarding each of the disbursements at
 5 issue,¹⁶ as well as the specific mail piece and scripts and on-screen descriptions of the television
 6 ads at issue.¹⁷

7 **III. LEGAL BACKGROUND**

8 Under the Act, a “contribution” is “anything of value made by any person for the purpose
 9 of influencing any election for Federal office.”¹⁸ An “expenditure” is similarly defined.¹⁹
 10 Commission regulations state that “anything of value made with respect to a recount of the
 11 results of a Federal election, or an election contest concerning a Federal election,” is not a
 12 contribution or an expenditure.²⁰

13 **A. Historical Treatment of Recount Funds**

14 The Commission has long interpreted the Act to exclude donations to “cover costs of
 15 recounts and election contests” because, though they are related to elections, recounts and
 16

¹⁴ *Id.* at 3.

¹⁵ *Id.*

¹⁶ *Id.* at Ex. A (Declaration of NRSC general counsel Ryan Dollar).

¹⁷ *Id.* at pp. 4-7, Exs. A-J.

¹⁸ 52 U.S.C. § 30101(8)(A)(i).

¹⁹ *Id.* § 30101(9)(A)(i).

²⁰ 11 C.F.R. §§ 100.91, 100.151. In 2002, these regulations were recodified without substantive change from 11 C.F.R. §§ 100.7(b)(20), 100.8(b)(20). *See* Reorganization of Regulations on “Contribution” and “Expenditure,” 67 Fed. Reg. 50582 (Aug. 5, 2002); Federal Election Regulations, H. R. Doc. No. 44, 95th Cong., 1st Sess. at 40 (1977); Amendments to Federal Election Campaign Act Amendments of 1971; Regulations Transmitted to Congress, 45 Fed. Reg. 15080 (Mar. 7, 1980). Prior to 1980, similar provisions appeared at 11 C.F.R. §§ 100.4(b)(15), 100.7(b)(17). *See* 11 C.F.R. §§ 100.4(b)(15), 100.7(b)(17) (1977).

1 election contests are not federal elections as defined by the Act.²¹ That principle appears to have
2 been first applied in MUR 327. In that matter, the Commission found no reason to believe that a
3 candidate violated the Act by accepting \$10,000 from an unknown source as part of an effort to
4 win a recount.²² Because the Act’s definitions of “contribution,” “expenditure,” and “election”
5 excluded recounts, the Commission did not consider the donations for the purpose of an election
6 recount or otherwise contesting the results of an election as subject to the Act’s contribution
7 limits or its disclosure requirements.²³

8 The Commission affirmed that view in Advisory Opinion 1978-92 (Miller) and Advisory
9 Opinion 1998-26 (Landrieu).²⁴ In those opinions, the Commission concluded that separate
10 entities established by a candidate’s committee in order to fund recounts and election contests
11 were not subject to the Act’s contribution limits or its disclosure requirements.²⁵ The
12 Commission advised, however, such recount funds could not be used to make contributions or
13 expenditures.²⁶

²¹ Federal Election Regulations, H. R. Doc. No. 44, 95th Cong., 1st Sess. at 40 (1977).

²² See Certification (“Cert.”) (Feb. 1, 1977), MUR 327 (Quincy Collins).

²³ First GCR at 1-2, MUR 327 (Quincy Collins) & Cert. (Feb. 1, 1977).

²⁴ Advisory Opinion 1978-92 (Miller) (“AO 1978-92”) (funds received by separate entity established by the candidate solely for the purposes of funding a recount is not subject to the Act’s contribution limitations, and does not trigger political committee status or reporting obligations, but is subject to the Act’s prohibitions on contributions from labor organizations, corporations, and national banks); Advisory Opinion 1998-26 (Landrieu) (“AO 1998-26”) (same as to separate entity established to fund election contests). These two advisory opinions were superseded, in part, by Advisory Opinion 2006-24 (NRSC, *et al.*) (“AO 2006-24”). Nevertheless, the Commission continued to cite AO 1978-92 for the proposition that a national party committee’s recount funds may not be used for campaign activities. See Advisory Opinion 2010-14 at 5 (DSCC).

²⁵ AO 1998-26 at 3; AO 1978-92 at 2. The prohibitions on contributions from foreign nationals and corporations, labor organizations, and national banks still applied, however.

²⁶ AO 1998-26 at 3; AO 1978-92 at 3.

1 **B. Treatment of Recount Funds Following the Bipartisan Campaign Reform**
2 **Act**

3
4 In the years prior to the passage of the Bipartisan Campaign Reform Act of 2002
5 (“BCRA”), “certain corporations, labor unions, and wealthy individuals sought to bypass
6 [certain] contribution limits by making so-called ‘soft money’ contributions to political
7 parties.”²⁷ The national parties used unlimited soft money donations, together with a proportion
8 of “hard money” raised pursuant to the Act’s source and amount limits, for “mixed” activities
9 purportedly affecting both federal and state elections, including advertising that “did not
10 expressly advocate the election or defeat of a federal candidate” but was in fact primarily
11 designed to affect federal elections.²⁸ In 1998, after an extensive investigation, the Senate
12 Committee on Governmental Affairs issued a report detailing the influence that soft money had
13 come to wield in the electoral and legislative processes.²⁹ The six-volume, 9,500-page report
14 concluded that the parties’ ability to solicit and spend soft money had completely undercut the
15 Act’s source-and-amount limitations.³⁰

16 As the Supreme Court described it, Congress’s response to the rise of soft money (and
17 other concerns) in BCRA took “national parties out of the soft-money business.”³¹ BCRA’s soft

²⁷ *Rufer v. FEC*, 64 F. Supp. 3d 195, 199 (D.D.C. 2014).

²⁸ *Republican Nat’l Comm. v. FEC*, 698 F. Supp. 2d 150, 153 (D.D.C. 2010), *aff’d*, 561 U.S. 1040 (2010).

²⁹ *McConnell v. FEC*, 540 U.S. 93, 129 (2003); S. REP. NO. 105-167 (1998).

³⁰ *McConnell*, 540 U.S. at 129-32.

³¹ *Id.* at 133 (2003); 147 CONG. REC. S2696 (daily ed. Mar. 22, 2001) (“The soft money ban is the centerpiece of this bill. Our legislation shuts down the soft money system, prohibiting all soft money contributions to the national political parties from corporations, labor unions, and wealthy individuals.”) (statement of Sen. Feingold); 147 CONG. REC. S3251 (daily ed. Apr. 2, 2001) (soft money ban is designed to ensure “that national parties, federal officeholders and federal candidates use only funds permitted in federal elections to influence federal elections”) (statement of Sen. Thompson); 148 CONG. REC. H409 (daily ed. Feb. 13, 2002) (“Because the national parties operate at the national level, and are inextricably intertwined with federal officeholders and candidates, who raise the money for the national party committees, there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process”) (statement of Rep. Shays).

1 money ban prohibits, among other things, national political parties from soliciting, receiving,
2 directing, donating, transferring, or spending funds unless the funds are subject to the limitations,
3 prohibitions, and reporting requirements of the Act.³² BCRA also prohibits candidates and
4 federal officeholders from soliciting, receiving, directing, transferring, or spending funds “in
5 connection with an election for Federal office” unless the funds are subject to the limitations,
6 prohibitions, and reporting requirements of the Act, or in connection with an election for
7 non-federal office unless the funds are subject to the limitations and prohibitions of the Act.³³

8 In Advisory Opinion 2006-24 (NRSC), the Commission determined that BCRA’s soft
9 money ban applied to a federal candidate’s recount fund, as well as to a recount fund of a state
10 political party committee for use in federal elections. While the Commission acknowledged that
11 recounts themselves are not included in the Act’s definition of “election,” the Commission
12 concluded that funds in a recount fund are still raised and spent “in connection with” an election
13 for federal office and are therefore required to comply with the Act’s amount limitations and
14 source prohibitions.³⁴ The Commission also reiterated its pre-BCRA finding that recount funds
15 “are not otherwise permitted to be used for campaign activity.”³⁵

16 Subsequently, in Advisory Opinion 2009-04 (Franken/DSCC), the Commission advised
17 that a national party committee “may establish a recount fund, separate from its other accounts

³² Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 101(a), 116 Stat. 81, 84 (2002);
52 U.S.C. § 30125(a)(1).

