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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 22-27-A
AGENDA ITEM
For meeting of July 14, 2022

July 7, 2022

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
Acting General Counsel

Neven F. Stipanovic *NFS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Cheryl A. Hemsley *CAH*
Attorney

Subject: AO 2022-07 (Swalwell) (Draft A)

We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on July 13, 2022.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2022-07

2

3 Rebecca J. Olson, Esq.
4 Miller & Olson, LLP
5 400 Capitol Mall, Suite 1545
6 Sacramento, CA 95814-4434

DRAFT A

7

8 Dear Ms. Olson:

9 We are responding to your advisory opinion request on behalf of Congressman
10 Eric Swalwell and Swalwell for Congress (the “Committee”) concerning the application
11 of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and
12 Commission regulations to the proposed use of campaign funds to pay certain of
13 Congressman Swalwell’s childcare expenses. The Commission concludes that
14 Congressman Swalwell may use campaign funds to pay overnight childcare expenses that
15 he will incur when he travels for his own campaign and his spouse is not available to care
16 for their children. The Commission also concludes that the use of campaign funds to pay
17 childcare expenses that Congressman Swalwell will incur when he travels for campaigns
18 other than his own or at the request of foreign governments or other entities would be
19 prohibited, because it would convert campaign funds to personal use.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 May 26, 2022.

23 Congressman Swalwell currently represents California Congressional District 15.
24 He also serves as Co-Chair of the House Democratic Steering and Policy Committee,
25 which is a party leadership position that can be held only by a Member of Congress. His
26 duties as Co-Chair “include getting more Democrats elected to Congress.”¹ In addition,

¹ Advisory Opinion Request (“AOR”) at AOR001.

1 Congressman Swalwell is a candidate for California Congressional District 14 in the
2 2022 elections. The Committee is his principal campaign committee.²

3 Congressman Swalwell and his wife work full-time and have three young children
4 at home. Congressman Swalwell often pays for childcare when conducting campaign
5 activities locally. In addition, Congressman Swalwell “is often expected to travel and be
6 away from home, including overnight,” “[a]s part of his duties as” an officeholder,
7 candidate, and fundraiser for other Democratic candidates.³ Further, “because of his
8 status as a well-known member of Congress,” Congressman Swalwell also receives
9 invitations, including invitations from foreign governments for information gathering
10 visits, “that may require him and sometimes his spouse to be away for multiple days.”⁴

11 ***Questions Presented***

- 12 1. *May Congressman Swalwell use campaign funds to pay for overnight childcare if*
13 *he travels for campaign events for his campaign or other campaigns, if his spouse*
14 *is not available to care for the children?*
15
16 2. *May Swalwell for Congress pay for childcare expenses for Congressman*
17 *Swalwell’s children if he travels at the request of foreign governments or other*
18 *entities because of his status as a Member of Congress? If yes, would that include*
19 *the expenses for overnight childcare as well?*
20

21 22 ***Legal Analysis and Conclusions***

- 23 1. *May Congressman Swalwell use campaign funds to pay for overnight childcare if*
24 *he travels for campaign events for his campaign or other campaigns, if his spouse*
25 *is not available to care for the children?*

² See Swalwell for Congress, Statement of Candidacy, FEC Form 2 (Jan. 15,2022), <https://docquery.fec.gov/pdf/513/202201159474990513/202201159474990513.pdf> (last viewed June 21, 2022)

³ AOR001

⁴ *Id.*

1
2 Congressman Swalwell may use campaign funds to pay for overnight childcare if
3 he travels for campaign events for his campaign and his spouse is not available to care for
4 their children, because the expenses would not exist irrespective of Congressman
5 Swalwell’s campaign. Congressman Swalwell may not, however, use campaign funds to
6 pay childcare expenses that he will incur when he travels for campaigns other than his
7 own, because doing so would convert campaign funds to personal use.

