Olson | Remcho

**VIA ELECTRONIC SUBMISSION**

September 30, 2024

Federal Election Commission
Attn.: Ms. Amy L. Rothstein
Assistant General Counsel for Policy
1050 First Street NE
Washington, DC 20463

**Re: REG 2024-07**

Dear Ms. Rothstein:

We are counsel to the California Democratic Party ("CADEM"). We write to support the petition for rulemaking filed by Ken Martin, Chair of the Minnesota Democratic Farmer-Labor Party. The passage of the Bipartisan Campaign Reform Act in 2002 required CADEM, and the local party committees in California, to entirely revamp their operations and has severely chilled their ability to support its non-federal candidates and endorsed ballot measures. Its experience over the past 22 years has been that, due to various factors, compliance has become more burdensome for CADEM and local party committees, all during a period in which non-party soft money organizations have been empowered. The result has been that CADEM has had to curtail its nonfederal activities. CADEM strongly believes that regulatory relief is necessary to maintain the health of the state political parties, and would not contravene legislative intent or the dictates of the *Shays* decisions.

One area where reform is needed is in the definition of "GOTV activity." Though *Shays v. FEC*, 528 F3d. 914, 932 (2008) (*Shays III)* did mandate some expansion of the definition, the Commission went too far. Under the post-*Shays III*, definition, any communication that urges potential voters to vote is considered FEA, and must be paid with 100% federal funds, unless the communication contains a "brief" and "incidental" exhortation to vote. 11 C.F.R. § 100.24(a)(3). So too does any communication that "[i]nform[s] potential voters … about … voting by absentee ballot," *id*. § 100.24(a)(3)(B)(3) – even though California has largely transitioned to a vote-by-mail system. The result has been to chill CADEM's purely nonfederal activities aimed at electing Democrats to state and local offices and promoting the passage of the party's endorsed ballot measures.

California is the most populous state in the nation. It contains two of the country's ten largest and most expensive media markets and it is the most expensive state in the country in which to conduct a campaign. Each of its 40 state senators represents over 900,000 residents, twenty percent more than the number of residents in a congressional district. A competitive Assembly race in California will cost approximately $3 million. California is also a state where ballot measures play a central role; there will be ten statewide measures on the upcoming November 2024 ballot, and many local ones as well.

CADEM invests heavily in helping elect Democrats to state and local office, and to advance its favored ballot measures, but BCRA and Commission regulations have hamstrung its ability to work on these campaigns. In its communications aimed solely at influencing these nonfederal elections, CADEM has limited exhortations to vote to a single "Vote on November 5." It has not included this language more than once, for fear that such references would require paying for these nonfederal communications with 100% federal funds.

The effect of this rule is compounded by how voting occurs in California. In 2016, California passed the Voters Choice Act, which revamped how elections are conducted in certain counties in the state. A county that wishes to opt into the Voter's Choice Act departs from the traditional precinct-by-precinct polling place system and gives voters many options for voting. Each voter is sent a mail ballot, which they can return by mail, drop box, or delivery at any voting center in the county. Voters can also vote in person at any voting center in the county. While the new rules have helped empower voters, they have also required increased voter education as more and more counties continue to adopt the new system. But under the Commission's GOTV definitions, CADEM has refrained from informing voters about the new rules, even where the main purpose of its communication is to persuade voters to vote for a ballot measure. This is so, even though ballot measures are not "in connection with an election" and federal candidates can now solicit unlimited soft money for the ballot measure committees themselves. *See* Advisory Opinion 2024-05.