³³ 52 U.S.C. § 30125(e)(1)(A)-(B).

³⁴ See AO 2006-24 at 6, 8 (NRSC, *et al.*) (interpreting 2 U.S.C. § 441i(e), since recodified at 52 U.S.C. § 30125(e)). At the same time, the Commission distinguished between activity “in connection with an election” (not subject to coordinated spending limitations) and activity “in connection with a general election campaign” (subject to coordinated spending limitations). *Id.* at 9. The Commission concluded that the coordinated spending limits did not apply because recount funds “are not in connection with the general election campaign of the Federal candidate because the campaign has ended and because such funds are not otherwise permitted to be used for campaign activity.” *Id.*

³⁵ *Id.* at 9.

1 and subject to a separate limit on amounts received, and use that fund to pay expenses incurred in
2 connection with recounts and election contests of Federal elections.”³⁶ Then, in Advisory
3 Opinion 2010-14 (DSCC), the Commission reaffirmed that “recount activities paid for by the
4 [DSCC’s] recount fund must have no relation to campaign activities.”³⁷ In AO 2010-14, the
5 Commission recognized that some of the DSCC’s expenses — such as expenses for “attorneys
6 and staff for the purpose of conducting research and making preparations for possible recounts
7 and election contests. . . . [and] the costs of soliciting donations to the recount fund” — may be
8 attributable to more than one purpose.³⁸ The Commission approved the DSCC’s proposal to use
9 the recount fund to pay recount-related expenses incurred before the general election; to defray
10 the costs of soliciting donations to its recount fund; and to hold fundraising events to raise both
11 contributions and recount funds, provided that the DSCC’s recount solicitations *clearly stated*
12 *the purpose of the fund and noted that no donations to the fund will be used for the purpose of*
13 *influencing any Federal election.*³⁹

14 C. The 2015 Consolidated and Further Continuing Appropriations Act

15 The 2015 Appropriations Act, among other things, amended the Act by adding 52 U.S.C.
16 § 30116(a)(9)(C), which permits national party committees — such as the NRSC — to create a
17 separate segregated account “to defray expenses incurred with respect to the preparation for and
18 the conduct of election recounts and contests and other legal proceedings.”⁴⁰ Such accounts are

³⁶ Advisory Opinion 2009-04 at 2-3 (Franken/DSCC) (“AO 2009-04”) (citing AO 2006-24).

³⁷ Advisory Opinion 2010-14 at 5 (DSCC) (“AO 2010-14”) (citing AO 1978-92 (Miller)).

³⁸ AO 2010-14 at 6-7 (DSCC) (citing 11 C.F.R. § 9003.3(a)(1)(A) which requires solicitations by major party presidential candidates and nominees for a legal and accounting compliance fund to state, among other things, that “contributions will be used solely for legal and accounting services”).

³⁹ *Id.*

⁴⁰ Pub. L. No. 113-235, 101, 128 Stat. 2130, 2772-73 (2014) (codified at 52 U.S.C. § 30116(a)(9)(C)).

1 in addition to any other federal accounts maintained by a national party committee and are
2 subject to contribution limits equal to 300% of the otherwise-applicable contribution limit to
3 national party committees.⁴¹ In addition, disbursements from such accounts are not subject to
4 coordinated party expenditure limits.⁴²

5 Statements by House and Senate leaders made during the passage of the 2015
6 Appropriations Act explained that “Commission precedent” — specifically, the advisory
7 opinions discussed above, AO 2006-24 and AO 2009-04 — permitting the raising and spending
8 of recount funds would continue to apply to national party committee accounts established under
9 52 U.S.C. § 30116(a)(9)(C).⁴³

10 Consistent with that precedent, the Commission determined in Advisory Opinion 2019-
11 02 (Bill Nelson for Senate) that funds in the DSCC’s legal proceedings account “could not be
12 used for the purpose of influencing a federal election.”⁴⁴ Most recently, in Advisory Opinion
13 2022-21 (DSCC, *et al.*), the Commission advised that the DSCC must pay for television
14 advertisements that feature federal candidates and solicit donations to its legal proceedings
15 account subject to a reasonable cost allocation among the committee’s accounts.⁴⁵ Relying on
16 Advisory Opinion 2010-14, the Commission required allocation to the extent the committee’s
17 solicitations served more than one purpose — *i.e.*, a solicitation of funds for the committee’s
18 legal proceedings account, which the opinion describes as “recount activities,” as distinguished

⁴¹ 52 U.S.C. § 30116(a)(1)(B), (2)(B).

⁴² 52 U.S.C. § 30116(d)(5); *see also* 11 C.F.R. §§ 109.30, 109.32(a)(1).

⁴³ 160 CONG. REC. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner); 160 CONG. REC. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid).

⁴⁴ AO 2019-02 at 4 (Bill Nelson for Senate).

⁴⁵ AO 2022-21 at 5, 8 (DSCC, *et al.*).

1 from party coordinated communications, which the opinion considered as being within
 2 “campaign activities.”⁴⁶

3 IV. LEGAL ANALYSIS

4 The NRSC, as a national committee of a political party, may not solicit, receive, or direct
 5 to another person a contribution,⁴⁷ donation,⁴⁸ or transfer of funds or any other thing of value, or
 6 spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements
 7 of the Act.⁴⁹ 52 U.S.C. § 30116(a) sets forth limits on how much a person may contribute to a
 8 national committee of a political party.⁵⁰ During the 2022 election cycle, persons could not
 9 contribute more than \$36,500 in a calendar year to NRSC,⁵¹ except that contributions up to the
 10 amount of \$109,500 were permitted to be made to the following two types of accounts:

11 A separate segregated account of a national committee of a
 12 political party (including a national congressional campaign
 13 committee of a political party) which is *used solely to defray*
 14 *expenses incurred with respect to the construction, purchase,*
 15 *renovation, operation, and furnishing of one or more headquarters*
 16 *buildings of the party . . .*

17 A separate segregated account of a national committee of a
 18 political party (including a national congressional campaign
 19 committee of a political party) which is *used to defray expenses*
 20 *incurred with respect to the preparation for and the conduct of*
 21 *election recounts and contests and other legal proceedings.*⁵²

⁴⁶ *Id.*

⁴⁷ The term “contribution” includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election to Federal office.” 52 U.S.C. § 30101(8)(A).

⁴⁸ A “donation” means a “payment, gift, subscription, loan, advance, deposit, or anything of value given to a person, but does not include contributions.” 11 C.F.R. § 300.2(e).

⁴⁹ 52 U.S.C. § 30125(a)(1); 11 C.F.R. § 300.10(a)(1) and (2); *see also* 11 C.F.R. § 102.5(c) (national committees of a political party “are prohibited from raising and spending non-Federal funds” after December 31, 2002).

⁵⁰ 52 U.S.C. § 30116(a)(1)(B).

⁵¹ *Id.* § 30116(a)(1)(B) and 11 C.F.R. § 110.1(c); FEC, Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 86 Fed. Reg. 7867, 7869 (Feb. 2, 2021).

⁵² 52 U.S.C. § 30116(a)(9)(B)–(C) (emphases added).