8 Under the Act and Commission regulations, a candidate’s authorized committee
9 may use campaign funds for several specific purposes, including “for otherwise
10 authorized expenditures in connection with the campaign for Federal office of the
11 candidate or individual,” “for ordinary and necessary expenses incurred in connection
12 with duties of the individual as a holder of Federal office,” and “for any other lawful
13 purpose” that does not constitute conversion of campaign funds to “personal use.”⁵ The
14 Act and Commission regulations define “personal use” as the use of campaign funds “to
15 fulfill any commitment, obligation, or expense of a person that would exist irrespective of
16 the candidate’s election campaign” or duties as a federal officeholder.⁶

17 The Act and Commission regulations provide a non-exhaustive list of expenses
18 that, when paid using campaign funds, constitute *per se* personal use.⁷ For expenses not
19 included on this list, the Commission determines, on a case-by-case basis, whether the

⁵ See 52 U.S.C. § 30114(a)(1)-(2), (a)(6); 11 C.F.R. § 113.2(a), (e).

⁶ 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1(g).

⁷ See 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1 (g)(1)(i).

1 use is a prohibited “personal use” — that is, whether the expense would exist irrespective
2 of the candidate’s campaign or federal officeholder duties.⁸

3 The Act and Commission regulations do not expressly address childcare
4 expenses. The Commission, accordingly, determines whether the proposed use of
5 campaign funds for childcare expenses would exist irrespective of the candidate’s
6 campaign for federal office or federal officeholder duties.

7 *A. Use of campaign funds to pay Congressman Swalwell’s overnight*
8 *childcare expenses when he travels for campaign events for his own*
9 *campaign*

10 In previous advisory opinions, the Commission has considered whether federal
11 candidates may use campaign funds to pay childcare costs incurred as a result of their
12 own campaigns. In Advisory Opinion 2018-06 (Liuba for Congress), for example, a
13 federal candidate who had given up her in-home consulting work in order to campaign
14 and hired a caregiver for her children proposed to use campaign funds to pay childcare
15 expenses when her campaign responsibilities prevented her from caring for the children
16 herself.⁹ Similarly, in Advisory Opinion 2019-13 (MJ for Texas), a federal candidate
17 who had left her job to work full-time on her campaign proposed to use campaign funds
18 to pay for full-time daycare for her children when her campaign activities prevented her
19 from providing the care herself.¹⁰ In both advisory opinions, the Commission concluded
20 that the candidates could use campaign funds to pay childcare expenses to the extent the

⁸ See 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1(g)(1)(ii).

⁹ Advisory Opinion 2018-06 (Liuba for Congress) at 1-2.

¹⁰ Advisory Opinion 2019-13 (MJ for Texas) at 1-2.

1 expenses were a “direct result of campaign activity,” because such expenses would not
2 have existed irrespective of the candidates’ campaigns.¹¹

3 The Commission’s analysis and conclusions in the previous advisory opinions
4 apply equally here. The requestors state that Congressman Swalwell’s campaign
5 activities will occasionally require him to be away from home overnight, and that he will
6 incur expenses for overnight childcare during those times when his wife is unavailable to
7 care for their children. To the extent that Congressman Swalwell’s overnight childcare
8 expenses will be a direct result of Congressman Swalwell’s travel for his own campaign
9 activities, the Commission concludes that those expenses would not exist irrespective of
10 his campaign and, therefore, may be paid with campaign funds.¹² This conclusion is
11 consistent with the Commission’s conclusions in Advisory Opinion 2018-06 (Liuba for
12 Congress) and Advisory Opinion 2019-13 (MJ for Texas).

13 *B. Use of campaign funds to pay Congressman Swalwell’s overnight childcare*
14 *expenses when he travels for campaign events for other campaigns*

15 As noted above, the Act explicitly authorizes candidates to use campaign funds
16 for otherwise authorized expenditures in connection with their own federal campaigns.
17 The Act does not, however, explicitly address a candidate’s or officeholder’s use of
18 campaign funds to pay expenses incurred in connection with someone else’s campaign,
19 as proposed here.

¹¹ Advisory Opinion 2018-06 (Liuba for Congress) at 3, Advisory Opinion 2019-13 (MJ for Texas)
at 3; *see also* Advisory Opinion 1995-42 (McCrery) at 2 (approving proposed use of campaign funds to pay
Congressman’s childcare expenses when he and his wife attend campaign events, where childcare expenses
result only from campaign activity and otherwise would not exist).

¹² *See* 52 U.S.C. § 30114(a)(1), (b); 11 C.F.R. § 113.1(g).

