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Washington, DC

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AGENDA ITEM
For meeting of October 10, 2024
SUBMITTED LATE

October 7, 2024

MEMORANDUM

TO: The Commission

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

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Attorney

Subject: AO 2024-09 (Nanette Barragán and Barragán for Congress) - Draft C

Attached is a proposed draft of the subject advisory opinion. 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 12:00pm (Eastern Time) on October 9, 2024.

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

ADVISORY OPINION 2024-09

Rebecca J. Olson, Esq. **DRAFT C**
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Sacramento, CA 95814

Dear Ms. Olson:

We are responding to your advisory opinion request on behalf of Congresswoman Nanette Barragán and Barragán for Congress concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the "Act"), and Commission regulations to the use of campaign funds to pay for eldercare expenses incurred by Congresswoman Barragán as the primary caretaker of her mother. As explained further below, the Commission concludes that Congresswoman Barragán may use campaign funds to pay certain eldercare expenses to the extent that they are incurred as a direct result of her campaign activity for her own campaign. The Commission also concludes that Congresswoman Barragán may use campaign funds to pay certain eldercare expenses she incurs when she is: (1) traveling for official business for a Congressional Member Delegation ("CODEL"); or (2) in Washington, D.C. to cast votes in Congress. The Commission further concludes that the remainder of the Request fails to identify a "specific transaction or activity" and declines to render an opinion.[1]

Background

The facts presented in this advisory opinion are based on your letter received on July 18, 2024, and your email dated August 6, 2024.

[1] 52 U.S.C. § 30108(a)(1).

Congresswoman Barragán serves California's 44th Congressional District in the U.S. House of Representatives.[2] Her principal campaign committee is Barragán for Congress.

Congresswoman Barragán's mother suffers from several severe health conditions.[3] Due to her conditions, she requires "constant round-the-clock 24-hour care and supervision."[4] In late 2021, Congresswoman Barragán moved into her mother's home in Los Angeles to serve as her caregiver. Congresswoman Barragán cared for her mother and voted by proxy in Congress until the option to do so ended in January 2023, at which point she returned to her duties in Washington, D.C. and arranged for additional caregivers to ensure full-time care for her mother. Congresswoman Barragán continues to reside in her mother's home, holds her mother's power of attorney, and manages her mother's care.

Because her mother is eligible for benefits under California's Medi-Cal program, Congresswoman Barragán has been able to secure the services of several caregivers provided by Los Angeles County's In-Home Supportive Services ("In-Home") program and the Home and Community Based Services ("Community Services") program.[5] Under these programs, caregivers are paid hourly to care for Congresswoman Barragán's mother when Congresswoman Barragán is away from their home.[6] Due to significant turnover among In-Home program workers, however, and missed shifts for illnesses or other reasons, "it can be difficult to ensure

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[2] AOR001.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Congresswoman Barragán registered as a caregiver herself under the In-Home program in 2022 and provided approximately 1600 hours of care for her mother. AOR001-2.

constant, continual care."[7] Moreover, gaps in coverage "can happen without notice."[8] Congresswoman Barragán covers gaps in coverage by either caring for her mother herself or paying for a caregiver through a private agency. In 2023, Congresswoman Barragán's out-of-pocket expenses to cover gaps in her mother's care were nearly $27,000.

Congresswoman Barragán expects that gaps in coverage will continue and would like to use campaign funds to pay for caregiving to cover gaps that arise when she is not able to provide the care herself for campaign or officeholder-related reasons. She provides five factual scenarios, which appear in the questions below.

Questions Presented

1. *May Congresswoman Barragán use campaign funds to pay for gaps in her mother's caregiving when Congresswoman Barragán is in her district or traveling to other destinations for campaign events such as fundraising events, meetings with campaign supporters, traveling with presidential or other congressional candidates, or to the national convention?*

2. *May Congresswoman Barragán use campaign funds to pay for gaps in her mother's caregiving when Congresswoman Barragán is:*

    a. *Traveling in her official capacity as Chair of the Congressional Hispanic Caucus?*

    b. *Traveling for official business out of state or internationally, such as for a CODEL?*

    c. *Traveling to, from, or in Washington, D.C. or her district to attend events in her official capacity as a member of Congress?*

    d. *In Washington, D.C. to cast votes in Congress?*

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7 AOR002.

8 *Id.*

Legal Analysis

1. *May Congresswoman Barragán use campaign funds to pay for gaps in her mother's caregiving when Congresswoman Barragán is in her district or traveling to other destinations for campaign events such as fundraising events, meetings with campaign supporters, traveling with presidential or other congressional candidates, or to the national convention?*

Yes, Congresswoman Barragán may use campaign funds to pay for gaps in her mother's caregiving when Congresswoman Barragán is in her district or traveling to other destinations for official campaign events such as fundraising events and meetings with campaign supporters, because these expenses would not exist irrespective of Congresswoman Barragán's campaign.