1 Section 30116(f) prohibits, among other things, candidates and political committees from
 2 knowingly accepting any contribution or making any expenditure in violation of the limits set
 3 forth in 52 U.S.C. § 30116(a).⁵³ Furthermore, Commission regulations state that “anything of
 4 value made with respect to a recount of the results of a Federal election, or an election contest
 5 concerning a Federal election,” is not a contribution or an expenditure.⁵⁴

6 **A. There is Reason to Believe that the NRSC Paid for at Least Some Campaign-**
 7 **Related Expenses From its Legal Proceedings Account in Violation of 52**
 8 **U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1)**
 9

10 1. The NRSC’s TV Ads
 11

- 12 a. The Portion of the NRSC’s TV Ads Made for Purposes Other Than
 13 Those Described in 52 U.S.C. § 30116(a)(9)(B)-(C) Are by
 14 Definition Campaign Related and Must Be Paid From Funds
 15 Raised Under the \$36,500 Contribution Limit

16 Under BCRA and the 2015 Appropriations Act, national party committees like the NRSC
 17 may only spend funds that are subject to the limitations, prohibitions, and reporting requirements
 18 of the Act; meaning funds accepted pursuant to the \$36,500 contribution limit, or funds accepted

⁵³ *Id.* § 30116(f). The word “knowingly,” as used in section 30116(f), turns on whether the committee had knowledge of the facts that make the conduct unlawful. *See FEC v. Friends of Jane Harman*, 59 F. Supp. 2d 1046, 1056 n.11 (C.D. Cal. 1999) (“A ‘knowing’ standard, as opposed to a ‘knowing and willful’ one, does not require knowledge that one is violating a law, but merely requires an intent to act.”) (quoting *FEC v. John A. Dramesi for Congress Comm.*, 640 F. Supp. 985, 987 (D. N.J. 1986)); *see also FEC v. Cal. Med. Ass’n*, 502 F. Supp. 196, 203-04 (N.D. Cal. 1980) (knowledge of the facts making conduct unlawful constitutes a knowing acceptance under the Act). Only one court appears to have ever interpreted “knowingly” as requiring actual knowledge of illegality. *See In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1044, 1047 n.3 (D.D.C. 1979). The Commission does not appear to have ever supported that interpretation. *See, e.g.,* F&LA at 4, MUR 6919 (Canseco for Congress, *et al.*) (“The ‘knowing’ acceptance of a contribution requires knowledge of the underlying facts that constitute the prohibited act, but not knowledge that the act itself — such as acceptance of an excessive contribution — is unlawful.”); Gen. Counsel’s Report (“GCR”) at 6 n.5 (Oct. 5, 1995) (recommending Commission apply standard articulated in *Dramesi* for “knowingly accept[ing]” excessive contributions) & Certification (“Cert.”) ¶ 1 (Dec. 6, 1995), MUR 3546 (Clinton for President Comm., *et al.*) (approving OGC’s recommendations); GCR at 3 (July 14, 1978) (recommending *against* applying the criminal law definition of knowingly) & Cert. ¶1 (July 19, 1978) (finding reasonable cause to believe campaign committee knowingly accepted excessive contributions) & Conciliation Agreement ¶ 10, MUR 515 (Comm. of 1976 for Bates for Congress) (in the context of accepting excessive contributions, “the term ‘knowingly accepted’ only implies that Respondent was aware of the facts of the situation and not that Respondent was aware that a violation of the Act had occurred”).

⁵⁴ 11 C.F.R. §§ 100.91, 100.151.

1 pursuant to the \$109,500 contribution limit for the limited purposes described in 52 U.S.C.
2 § 30116(a)(9)(B)-(C).⁵⁵

3 Here, it appears that the NRSC’s TV ads were campaign related and for campaign
4 activities, if not completely, then at least in large part. None of the NRSC’s TV ads mention
5 recounts or election challenges, or any legal proceedings.⁵⁶ Nor do any of the TV ads at issue
6 explicitly state that the NRSC’s request for funds was for its legal proceedings account. Instead,
7 the ads included the following brief screen messages (in English or Spanish) at the end, “Text
8 with DONATE to 55404,” with the audio “Donate today.”⁵⁷ The NRSC described the on-screen
9 55404 “short code” as “written instructions to donate to the NRSC’s Legal Proceedings
10 Account.”⁵⁸

11 Most of the TV ads explicitly call for actions against or state an imperative critical of
12 Democratic Senate candidates directly before the “donate” request.⁵⁹ Although the NRSC
13 contends that these ads sought donations of a legal proceedings account,⁶⁰ the ads in fact appear
14 mostly or entirely designed to influence viewers to view their subjects negatively and raise funds
15 for unspecified use. For example, the ad “Quieren Más Poder” states “We need to stop Pelosi
16 and Mark Kelly’s political corruption before it’s too late.”⁶¹ The ad “Against Arizona” calls on

⁵⁵ 52 U.S.C. §§ 30116(a)(1)(B)-(C), 30125(a)(1).

⁵⁶ Resp. Exs. C-J (scripts of TV ads).

⁵⁷ *Id.* Exs. C-J.

⁵⁸ *Id.* at 19, Ex. A.

⁵⁹ The senators identified in the NRSC’s TV ads were all candidates for reelection in 2022 at the time the ads aired. *See* Catherine Cortez Masto, Statement of Candidacy (Jan. 31, 2022); Raphael Warnock, Statement of Candidacy (Jan. 18, 2021); Margaret Hassan, Statement of Candidacy (Dec. 16, 2020); Mark Kelly, Statement of Candidacy (Nov. 25, 2020); Michael Bennet, Statement of Candidacy (Feb. 21, 2020).

⁶⁰ *Id.* at 13-20.

⁶¹ *Id.* at Ex. C; NRSC, *Quieren Más Poder – Kelly*, YOUTUBE (Mar. 29, 2021), <https://www.youtube.com/watch?v=Wx9EZ5CRf7w>.

1 viewers to “Tell Senator Kelly: Stop voting with Biden and against Arizona.”⁶² The ad “Daño”
2 also directs viewers to “tell Senator Kelly to stop voting with Biden.”⁶³ Such language indicates
3 a purpose separate and apart from a solicitation of funds for recounts, contests, and other legal
4 proceedings.⁶⁴ Even the ad the NRSC’s response leads with (“Power Grab”), when viewed as
5 video or read as script, is plainly about why the named candidates are “corrupt[]” and fails to
6 articulate, mention, or even suggest the idea of mounting a legal challenge to the voting
7 legislation referenced in the ad, Senate Bill 1.⁶⁵ “Goes Along,” with its message of how Senator
8 Bennet “goes along” with President Biden, described in text and conveyed in imagery converting
9 the face of the former into the face of the latter, cannot plausibly be described as a request for
10 funds election recounts, contests, or other legal proceedings.⁶⁶

11 The NRSC Response’s descriptions of the ads acknowledge their dual purpose, stating
12 that “the fundraising communications at issue *discussed incumbent officeholder positions on*
13 *policy issues* in an effort to motivate the audience to donate.”⁶⁷ But that supposed motivation to
14 donate is itself grounded in viewers’ negative reactions to the officeholder/candidate’s positions
15 on the issues identified, and not to any discussion of recounts or election contests, as shown
16 below in the NRSC’s own description of the ads:

⁶² *Id.* at Ex. G; NRSC, *Against Arizona*, YOUTUBE (Apr. 25, 2022),
<https://www.youtube.com/watch?v=kThE0xJE3mE>.

⁶³ *Id.* at Ex. H; NRSC, *Daño Damage*, YOUTUBE (Apr. 25, 2022),
<https://www.youtube.com/watch?v=W3upxdl8Ic0>.

⁶⁴ *See* AO 2010-14 (DSCC).

⁶⁵ *Id.* at Ex. C; NRSC, *Power Grab – Hassan*, YOUTUBE (Mar. 29, 2021),
<https://www.youtube.com/watch?v=SpxvYVEffR0>.

⁶⁶ *Id.* at Ex. J; NRSC, *Goes Along – CO*, YOUTUBE (Aug. 4, 2022),
<https://www.youtube.com/watch?v=0yR8un4JM80>.

⁶⁷ Resp. at 2 (emphasis added).