1 Nonetheless, federal officeholders may use campaign funds to defray “ordinary
2 and necessary expenses incurred in connection with [their] duties . . . as a holder of
3 Federal office.”¹³ Here, Congressman Swalwell serves as Co-Chair of the House
4 Democratic Steering and Policy Committee. His official House website states that he
5 “was selected by Democratic Leader Pelosi and elected by [his] colleagues to help lead
6 this committee, which sets the Democratic policy agenda and nominates Democratic
7 Members for committee assignments.”¹⁴ The requestors describe the position of Co-
8 Chair as “a party leadership position that can only be held by a Member of Congress.”¹⁵
9 Based on these representations, it appears that Congressman Swalwell’s service as Co-
10 Chair of the House Democratic Steering and Policy Committee is directly connected to
11 his *bona fide* official responsibilities.

12 Commission regulations provide that an officeholder may use campaign funds to
13 pay the costs of travel for the officeholder (and an accompanying spouse) to participate in
14 a function directly connected to the officeholder’s *bona fide* official responsibilities, such
15 as a fact-finding meeting or an event at which the officeholder provides services by
16 making a speech or appearance in an official capacity.¹⁶ As the Commission has stated
17 previously, expenses incurred by an officeholder for travel to a function that is directly
18 connected to his *bona fide* official responsibilities “clearly would not exist irrespective of

¹³ 52 U.S.C. §30114(a)(2); *see also* 11 C.F.R. § 113.2(a).

¹⁴ Congressman Eric Swalwell, Committee, Leadership and Caucuses,
<https://swalwell.house.gov/about/committees-and-caucuses> (last viewed June 20, 2022).

¹⁵ AOR001.

¹⁶ 11 C.F.R. § 113.2(a)(1).

1 his . . . duties as a Federal officeholder.”¹⁷ Thus, the use of campaign funds to pay those
2 expenses would not be personal use. Accordingly, Congressman Swalwell may use
3 campaign funds to pay ordinary and necessary expenses that he will incur in connection
4 with the performance of his duties as Co-Chair of the House Democratic Steering and
5 Policy Committee, including costs to travel to participate in functions directly connected
6 to his *bona fide* official responsibilities.¹⁸

7 Congressman Swalwell proposes to use campaign funds to pay childcare expenses
8 that he will incur while traveling to campaign for other candidates, if his spouse is not
9 available to care for their children. The requestors state that Congressman Swalwell’s
10 duties as Co-Chair of the House Democratic Steering and Policy Committee “include
11 getting more Democrats elected to Congress,”¹⁹ and he “often is expected to travel and be
12 away from home, including overnight,” “[a]s part of his duties.”²⁰

13 The Commission concludes that Congressman Swalwell’s proposal is not
14 permissible under the Act and Commission regulations, because it would result in the
15 conversion of campaign funds to personal use. Although campaign funds may be used to

¹⁷ Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7872 (Feb. 9, 1995).

¹⁸ See 11 C.F.R. § 113.2(a)(1). The use of campaign funds to assist another’s campaign may result in an in-kind contribution to that campaign. *Id.* § 113.4(a) (“Any contributions to, or expenditures from an office account which are made for the purpose of influencing a federal election shall be subject to 52 U.S.C. § 30116 [limitations, contributions, and expenditures] and 11 C.F.R. part 110 [contribution and expenditure limitations and prohibitions]”). No political committee that supports or has supported more than one candidate may be designated as a principal campaign committee; contributions by one authorized committee to another authorized committee in amounts aggregating \$2,000 or less per election do not count as “support.” 11 C.F.R. § 102.12(c).

¹⁹ AOR001.

²⁰ *Id.*

1 pay the “costs of travel”²¹ that are incurred when an officeholder travels in connection
2 with his *bona fide* official responsibilities, the Commission has generally described travel
3 costs as the costs of the traveler’s transportation and, sometimes, subsistence (food and
4 lodging).²² Childcare expenses do not fall into either category.

5 As noted by requestors, the Commission has previously approved certain
6 proposals to use campaign funds to pay for an officeholder’s children to travel with the
7 officeholder in connection with his *bona fide* official responsibilities.²³ The Commission
8 has never, however, approved the use of campaign funds to pay expenses that are not
9 themselves travel costs but are, instead, merely incident to an officeholder’s travel. To
10 do so would risk opening the door to a range of abuses by enabling officeholders to use
11 campaign funds to pay their personal expenses.

12 Here, Congressman Swalwell’s obligation to ensure that his children receive care
13 when he is away on travel would exist irrespective of his official duties.²⁴ Accordingly,

²¹ 11 C.F.R. § 113.2(a)(1).