Under the Act and Commission regulations, a candidate and individual holding federal office may use campaign funds for several specific purposes, including (1) "for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual," (2) "for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office," and (3) "for any other lawful purpose" that does not convert the campaign funds to "personal use."[9] The Act and Commission regulations define "personal use" as the use of campaign funds "to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office."[10]

The Act and Commission regulations provide a non-exhaustive list of expenses that, when paid using campaign funds, constitute *per se* personal use.[11] For expenses not included on

[9] 52 U.S.C. § 30114(a)(1)-(2), (a)(6); *see also* 11 C.F.R. § 113.2(a), (e).

[10] 52 U.S.C. § 30114(b)(2); *see also* 11 C.F.R. § 113.1(g)(1).

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

this list — such as eldercare expenses — the Commission determines, on a case-by-case basis, whether the use is a prohibited "personal use."[12] When the Commission engages in a case-by-case determination, it does so in light of its "long-standing opinion that candidates have wide discretion over the use of campaign funds."[13]

Although the Commission has not previously addressed in advisory opinions the use of campaign funds to pay eldercare expenses, the Commission has considered the use of campaign funds in the context of childcare expenses. The Commission has approved the use of campaign funds to pay candidates' childcare expenses incurred when the candidates travel for their own campaigns,[14] and when their campaign responsibilities and activities for their own campaigns otherwise prevent them from caring for their children themselves.[15] In these advisory opinions, the Commission concluded that the candidates could use campaign funds to pay childcare expenses to the extent that the expenses were a "direct result of campaign activity," because such expenses would not have existed irrespective of the candidate's campaign.[16]

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[12] 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1(g).

[13] Personal Use of Campaign Funds, 60 Fed. Reg. 7867 (Feb. 9, 1995).

[14] Advisory Opinion 2022-07 (Swalwell) at 3 (concluding that candidate could use campaign funds to pay childcare expenses incurred when candidate travels for own campaign to extent expenses are direct result of candidate's campaign travel, because expenses "would not have existed irrespective of the candidates' campaigns"); Advisory Opinion 1995-42 (McCrery) at 2 (concluding that candidate could use campaign funds to pay childcare expenses resulting from candidate's and spouse's attendance at campaign events because "the childcare expenses [were] incurred only as a direct result of campaign activity and would not otherwise exist").

[15] Advisory Opinion 2018-06 (Liuba for Congress) at 3 (concluding that candidate who had given up in-home consulting to campaign for Congress could use campaign funds to pay childcare expenses "incurred as a direct result of campaign activity, [because the expenses] would not exist irrespective of" campaign); Advisory Opinion 2019-13 (MJ for Texas) at 3 (concluding that candidate who had left her job to campaign full-time could use campaign funds to pay children's daycare expenses "to the extent they are a direct result of campaign activity, [because the expenses] would not exist irrespective of" campaign).

[16] Advisory Opinion 2022-07 (Swalwell) at 3; Advisory Opinion 2019-13 (MJ for Texas) at 3; Advisory Opinion 2018-06 (Liuba for Congress) at 3; Advisory Opinion 1995-42 (McCrery) at 2; *cf.* Advisory Opinion 1995-

Here, similarly, Congresswoman Barragán's campaign activities as described in the request will require her to be away from home from time to time. As her mother's primary caregiver, Congresswoman Barragán is responsible for ensuring that her mother receives the necessary care during those times. Congresswoman Barragán also has power of attorney over her mother, giving her legal responsibility to provide for and manage her mother's care.[17] When gaps arise in care previously arranged through the In-Home and Community Service programs and Congresswoman Barragán's campaign activities for her own campaign prevent her from caring for her mother herself, the additional expenses that she incurs in obtaining alternative care for her mother are a direct result of those campaign activities. Consistent with the Commission's conclusions in the childcare advisory opinions discussed above, the Commission concludes that Congresswoman Barragán may use campaign funds to pay the additional eldercare expenses that she incurs to the extent that the expenses are the direct result of campaign activities for her own campaign, because those expenses would not exist irrespective of her campaign.

Consistent with the foregoing, Congresswoman Barragán may use campaign funds to pay for gaps in her mother's caregiving when Congresswoman Barragán is in her district or traveling to other destinations for official campaign events such as fundraising events and meetings with campaign supporters. Travel with other candidates or attendance at the Democratic National Convention, however, may or may not be directly connected to Congresswoman Barragán's

20 (Roemer) at 2 (approving use of campaign funds to pay expenses of candidate's children to travel with candidate and spouse to campaign events, where such travel is "only required because of the campaign").