- 1 • **“Power Grab” Ad** — “focused on a discrete policy issue . . . then-pending
 2 Senate Bill 1 [referred to as the Kelly/Warnock/Cortez Masto/Hassan] Pelosi
 3 plan and its corrupting influence”⁶⁸
 4
- 5 • **“Quieren Más Poder” Ad** — “Spanish-language version of the ‘Power Grab’ . . .
 6 . [but with] spoken message in Spanish stating “We need to stop Pelosi and
 7 [Kelly/Cortez Masto]’s political corruption before it’s too late.”⁶⁹
 8
- 9 • **“Welfare for Politicians” & “No One” Ad** — “focused on the discrete issue of
 10 the then-pending S.B. 1 . . . focused on the expenses and perceived wastefulness
 11 of S.B. 1” and called on viewers to “help us stop Warnock’s welfare for
 12 politicians plan” or “help us [i.e., the NRSC] stop the Hassan plan.”⁷⁰
 13
- 14 • **“Against Arizona” Ad** — “appealed[ed] to a . . . policy issue[] . . . focused on
 15 Senator Kelly’s record of supporting President Biden on several immigration
 16 issues, specifically ‘sanctuary cities,’ ‘benefits to illegals,’ and the ‘border
 17 wall’”⁷¹
 18
- 19 • **“Daño” Ad** — “took a similar approach [to ‘Against Arizona’] . . . Daño focused
 20 on Senator Kelly’s record of supporting President Biden on several policy issues,
 21 specifically ‘the border,’ ‘crime,’ and ‘overcrowded schools’”⁷²
 22
- 23 • **“Gullible” Ad** — “dr[ew] attention to Senator Hassan’s voting record on issues
 24 including ‘drilling for natural gas’ and the ‘Keystone Pipeline’”⁷³
 25
- 26 • **“Goes Along” Ad** — “highlight[ed] the voting records of Senator Murray and
 27 Senator Bennet . . . focused on the frequency with which each Senator ‘goes along
 28 with Biden’ on policy matters like inflation, and ‘economic recession looming,’
 29 the ‘baby formula shortage,’ ‘empty shelves,’ and more ‘crime in our streets’”⁷⁴

30 Funds raised by the NRSC pursuant to the Act’s base national party \$36,500 per year
 31 limit may be used for any purpose, but funds raised pursuant to the higher \$109,500 limit for its
 32 legal proceedings account are restricted for the purposes of defraying expenses for the conduct of

⁶⁸ *Id.* at 16-17.

⁶⁹ *Id.*

⁷⁰ *Id.* at 17-18.

⁷¹ *Id.* at 18.

⁷² *Id.* at 18-19.

⁷³ *Id.* at 19.

⁷⁴ *Id.* at 19-20.

1 election recounts and contests and other legal proceedings.⁷⁵ The NRSC itself acknowledges that
 2 the TV ads focus on subjects *other than* recounts, election contests and other legal proceedings.
 3 Assuming that the ads addressed policy issues, the NRSC’s payments for them is, “by definition,
 4 campaign related.”⁷⁶ As a result, because the NRSC used its legal proceedings account to pay the
 5 entire cost of the TV ads (\$3,359,363), it appears that the NRSC spent funds not subject to the
 6 \$36,500 limit on campaign activities. And to any extent that a portion of such funds related to
 7 legal proceedings by virtue of the requests for donations was allocable, it appears that any such
 8 allocation would at most be lopsidedly against an allocation to the legal proceedings account.⁷⁷

9 b. The NRSC’s TV Ads PASO Federal Candidates and are Therefore
 10 Campaign Activity

11 Following BCRA, the Commission provided guidance on the types of activities that are
 12 “in connection” with an election for federal office under 52 U.S.C. § 30125(e). Such activities
 13 include, but are not limited to: (1) contributing to a candidate committee; (2) contributing to a
 14 political party organization; (3) soliciting funds for a candidate committee; (4) expending funds

⁷⁵ 52 U.S.C. § 30116(a)(9)(C); 160 CONG. REC. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner) (“[I]t is the intent of the amendments contained herein that expenditures made from the accounts described in [52 U.S.C. § 30116(a)(9)], many of which (such as recount and legal proceeding expenses) are not for the purpose of influencing federal elections, do not count against the coordinated party expenditure limits.”); 160 CONG. REC. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid) (same).

⁷⁶ *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (“Expenditures of candidates and of ‘political committees’ so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.”); *FEC v. GOPAC*, 871 F. Supp. 1466, 1470-71 (D.D.C. 1994) (“*Buckley* authoritatively establishes that *any* payment of \$1,000 or more by an organization whose major purpose has been determined to be the nomination or election of an identified candidate for federal office . . . is, ‘by definition, campaign related’ and hence, constitutes an ‘expenditure’”); Memorandum, *Ohio Democratic Party v. FEC*, No. 98-0991 (D.D.C. June 25, 1998) (denying Plaintiff’s motion for preliminary injunction which sought to pay for “issue advocacy advertisements” with nonfederal funds, thereby indicating agreement with the Commission’s determination in Advisory Opinion 1995-25 (RNC) that issue advocacy by national party committees is campaign-related); *see also McConnell*, 540 U.S. at 170 n.64 (“actions taken by political parties are presumed to be in connection with election campaigns”); *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc) (“when an *organization* controlled by a candidate or the major purpose of which is election-related makes disbursements, those disbursements will presumptively be *expenditures*”), *vacated on other grounds*, 524 U.S. 11 (1998)).

⁷⁷ *E.g.*, Statement of Commissioner Shana M. Broussard Regarding Advisory Opinion 2022-21 (DSCC, *et al.*) at 2.

1 to obtain information that will be shared with a candidate committee; (5) expressly advocating
 2 the election or defeat of a candidate; and (6) “federal election activity,” as defined by the Act,
 3 which includes public communications referring to a clearly identified federal candidate and that
 4 promote, support, attack, or oppose a candidate for that office.⁷⁸ The four verbs “promote,”
 5 “support,” “attack,” and “oppose,” are collectively referred to as “PASO.”

6 As described below, each of the NRSC’s TV advertisements PASOs federal candidates,
 7 each of whom was up for election in the upcoming 2022 midterms:

- 8 • **“Power Grab” and “Quieren Más Poder”** — attacks the Democratic party
 9 and/or federal candidates Maggie Hassan and Mark Kelly as engaging in
 10 “political corruption” and “fraud.”⁷⁹
- 11 • **“Welfare for Politicians”** — attacks federal candidate Raphael Warnock as
 12 destroying jobs and small businesses in Georgia⁸⁰
- 13 • **“No One”** — attacks federal candidate Maggie Hassan as a supporter of
 14 government waste⁸¹
- 15 • **“Against Arizona”** — attacks federal candidate Mark Kelly for saying one thing
 16 in Arizona, but voting “against Arizona” in Washington, D.C.⁸²
- 17
- 18
- 19
- 20

⁷⁸ Factual & Legal Analysis (“F&LA”) at 6, MUR 7954 (Kevin Mullin for Congress, *et al.*) (citing F&LA at 3, MUR 7106 (Citizens for Maria Chappelle-Nadal) (citing among others AO 2009-26 at 5 (Coulson))). The Commission has twice proposed but not adopted definitions for PASO. *See* Prohibited and Excessive Contributions, 67 Fed. Reg. 35,654, 35,681 (May 20, 2002) (Notice of Proposed Rulemaking); Coordination, 74 Fed. Reg. 53,893, 53,898-900 (Oct. 21, 2009) (Notice of Proposed Rulemaking). Nevertheless, the Supreme Court has stated that the use of PASO in 52 U.S.C. § 30101(20)(A)(iii) does not render the provision unconstitutionally vague, because they “clearly set forth the confines within which potential party speakers must act in order to avoid triggering the provision,” and they “provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003).

⁷⁹ Resp. at Exs. C, D.

⁸⁰ *Id.* at Ex. E.

⁸¹ *Id.* at Ex. F.

⁸² *Id.* at Ex. G.

- 1 • **Daño** — attacks federal candidate Mark Kelly for saying one thing in Arizona,
 2 but “chicken[ing] out” and voting against Arizona in Washington, D.C. and says
 3 he is “damaging the families of Arizona.”⁸³
 4
 5 • **“Gullible”** — attacks federal candidate Maggie Hassan as someone who is trying
 6 to “fool” her constituents⁸⁴
 7
 8 • **“Goes Along”** — attacks federal candidate Michael Bennet as someone who does
 9 not stand up for his constituents’ welfare when it comes to increases in their cost
 10 of living and crime⁸⁵
 11

12 By virtue of the Supreme Court’s observation in *Buckley v. Valeo* that all expenditures by
 13 a political committee are “by definition, campaign related,” the NRSC’s payment for TV ads for
 14 any purpose other than the purposes set forth in 52 U.S.C. § 30116(a)(9)(B)-(C) is campaign
 15 related.⁸⁶ The textual differences between the Act’s soft money prohibition as it relates to
 16 national party committees and candidates/federal officeholders reinforces this conclusion,⁸⁷ as
 17 does the Commission’s allocation requirement for solicitation costs that are attributable to a
 18 purpose other than defraying expenses incurred with respect to the preparation for and the
 19 conduct of election recounts and contests and other legal proceedings.⁸⁸

⁸³ *Id.* at Ex. H.

⁸⁴ *Id.* at Ex. I.