²² See, e.g., 11 C.F.R. §§ 113.1(g)(1)(ii)(C) (listing “[t]ravel expenses, including subsistence expenses incurred during travel,” as expenses analyzed on case-by-case basis for personal use); 100.79 (exempting certain unreimbursed personal transportation expenses paid by individuals traveling on behalf of candidates or party committees from definition of “contribution” under Act’s exemption for unreimbursed “travel expenses,” 52 U.S.C. § 30101(8)(b)(iv)); 11 C.F.R. §§ 100.139 (containing parallel exemption from definition of “expenditure”); 9034.4(e)(7) (describing “travel costs” as “[e]xpenditures for campaign-related transportation, food, and lodging by any individual” under Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9012).

²³ See, e.g., Advisory Opinion 2005-09 (Dodd) (approving use of campaign funds to pay travel costs of officeholder’s minor children when accompanying their parents traveling to participate in function directly connected to officeholder’s *bona fide* official responsibilities); Advisory Opinion 1997-02 (Skaggs/LaHood) (approving use of campaign funds to pay travel expenses and attendance fees of Members and their spouses and children to participate in Bipartisan Congressional Retreat).

²⁴ See MUR 7923 (Friends of David Schweikert, *et al.*), Factual and Legal Analysis at 17-18 (finding reason to believe officeholder’s use of campaign funds to pay childcare expenses was personal use).

1 the Commission concludes that Congressman Swalwell may not use campaign funds to
2 pay overnight childcare costs incurred when he travels to campaign for other candidates.

3 2. *May Swalwell for Congress pay for childcare expenses for Congressman*
4 *Swalwell's children if he travels at the request of foreign governments or other*
5 *entities because of his status as a Member of Congress? If yes, would that include*
6 *the expenses for overnight childcare as well?*

7
8 No, Swalwell for Congress may not pay childcare expenses for Congressman
9 Swalwell's children if he travels at the request of foreign governments or other entities
10 because doing so would convert campaign funds to personal use.

11 Congressman Swalwell receives invitations, including invitations from foreign
12 governments for information-gathering visits, "because of his status as a well-known
13 [M]ember of Congress."²⁵ These invitations may require Congressman Swalwell and,
14 occasionally, his accompanying spouse, to be away from home for several days at a time.

15 Although Congressman Swalwell's travel on these occasions would appear to be
16 directly connected with his *bona fide* official duties,²⁶ the use of campaign funds to pay
17 his childcare expenses nonetheless would be personal use for the same reasons provided
18 above in response to Question 1(B). Accordingly, Swalwell for Congress will not be able
19 to use campaign funds to pay Congressman Swalwell's childcare expenses when he
20 travels at the request of foreign governments or other entities because of his status as a
21 Member of Congress.

²⁵ AOR001.

²⁶ 52 U.S.C. § 30114(a)(2); *see also* 11 C.F.R. § 113.2(a).

1 The Commission expresses no opinion regarding the application of the rules of
2 the U.S. House of Representatives to the proposed activities, because those rules are not
3 within the Commission's jurisdiction.

4 This response constitutes an advisory opinion concerning the application of the
5 Act and Commission regulations to the specific transaction or activity set forth in your
6 request.²⁷ The Commission emphasizes that, if there is a change in any of the facts or
7 assumptions presented, and such facts or assumptions are material to a conclusion
8 presented in this advisory opinion, then the requestors may not rely on that conclusion as
9 support for their proposed activity. Any person involved in any specific transaction or
10 activity which is indistinguishable in all its material aspects from the transaction or
11 activity with respect to which this advisory opinion is rendered may rely on this advisory
12 opinion.²⁸ Please note that the analysis or conclusions in this advisory opinion may be
13 affected by subsequent developments in the law including, but not limited to, statutes,
14 regulations, advisory opinions, and case law. Any advisory opinions cited herein are
15 available on the Commission's website. Advisory opinions do not address questions of
16 general law, hypothetical situations, the activities of third parties, or past activity.²⁹

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18 On behalf of the Commission,
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20

21
22
23 Allen J. Dickerson
24 Chairman

²⁷ See 52 U.S.C. § 30108.

²⁸ See *id.* § 30108(c)(1)(B).

²⁹ See 11 C.F.R. § 112.1(b).