[17] AOR Supp. at 1. *See also* Advisory Opinion 2018-06 (Liuba for Congress) at 3 (observing that requestor was "the full-time caregiver for [her] young children, and, because of [her] campaign activity," would have to "incur expenses for part-time or full-time childcare.").

official campaign activities. Accordingly, absent further context, the Commission is unable to provide an opinion concerning those categories of proposed travel.[18]

2. *May Congresswoman Barragán use campaign funds to pay for gaps in her mother's caregiving when Congresswoman Barragán is:*

    a. *Traveling in her official capacity as Chair of the Congressional Hispanic Caucus?*

    b. *Traveling for official business out of state or internationally, such as for a CODEL?*

    c. *Traveling to, from, or in Washington, D.C. or her district to attend events in her official capacity as a member of Congress?*

    d. *In Washington, D.C. to cast votes in Congress?*

Congresswoman Barragán may use campaign funds to pay to fill gaps in her mother's caregiving that arise when Congresswoman Barragán travels for a CODEL or to cast votes in Congress. In those circumstances, because Congresswoman Barragán's travel is directly connected to her duties as a Federal officeholder, and because she is unable as a direct result of such travel to fill unanticipated gaps that arise in her mother's care, the additional expenses would not exist irrespective of Congresswoman Barragán's duties as a Federal officeholder. In those circumstances, the use of campaign funds to pay the expenses would not convert the funds to personal use. Travel for undefined "official business" or in an undefined "official capacity," however, may or may not be directly connected to Congresswoman Barragán's formal duties as a

[18] 2 U.S.C. § 30108(a)(1) (Commission may only provide advisory opinions concerning a "specific transaction or activity").

Federal officeholder. Accordingly, absent further context, the Commission is unable to provide an opinion concerning additional categories of proposed travel.[19]

Federal officeholders may use campaign funds to defray "ordinary and necessary expenses incurred in connection with [their] duties . . . as a holder of Federal office."[20] The Commission has long recognized that "[l]egislation is the principal *bona fide* official responsibility of each Member of Congress."[21] Thus, when Congresswoman Barragán is in Washington D.C. to vote on policy or legislation and, as a direct result, is unable to fill unanticipated gaps in her mother's care, the additional caregiving expenses that she incurs would not exist irrespective of her duties as a Federal officeholder.[22] The same analysis applies where Congresswoman Barragán is engaged in unquestionably "official travel," such as "official travel to a foreign country" funded by the Federal government and "authorized by the Speaker [of the House] or a committee chair."[23] In those circumstances, the use of campaign funds to fill unanticipated gaps in care would not be a prohibited conversion to personal use.

The Commission has previously concluded that Congresswoman Barragán may use campaign funds to pay for travel to attend certain Congressional Hispanic Caucus events in her official capacity as Caucus Chair because the events were directly connected to her duties as a

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[19] 2 U.S.C. § 30108(a)(1) (Commission may only provide advisory opinions concerning a "specific transaction or activity").

[20] 52 U.S.C. § 30114(a)(2); *see also* 11 C.F.R. § 113.2(a).

[21] Advisory Opinion 1997-02 (Skaggs/LaHood) at 4.

[22] *Cf.* U.S. Const. art. I, § 6.

[23] Comm. on Ethics, House Ethics Manual, IV. Official Travel, *available at*: https://ethics.house.gov/house-ethics-manual/travel#_Official_Travel.

Federal officeholder.[24] Here, however, Congresswoman Barragán seeks to use campaign funds to cover gaps in caregiving that occur whenever she travels in her official capacity as Chair of the Congressional Hispanic Caucus, irrespective of whether that travel is to or from an official Caucus event. The scope of the Congresswoman's "official capacity" as Chair is not explained, and the Commission accordingly lacks sufficient information to characterize Congresswoman Barragán's proposed travel. In such circumstances, it cannot opine upon the legal question presented.[25]

Similarly, because the Request does not explain the scope of Congresswoman Barragán's "official" travel or its specific connection to her duties as a Federal officeholder, the Commission is unable to opine upon the application of the personal use prohibition to these hypothetical trips.[26]

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transactions or activities set forth in the request.[27] The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestors may not rely on that conclusion as support for their proposed transactions or activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory

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[24] Advisory Opinion 2023-01 (Barragán) at 1-2.

[25] 52 U.S.C. § 30108(a)(1)

[26] *Id.*

[27] *See* 52 U.S.C. § 30108.

opinion is rendered may rely on this advisory opinion.[28] Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

Sean J. Cooksey
Chairman

[28] *See id.* § 30108(c)(1)(B).a