⁸⁵ *Id.* at Ex. J.

⁸⁶ *Supra* note 76.

⁸⁷ *Compare* 52 U.S.C. § 30125(a)(1) (prohibiting national party committees from spending *any* funds that are not subject to the limitations, prohibitions, and reporting requirements of the Act), *with* 52 U.S.C. § 30125(e)(1)(A) (prohibiting candidates, federal officeholders and entities directly or indirectly established, financed, maintained or controlled by or acting on behalf of a candidate or federal officeholder from spending such funds only if spent *in connection with* an election for federal office); *see also* AO 2006-24 at 11 (“As the Explanation and Justification for 11 CFR [3]00.10 makes clear,” the soft money prohibition at 52 U.S.C. § 30125(a)(1) “applies regardless of whether such funds are ‘in connection with’ a Federal election or for any other purpose”) (citing Explanation and Justification for Final Rule on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49089 (July 29, 2002)).

⁸⁸ AO 2022-21 at 8 (describing a possible coordinated communication referred to as “Solicitation 2”) (footnote omitted).

1 But even if the NRSC’s status as a national party committee alone fails to render the TV
 2 ads as campaign related (because they focus on subjects *other than* recounts, election contests
 3 and other legal proceedings), the NRSC’s TV ads still may not be paid entirely from the NRSC’s
 4 legal proceedings account because they PASO federal candidates.⁸⁹ Accordingly, it appears that
 5 the NRSC paid \$3,359,363 for TV ads that are “federal campaign activity” with funds from its
 6 legal proceedings account (*i.e.*, funds not subject to the \$36,500 limit).

⁸⁹ In the political committee status context, the Commission has used the term “federal campaign activity.” Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) (“Supplemental E&J”). Although Commissioners have not always based major purpose analyses on such spending, the 2007 Supplemental E&J’s description of spending that constitutes “federal campaign activity” appears on its face to encompass PASO communications. *See id.* at 5605 (citing MUR 5511 (Swift Boat Veterans and POWs for Truth) where the organization’s spending on communications that “attack[] *or* expressly advocat[e]” against John Kerry indicated the organization’s major purpose was federal campaign activity) (emphasis added); *id.* (citing MUR 5754 (MoveOn.org Voter Fund) where organization’s spending on advertisements that “opposed” or “criticized” George W. Bush established political committee status); *see also* Conciliation Agreement IV.14, MUR 5487 (Progress for America Voter Fund) (concluding that organization qualified for political committee status (*i.e.*, having federal campaign activity as its major purpose) because it spent 60% of its funds on communications that “praised George W. Bush’s leadership as President and/or criticized Senator Kerry’s ability to provide similar leadership”).

Moreover, many of those cited enforcement matters (and others not cited) relied on *Richey v. Tyson*, a district court case which stated that the requisite major purpose for political committee status under the Act is “‘the nomination or election of a candidate,’ or simply ‘campaign activity,’ terms that comfortably reach beyond explicit directions to vote a particular way.” 120 F. Supp. 2d 1298, 1311 n.11 (S.D. Ala. 2000); *see also* F&LA at 11, MUR 5754 (MoveOn.org); F&LA at 17, MUR 5753 (League of Conservation Voters 527, *et al.*); Conciliation Agreement IV.5, MUR 5752 (Environment2004, Inc. *et al.*); Conciliation Agreement IV.5, MURs 5577 & 5620 (National Association of Realtors – 527 Fund); Conciliation Agreement IV.3, MUR 5542 (Texans for Truth); Conciliation Agreement IV.6, MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth); Conciliation Agreement IV.6, MUR 5487 (Progress for America Voter Fund); Conciliation Agreement at IV.6, MUR 5440 (The Media Fund).

Some Commissioners have objected to including PASO communications as federal campaign activity — at least in the context of corporations organized under section 501(c) of the Internal Revenue Code — out of concern for protecting issue discussion by groups that may not even be political committees. *See, e.g.*, Statement of Reasons at 14-16, Commr’s Hunter & Petersen, MUR 6596 (Crossroads GPS). But that concern is not present here, since the PASO ads were made by a national party committee whose spending is “by definition, campaign related.” *Buckley*, 424 U.S. at 79; *supra* note 76.

1 c. The NRSC’s Arguments Are Unavailing

2 i. *Advisory Opinion 2022-21 (DSCC, et al.) Did Not Purport*
 3 *to Limit the Universe of Party Committee Communications*
 4 *Considered “Campaign Related” to Party Coordinated*
 5 *Communications*

6 The NRSC argues that Advisory Opinion 2022-21 (DSCC, *et al.*) established a
 7 “framework” that permits disbursements from its legal proceedings account for solicitations to its
 8 legal proceedings account, so long as the solicitations do not qualify as party coordinated
 9 communications.⁹⁰ But the NRSC’s focus on party coordinated communications is misconceived
 10 because Advisory Opinion 2022-21 (DSCC, *et al.*) did not limit the universe of political party
 11 communications considered campaign-related — and thus ineligible to be paid from funds from
 12 the NRSC’s legal proceedings account — to party coordinated communications.⁹¹ Rather, that
 13 Advisory Opinion applied the pre-existing principle articulated in Advisory Opinion 2010-14
 14 (DSCC) that national party committee activities may have more than one purpose, and that
 15 allocation is an appropriate way to fund such activities.⁹² Because party coordinated
 16 communications are, by definition, for the purpose of influencing a federal election (*i.e.*, they are
 17 treated as in-kind *contributions* or coordinated party *expenditures*), the DSCC could not pay for
 18 them entirely with funds in the DSCC’s legal proceedings account.⁹³

⁹⁰ *Supra* at pp. 4-5.

⁹¹ The presence of express advocacy is not necessary for the NRSC’s ads to be “campaign related” or “in connection with” an election for federal office. *See supra* Part IV.A.1.a-b. Because AO 2022-21 (DSCC, *et al.*) did not limit the universe of political party communications considered campaign-related to party coordinated communications, the NRSC’s argument that none of the TV ads at issue expressly advocated the election or defeat of federal candidates, and therefore did not meet the criteria for a party coordinated communication, is irrelevant.

⁹² AO 2022-21 at 5, 8.

⁹³ *See* 11 C.F.R. § 109.37 (treating coordinated party communications as an in-kind *contribution* or coordinated party *expenditure*).

1 passage.”⁹⁶ It also ensures that the general term will not render the prior enumeration of terms
 2 meaningless.⁹⁷ Applying the principle here, the phrase “other legal proceedings” in 52 U.S.C.
 3 § 30116(a)(9)(C), in the context of the words it follows, means legal proceedings similar to
 4 “election recounts and contests.”⁹⁸ Election recounts are governed by state law and are
 5 conducted after an election (either automatically if the results are within a specified margin, or
 6 because someone asks for a recount).⁹⁹ Election contests are also governed by state law and are
 7 conducted after an election, with most states having enacted statutes specifying a date by which a
 8 candidate or campaign may sue to contest the outcome of an election.¹⁰⁰

9 Clearly, 52 U.S.C. § 30116(a)(9)(C) does not encompass payments for *any* “legal
 10 proceeding,” since that would render the words “election recounts and contests” meaningless.
 11 But it is also doubtful that payments for potential legal challenges to federal legislation such as
 12 S.B. 1 come within the meaning of “other legal proceedings,” since such challenges do not
 13 appear to be similar to election recounts or contests. The results of election recounts and election

⁹⁶ *Id.*

⁹⁷ *Id.* at 199-200.

⁹⁸ *Id.* at 197; *United States v. Mackay*, 757 F.3d 195, 197 (5th Cir. 2014) (“The words ‘other’ or ‘any other’ following an enumeration of particular classes ought to be read as ‘other such like’ and to include only those of like kind or character.”) (quoting *In re Bush Terminal Co.*, 93 F.2d 659, 660 (2d Cir. 1938)) (internal quotation marks removed). The Supreme Court addressed similar statutory language in *Washington Department of Social & Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003). There, the Court evaluated a provision of the Social Security Act that protects social security payments from “execution, levy, attachment, garnishment, or other legal process.” *Id.* at 382. Applying the statutory interpretation canon of *ejusdem generis* — *as well as the related canon of noscitur a sociis, meaning that words are known “by their companions”* — the Court unanimously held that the term “other legal process” did not mean any legal process but only a “process much like the processes of execution, levy, attachment, and garnishment.” *Id.* at 384-85.