Another example, pushing the limits of absurdity, relates to ranked choice voting, which has been adopted by several cities in California (including two of the largest, San Francisco and Oakland) for <u>local</u> elections only. In ranked choice voting, voters may select multiple choices for an office in a ranked order. The candidate who receives the fewest number of first choice votes is eliminated, and that candidate's votes are reallocated to the voters' second choices. This process continues until all the votes have been distributed to the top-two candidates. Proponents of ranked choice voting say that, among other things, it increases the civility of campaigns (because candidates must vie to be the second or third choice of their opponent's supporters) and it permits voters to vote for the candidate most closely aligned with their views without a "spoiler" effect. Experience shows, however, that it is a system that is not well understood by many voters who are unfamiliar with it. But CADEM has been unable to sponsor communications educating voters how it works, for fear that this would be deemed "other activity that assists potential voters to vote" – even though ranked choice voting is <u>not</u> used in federal elections.

The commission's FEA definitions have also chilled the party's canvassing activities. But for the overbreadth of these rules, CADEM would hire employees to conduct persuasion canvasses in its state legislative races. However, the rules make it difficult for the party to ensure that these employees would not be engaging in FEA unless the interactions are so heavily scripted as to be unnatural. To avoid the use of federal funds, canvassers can only include a brief exhortation to vote in their scripts; if they come across a household with a resident who is not registered, they cannot provide information on how to register, nor can they provide a single voter with

information about voting, even if the request comes from the voter. *See* 11 C.F.R. § 106.7(d)(1)(i).

It need not be this way. *Shays III* was focused on closing "two distinct loopholes" in the FEC's regulations as they existed at the time: (1) a requirement that GOTV involve assistance to a voter and (2) a requirement that GOTV only involve individualized communications. 528 F3d. at 931. But *Shays III* does not compel the result that *every* communication that encourages voters to vote or that informs potential voters about early voting be considered GOTV -- nor does it prevent the Commission from crafting a more reasonable rule that distinguishes between persuasion communications and GOTV communications. When a communication is focused primarily on persuasion involving one or more nonfederal candidates or ballot measures, the parties should have more leeway to discuss how a potential voter can vote for those candidates or measures.

Since the 1979 amendments, it has been a policy of the Act to encourage grassroots participation by those closest to the voters, the state and local party committees. Federal Election Campaign Act Amendments, 1979: Hearing Before the S. Comm. on Rules and Admin., 96th Cong. 97 (1979), *reprinted in* Federal Election Commission, Legislative History of Federal Election Campaign Act Amendments of 1979, at 32, 38. For example, the Act and Commission rules can pay (using federal funds) for literature supporting its federal candidates to be distributed by volunteers, and paid canvasses distributing slate cards, without a resulting contribution to the candidates. *See* 11 C.F.R. §§ 100.80, 100.87.

However, due to both judicial and administrative developments in the law, the relative strength of the parties has eroded and recent years, as soft money organizations have taken a more and more prominent role in federal elections. *See, e.g., Citizens United v. FEC*, 558 U.S. 310 (2010); Advisory Opinion 2010-11. Just this year, the Commission approved an advisory opinion that permitted non-party groups to conduct canvasses in full coordination with candidates using *soft money*, vitiating the above-mentioned slate-card and volunteer materials exemptions and, yet again, permitting soft money groups to supplant the traditional roles of the state parties. Precisely because of these developments, more and more of the functions traditionally filled by the state parties are being "outsourced" to outside groups, and state and local parties are doing less federal work than they once did.[1] If the state and local parties are doing less federal work, the government has even less justification for federalizing their activity. *See* McConnell v. FEC, 540 U.S. 93, at 168-169 (2003). To ensure the health of the state parties, and

[1] We can expect this trend to continue. If the Supreme Court reviews the *National Republican Senatorial Committee v. FEC* case, No. 24-3051, 2024 U.S. App. LEXIS 22607 (6th Cir. Sep. 5, 2024). and overturns the coordinated party expenditure limits, much of the coordinated campaign activities currently conducted by the state parties in support of federal candidates will naturally migrate to the national party committees.

proper constitutional tailoring, we are respectfully requesting the Commission to reevaluate the harsh restrictions it has placed on the state and local party committees.

Thank you for your attention to this matter.

Very truly yours,

Andrew Harris Werbrock
Counsel to the California Democratic Party