⁹⁹ See National Conference of State Legislatures, Election Recounts, <https://www.ncsl.org/elections-and-campaigns/election-recounts> (last visited Oct. 26, 2023).

¹⁰⁰ See National Conference of State Legislatures, Canvass, Certification and Contested Election Deadlines and Voter Intent Laws, <https://www.ncsl.org/elections-and-campaigns/canvass-certification-and-contested-election-deadlines-and-voter-intent-laws> (listing various states’ deadlines to initiate a lawsuit contesting the results of an election and linking to the applicable state law); see also 26 Am. Jur. 2d Elections § 381 (2d. Ed. 2019) (defining “election contest” as a “suit in which the validity of an election . . . is made the subject matter of litigation” or “a special proceeding . . . to provide a remedy for elections tainted by fraud, illegality, or other irregularity”).

1 contests impact elections that have already taken place, whereas legislation such as S.B. 1, if
2 enacted, impact *future* elections.¹⁰¹ In addition to their different temporal impact on elections,
3 the nature of their impact on elections is different. To use a baseball analogy — election
4 recounts and contests resemble arguments aimed at gaining an advantage within the confines of
5 existing rules, such as arguing balls and strikes, whether a hit ball is fair or foul, or whether a
6 baserunner is safe or out. A court challenge to S.B. 1, to the extent it touches on elections,
7 involves potential changes to the rules of the game itself.

8 Legislative history appears to support a limited reading of “other legal proceedings.”¹⁰²
9 The inclusion of that phrase in the statute dovetails with the language in Advisory Opinion 2006-
10 24, specifically cited in the legislative history, which permitted the proposed use of recount funds
11 for expenses relating to “‘recount[s], election contest[s], counting of provisional and absentee
12 ballots and ballots cast in polling places,’ as well as for expenses relating to ‘post-election
13 litigation and administrative-proceeding expenses concerning the casting and counting of ballots

¹⁰¹ The Commission’s decision in Advisory Opinion 2023-03 (Colorado Republican State Central Committee) is not to the contrary. There, a state committee sought to establish a legal fund solely for the purpose of challenging the constitutionality of a state law that changed the process for political parties to nominate a candidate for a general election. AO 2023-03 at 1-2. Relying on Advisory Opinion 2003-15 (Majette), the Commission concluded that donations to the proposed legal fund “would not constitute contributions or expenditures under the Act because such donations and disbursements would not be made ‘for the purpose of influencing any election for Federal office.’” *Id.* at 4. But constitutional challenges to state laws by state committees (to which 52 U.S.C. § 30116(a)(9)(C) does not apply) are not the same as a national party committee’s challenge to a federal election law. Indeed, one of the advisory opinions upon which AO 2023-03 relied explicitly noted that “legal expense funds established by national committees of political parties or related entities are subject to a different legal standard under [52 U.S.C. § 30125(a)].” Advisory Opinion 2003-15 at 4 n.4 (Majette) (“AO 2003-15”). In the case of national party committees, *all* spending must be with hard money because their activities “are presumed to be in connection with election campaigns.” *McConnell*, 540 U.S. at 170 n.64; 52 U.S.C. § 30125(a)(1). Thus, the relevant question is not whether Commission advisory opinions have found legal account expenses for constitutional challenges of election laws to be for the purpose of influencing an election, but whether such challenges are similar to election recounts and contests. Neither AO 2023-03 nor the advisory opinions upon which it relies support that proposition. *See* Advisory Opinion 2003-15 at 1 (involving a candidate seeking to use legal account funds to defend against litigation seeking to undo the results of her own primary and general election victories by challenging Georgia’s open primary election system); Advisory Opinion 2010-03 (National Democratic Redistricting Trust) (involving request for members of Congress to solicit soft money to a trust in order to defray its pre-litigation and litigation costs in connection with legislative redistricting).

¹⁰² 160 CONG. REC. H9286; 160 CONG. REC. S6814.

1 during the Federal election, fees for the payment of staff assisting the recount or election contest
2 efforts, and administrative and overhead expenses in connection with recounts and election
3 contests.”¹⁰³

4 Because the expense of a court challenge to S.B. 1 appears to fall outside the scope of
5 “other legal proceedings,” we do not believe the NRSC may use its legal proceedings account to
6 pay for TV ads soliciting funds for that purpose.

7 But even if a court challenge to S.B.1 could be considered an “other legal proceeding”
8 under 52 U.S.C. § 30116(a)(9)(C), the NRSC’s “Power Grab” and “Quieren Más Poder” TV ads
9 do not appear to just be raising funds for that purpose.¹⁰⁴ The contrast between “Power Grab”
10 and “Quieren Más Poder” and the NRSC’s mail piece discussed *infra* further supports the notion
11 that the costs of “Power Grab” and “Quieren Más Poder” are, if not completely, then at least in
12 large part, attributable to campaign activities.

13 *iii. The NRSC Did Not Lack Fair Notice that Its TV Ads Were*
14 *Campaign Related*

15 The NRSC argues, in the alternative, that the Commission should dismiss this matter
16 pursuant to its prosecutorial discretion because it has not provided national party committees
17 “meaningful guidance, let alone notice of any potential restrictions on the method, mode, or
18 content of fundraising communications for segregated accounts.”¹⁰⁵ To do otherwise, the NRSC
19 argues, would raise “very serious fair notice, due process, and First Amendment concerns.”¹⁰⁶

¹⁰³ AO 2006-24 at 2-3.

¹⁰⁴ *See supra* Part IV.A.1.a-b.

¹⁰⁵ Resp. at 20-21.

¹⁰⁶ *Id.* at 21 (citing *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)).

1 “[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform
2 his or her conduct to the law.”¹⁰⁷ “[A] party has fair notice when, ‘by reviewing the regulations
3 and other public statements issued by the agency,’ it can ‘identify, with ascertainable certainty,
4 the standards with which the agency expects parties to conform.’”¹⁰⁸ Put another way, fair notice
5 is provided if the agency’s interpretation is “reasonably comprehensible to people of good
6 faith.”¹⁰⁹

7 The NRSC’s fair notice argument is not persuasive. Congress passed BCRA to prohibit,
8 among other things, the national parties’ use of soft money. Moreover, the Commission has
9 publicly stated for decades that recount funds may not pay for campaign activities.¹¹⁰ Thus, the
10 NRSC had fair notice that its use of legal proceedings account funds for campaign activities is
11 not permitted.¹¹¹

12 Furthermore, the hallmarks indicative of a lack of fair notice are not present. There has
13 been no “change” in the Commission’s longstanding position with respect to the use of recount
14 funds for campaign activity.¹¹² Nor has the Commission been silent in the face of widespread

¹⁰⁷ *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (plurality opinion).

¹⁰⁸ *Northstar Wireless, LLC v. FCC*, 38 F.4th 190, 216 (D.C. Cir. 2022) (quoting *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)).

¹⁰⁹ *General Elec. Co.*, 53 F.3d at 1330 (quoting *McElroy Elecs. Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993)).

¹¹⁰ *See supra* Part III.A-C.

¹¹¹ Advisory opinions are among the types of public statements that provide fair notice. *See FEC v. Arlen Specter '96*, 150 F. Supp. 2d 797, 813-14 (E.D. Pa. 2001) (rejecting Specter ‘96’s argument that it lacked fair notice because, among other public statements, the Commission’s advisory opinions “state the Commission’s interpretation clearly and consistently, and that these materials were available to the public”).

¹¹² *See Fox Television Stations*, 567 U.S. at 254 (“The Commission’s lack of notice to Fox and ABC that its interpretation had *changed* . . . fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.”) (emphasis added) (internal quotations omitted).

1 violative conduct.¹¹³ And the NRSC chose not to inquire about whether the costs for its ads
 2 would need to be allocated.¹¹⁴ Instead, the NRSC bases its fair notice argument on the lack of
 3 Commission regulations specifically addressing legal proceedings accounts.¹¹⁵ But the NRSC
 4 itself argued against new regulations following the 2015 Appropriations Act, stating that it saw
 5 “little reason to undertake a comprehensive, time- and resource-consuming rulemaking” because
 6 “[t]he Appropriations Act *did not introduce any new concepts to the law*, and the national party
 7 committees have extensive experience with convention funding, building and legal funds.”¹¹⁶
 8 The NRSC was correct when it further stated “the current state of the law reflects decades of
 9 precedent and practice.”¹¹⁷ That precedent is discussed above and applies here.

10 This matter is also fundamentally different than MUR 7358 and MUR 7390, two recent
 11 matters in which the Commission dismissed allegations of improper payments from a national
 12 party committee’s legal proceedings account. In those matters, the Commission noted that it had

¹¹³ See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157 (2012) (finding “unfair surprise” where industry had engaged in “decades-long practice” before the Department of Labor first announced its regulatory interpretation in an enforcement proceeding).

¹¹⁴ See, e.g., *Howmet Corp. v. EPA*, 656 F. Supp. 2d 167, 174 (D.D.C. 2009) (failure to inquire is a relevant consideration in determination of fair notice to regulated party) (citing *Tex. E. Prods. Pipeline Co. v. Occupational Safety & Health Rev. Comm’n*, 827 F.2d 46, 50 (7th Cir. 1987)), *aff’d* 614 F.3d 544 (D.C. Cir. 2009). Cf. *U.S. Civil Service Commission v. National Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 580 (1973) (rejecting a vagueness challenge to the Hatch Act, in part, because “the Commission ha[d] established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law . . .”).

¹¹⁵ Resp. at 20 (“the Commission has yet to commence a rulemaking to provide guidance or impose any restrictions whatsoever on the operation of these segregated accounts”).

¹¹⁶ Comment of NRCC and NRSC (Jan. 30, 2017), Notice 2016-10 (Rulemaking Petition: Implementing the Consolidated and Further Continuing Appropriations Act, 2015) (emphasis added). The NRSC stated that any questions regarding the legal proceedings accounts “may be resolved more efficiently through the advisory opinion process.” *Id.*

¹¹⁷ *Id.* Put differently, the relevant legal landscape has not been recently “remade.” See *Campaign Legal Ctr. v. FEC*, 312 F. Supp. 3d 153, 166 (D.D.C. 2018) (finding decision by three Commissioners to dismiss allegations because of fair notice concerns was not contrary to law where matters involved “an issue of first impression, in a campaign finance environment remade by *Citizens United*, where existing Commission regulations and precedent offered few helpful clues about how the straw donor prohibition applied”), *aff’d*, 952 F.3d 352 (D.C. Cir. 2020).

1 not provided guidance on the permissible scope of payments from a national party committee’s
2 legal proceedings account.¹¹⁸ But the Commission *has* provided guidance on the use of legal
3 proceedings accounts — termed recount funds prior to the 2015 Appropriations Act — for
4 campaign activities. As shown above, the Commission has since the 1970s consistently stated
5 that campaign activities may not be paid for with recount funds. The payments in MURs 7358
6 and 7390, unlike here, were for quintessential legal services: legal representation of an
7 individual in a defamation lawsuit (MUR 7358) and for legal representation in connection with a
8 Department of Justice and congressional investigation into potential violations of federal law
9 (MUR 7390).¹¹⁹

10 By contrast, the NRSC’s TV ads appear to be conventional attack ads. The only aspect of
11 the ads that assertedly brings them into the realm of permissible funding from the NRSC’s legal
12 proceedings account is the “short code” that makes no express mention of recounts or other legal
13 proceedings. Therefore, the concern that animated the Commission’s dismissal decisions in
14 MURs 7358 and 7390 (*i.e.*, lack of guidance as to the scope of *legal* expenses that may be paid
15 from a national party committee’s legal proceedings account) is not present here. To the extent
16 that the reporting by the *New York Times* and others correctly captured an issue with the NRSC
17 spending down its general account funds too quickly in the runup to the 2022 midterms, and
18 prompting a pivot to spending from the legal proceedings account despite the risk of that being

¹¹⁸ F&LA at 9, MUR 7390 (Republican National Committee); F&LA at 6, MUR 7358 (Rosen for Nevada, *et al.*).

¹¹⁹ See F&LA at 12, MUR 7934 (Xochitl for New Mexico, *et al.*) (law firm’s representation of an individual in a lawsuit is a “quintessential legal service”).

1 found illegal, one could infer from the circumstances that the NRSC knew of and assumed that
 2 risk, undermining the fairness concerns it has articulated in its Response.¹²⁰

3 Finally, even if the NRSC was correct that enforcement in this context would raise due
 4 process concerns, such concerns are relevant to remedy, not liability.

5 2. Payments to America Rising LLC for “Research” and TAG LLC for
 6 “Digital Consulting”
 7

8 The NRSC’s payments to America Rising LLC and TAG LLC present a closer question.
 9 Commission regulations state that the provision of anything of value with respect to “a recount
 10 of the results of a Federal election, or an election contest concerning a Federal election” is not a
 11 “contribution” or an “expenditure.”¹²¹ The Commission has explained that recounts and election
 12 contests “though they are related to elections, are not Federal elections as defined by the Act.”¹²²
 13 By contrast, a “runoff election” is an “election.”¹²³

14 In Advisory Opinion 2006-24 (NRSC), the Commission approved of the use of recount
 15 funds for post-election litigation insofar as it concerned “the casting and counting of ballots.”¹²⁴
 16 Advisory Opinion 2006-24 is specifically cited in the legislative history for 52 U.S.C.
 17 § 30116(a)(9)(C), and because *legal* research is an integral part of any litigation, the NRSC may
 18 use its legal proceedings account to pay for legal research in connection with post-election
 19 litigation concerning the casting and counting of ballots.

¹²⁰ See *supra* note 4.

¹²¹ See 11 C.F.R. § 100.91 (“A gift, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election, is not a contribution except that the prohibitions of 11 CFR 110.20 and part 114 apply.”); 11 C.F.R. § 100.151 (same as to expenditures).

¹²² Explanation and Justification of 1976 Amendments to Federal Election Campaign Act of 1971, H.R. Doc. No. 95-44, at 40 (Jan. 12, 1977).

¹²³ 52 U.S.C. § 30101(1)(A).

¹²⁴ AO 2006-24 at 2.

1 At this stage, the question of whether the record indicates that the NRSC’s January 19,
2 2021 disbursement to America Rising LLC for “research” was a legal proceedings expense, or a
3 campaign expense is a close one. The Response includes a sworn declaration from the NRSC’s
4 general counsel stating that this disbursement was for “research services rendered to the NRSC
5 related to preparing for potential litigation in connection with the January 5, 2021 Georgia U.S.
6 Senate runoff election.”¹²⁵ Unlike the TV ads discussed above, these expenditures were reported
7 as being made after the January 5, 2021 runoff election.

8 Nevertheless, we believe that the available information supports finding reason to believe
9 that the NRSC’s January 19, 2021 disbursement to America Rising may have been for campaign
10 activities. First, America Rising is neither a law firm nor a *legal* research firm. Instead, it is an
11 opposition research firm.¹²⁶ The specific types of “research” it advertises are research reports on
12 candidates’ backgrounds¹²⁷ and “opposition research books.”¹²⁸ The Commission concluded in
13 MURs 7291 & 7449 that the apparent opposition research at issue in those matters was not

¹²⁵ Resp. at Ex. A.

¹²⁶ See America Rising, About Us, <https://americarisingcorp.com/about-us/> (last visited Oct. 26, 2023) (“America Rising LLC is a research and communications firm whose mission is to produce the content necessary to wage effective earned and paid media strategies”); see also Katie Zezima, *America Rising to help Republicans make inroads with independent female voters*, WASH. POST (July 7, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/07/07/america-rising-to-help-republicans-make-inroads-with-independent-female-voters/>; Zeke J. Miller, *For-Profit GOP Opposition Research Group Reports Major Haul*, TIME (Jan. 31, 2014), <https://time.com/3348/for-profit-gop-opposition-research-group-reports-major-haul/>.

¹²⁷ See America Rising, Services, <https://americarisingcorp.com/services/> (select “Rapid Response & Research Support”) (“Our team produces comprehensive research reports that provide our clients with ready-made content for use in message testing, digital strategies, earned media, and traditional paid media. Our reports provide a full spectrum understanding of a candidate’s background utilizing legal documents, personal financial disclosures, business records, news accounts, other open source or subscription-based datasets, as well as proprietary information.”).

¹²⁸ *Id.* (select “Opposition Research Books”) (“No research report can be considered complete relying exclusively on online content. [America Rising] has the ability to quickly pull primary documents from libraries, court houses, governmental agencies, and other record keepers across the country; and has an in-house attorney who specializes in Freedom of Information Act and state-specific public records requests. This information brings original source material to unreported or underreported narratives.”).

1 accurately described as legal services.¹²⁹ Second, the NRSC did not report its \$27,709 payment
2 to America Rising as being for *legal* research.¹³⁰ In fact, the Commission has no record of any
3 committee having ever reported disbursements to America Rising for “legal research” or any
4 other legal-related purpose. And while America Rising “has an in-house attorney who
5 specializes in Freedom of Information Act and state-specific public records requests,” that
6 service appears to be part and parcel of its opposition research on candidates.¹³¹ Finally, the
7 NRSC has not provided details on *how* America Rising’s research related to preparing the NRSC
8 for potential litigation.¹³² Because the NRSC’s January 19, 2021 disbursement to America
9 Rising appears to have been for opposition research and not legal research, it does not appear to
10 fall within the scope of 52 U.S.C. § 30116(a)(9)(C).

11 The NRSC identified its January 19, 2021 disbursement to TAG LLC of \$7,750 as being
12 for “the creation of a website that provided voters with information on how to cure their absentee
13 ballots after the January 5, 2021 runoff election.”¹³³ The NRSC argues that in AO 2006-24, the
14 Commission permitted the NRSC’s recount fund to pay for “recount activities,” including
15 “expenses resulting from . . . counting of provisional and absentee ballots” in addition to “post-
16 election . . . administrative-proceeding expenses concerning the casting and counting of ballots

¹²⁹ F&LA at 7-9 (finding reason to believe the DNC misreported the purpose of its disbursements to the law firm Perkins Coie by reporting payments for opposition research as “legal services”) & Cert. MURs 7291 & 7449 (DNC) (Dec. 16, 2021) (finding probable cause the DNC violated 52 U.S.C. § 30104(b)(5)(A), (b)(6)(B)(v), and 11 C.F.R. § 104.3(b)(3)(i) by failing to report the proper purpose of the funds it paid to the law firm Perkins Coie for opposition research performed by Fusion GPS).

¹³⁰ See F&LA at 8, MURs 7291 & 7449 (DNC) (“The fact that the DNC’s initial payment to Perkins Coie for services supported by Fusion disclosed the purpose of ‘Research Consulting,’ indicates that the DNC was aware that ‘research’ was the specific purpose of this and later disbursements to Perkins Coie for its work supported by Fusion.”).

¹³¹ *Supra* note 128.

¹³² See F&LA at 8, MURs 7291 & 7449 (DNC) (noting that “the Committee has not provided details on how Fusion’s research supported Perkins Coie’s legal work”).

¹³³ Resp. at 12.

1 during the Federal election.”¹³⁴ The NRSC appears to be correct that a disbursement for the
2 creation of a website to inform voters how to cure their absentee ballots after a runoff election is
3 similar to “post-election . . . administrative-proceeding expenses concerning the casting and
4 counting of ballots during the Federal election,” which the Commission advised *could* be paid
5 for with recount funds.¹³⁵

6 TAG’s website advertises that it offers “web design and development” services, and
7 numerous committees have reported disbursements to TAG for “web”-related services, such as
8 “website development and hosting” and “web development/marketing.”¹³⁶ And unlike America
9 Rising, TAG appears to be a marketing firm, and not an opposition research firm.¹³⁷ Thus, the
10 available information indicates that the NRSC’s January 19, 2021 disbursement to TAG was for
11 the creation of a website and is consistent with the statement in the NRSC’s general counsel’s
12 declaration that the website “provided voters who cast absentee ballots in the January 5, 2021
13 Georgia U.S. Senate runoff election with information on how to cure their absentee ballots after
14 the runoff election.”¹³⁸

15 With respect to the NRSC’s June 22, 2022 disbursement to TAG of \$207,852, the NRSC
16 states that the disbursement was for “digital and communication services rendered” to Doctor Oz

¹³⁴ *Id.*

¹³⁵ AO 2006-24.

¹³⁶ TAG Strategies, <https://tagstrategies.co/services/> (“TAG’s in-house web development team produces cutting-edge websites with stable and trusted site hosting. Tailored to your organization and goals, our team designs and creates beautiful and effective custom websites to tell your story and reach your audience.”); *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&two_year_transaction_period=2024&min_date=01%2F01%2F2023&max_date=12%2F31%2F2024 (last visited Oct. 26, 2023) (search recipients for “TAG”).

¹³⁷ *Id.*

¹³⁸ Resp. at 12, Ex. A.

1 for Senate in connection with the 2022 Pennsylvania Republican Primary recount.¹³⁹ We have
 2 no further information what the NRSC means by “digital and communication services.” Absent
 3 additional information, and because TAG appears to be a marketing firm, and not an opposition
 4 research firm, the record does not indicate that this disbursement falls outside the scope of
 5 52 U.S.C. § 30116(a)(9)(C).

6 3. Payment to Simo Cloud for “Direct Mail Production”

7 The NRSC identified its June 8, 2022 disbursement of \$3,250 to Simo Cloud as being for
 8 “a direct mail fundraising appeal for the Legal Proceedings Account.”¹⁴⁰ The NRSC also
 9 included a copy of the mailing with its Response.¹⁴¹ In sharp contrast to the NRSC’s TV ads
 10 discussed above, the mailing clearly requests funds for the NRSC’s legal proceedings account:
 11 “I’m asking you to support the NRSC’s Legal Fund today,” “send your most generous gift to the
 12 NRSC Legal Fund,” “[y]our generous support of the NRSC Legal Fund.”¹⁴² The mailing does
 13 not appear to be for any purpose other than raising funds for the NRSC’s legal proceedings
 14 account. Accordingly, it appears that the entirety of the direct mailing’s costs may properly be
 15 paid from the NRSC’s legal proceedings account.

16 * * *

17 Taken together, 52 U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1) prohibit the NRSC
 18 from spending its Legal Proceedings Account funds for campaign related expenses. Under the
 19 guidance provided in Advisory Opinions 2010-14 and 2022-21, expenses attributable to more
 20 than one purpose may be paid from the NRSC’s legal proceedings account if the payments for

¹³⁹ *Id.* at 3, Ex. A.

¹⁴⁰ *Id.* at 4, Ex. A.

¹⁴¹ *Id.* at Ex. B.

¹⁴² *Id.*

1 campaign activities are properly allocated.¹⁴³ Here, the NRSC’s TV ads appear to have been
2 campaign related, if not completely then at least in part, given their focus on opposing
3 candidates. As a result, the \$3,390,321 the NRSC paid for the TV ads should not have been
4 entirely from the NRSC’s legal proceedings account.” Further, the NRSC’s \$27,709
5 disbursement to America Rising LLC appears to have been a campaign related expense that was
6 paid from the NRSC’s legal proceedings account. Accordingly, the Commission finds reason to
7 believe that the NRSC violated 52 U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1) by knowingly
8 paying for campaign expenses from its legal proceedings account.¹⁴⁴ The Commission finds no
9 reason to believe that the NRSC’s disbursements to TAG LLC on January 19, 2021 and June 22,
10 2022 for digital consulting violated 52 U.S.C. § 30116(f) and 52 U.S.C. § 30125(a)(1) because
11 the record does not indicate those payments were not for permissible legal expenses. Finally,
12 because the NRSC’s June 8, 2022 payment to Simio Cloud appears to be for a mailing clearly
13 soliciting funds for the NRSC’s legal proceedings account and not for campaign activities, the
14 Commission finds no reason to believe that the NRSC’s payment to Simio Cloud for direct mail
15 production violated 52 U.S.C. §§ 30116(f) and 30125(a)(1).

¹⁴³ AO 2006-24; AO 2010-14.

¹⁴⁴ Because this matter involves the expenditure of its own legal proceedings account funds, it appears that the NRSC had knowledge of the facts that made its conduct unlawful. *See supra* note 53 (reviewing “knowingly” standard as used in 52 U.S.C. § 30116(f)).