



Federal Election Commission  
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Washington, DC 20463  
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**RE: Advisory Opinion Request 2022-21 (DSCC, *et al.*)**

Dear Commissioners,

Campaign Legal Center (“CLC”) respectfully submits this comment regarding Advisory Opinion Request 2022-21 (DSCC, *et al.*). The DSCC, a national congressional campaign committee, states that it plans to use restricted funds in a special purpose account for recounts and other legal proceedings to pay for television ads soliciting donations to that account — including ads that will expressly advocate for or against the election of federal candidates.<sup>1</sup>

The Commission should either dismiss the DSCC’s submission as an invalid advisory opinion request, or, alternatively, make clear that national party committees cannot use the restricted funds in a special purpose “legal proceedings” account to make expenditures.

**The Submission Is Not a Valid Advisory Opinion Request**

As a threshold matter, the DSCC’s submission “do[es] not qualify as [an] advisory opinion request” because it clearly pertains to “the activities of third parties.”<sup>2</sup> As publicly reported, CLC and End Citizens United have filed a complaint with the Commission alleging there is reason to believe<sup>3</sup> the DSCC’s Republican counterpart, the NRSC, has violated the Federal Election Campaign Act (“FECA”) by making disbursements for campaign expenses from

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<sup>1</sup> Advisory Op. Request 2022-21 at 1-2 (DSCC, *et al.*) (“AOR”).

<sup>2</sup> 11 C.F.R. § 112.1(b).

<sup>3</sup> This document has been redacted by the Office of General Counsel over CLC’s objection; the unredacted document is available at [www.campaignlegal.org](http://www.campaignlegal.org).

a special purpose account for recounts and other legal proceedings.<sup>4</sup> This complaint and the DSCC's submission both stem directly from the NRSC's conduct.<sup>5</sup> Indeed, the DSCC's counsel appears to have indicated as much to the New York Times, which published quotes from the DSCC's submission before the Commission had even made it public.<sup>6</sup> And surely it is not a coincidence that the DSCC claims it intends to engage in virtually identical conduct to the NRSC's. In sum, the DSCC is asking the Commission to immediately opine on the legality of the NRSC's activity.

We are not unsympathetic to the situation in which the DSCC finds itself. A competitor has broken the law, and the DSCC seeks redress. But FECA and Commission regulations provide an avenue for such redress: the enforcement process, including the availability of judicial review in the event the Commission fails to act or acts unlawfully. Commission regulations wisely do not allow the advisory opinion process to be used to circumvent FECA's statutory enforcement scheme, at least in part because doing so could evade judicial review of Commission action, inaction, or deadlock.

We also recognize that election season is in full swing, and an advisory opinion would surely provide an answer (or deadlock) more quickly than the results of the pending NRSC complaint and any subsequent litigation. But the Commission is charged with protecting American voters by administering and enforcing FECA, and has no freestanding power or obligation to level the partisan playing field by diverting one party's lawbreaking into an inapposite procedure that might benefit the other party, but lacks crucial procedural safeguards for the public. The utterly inadequate speed of the Commission's enforcement process must be addressed through the judicial and congressional processes, not through ad hoc circumvention.

The requestors are transparently attempting to misuse the Commission's advisory opinion process, and the Commission should not take the bait.

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<sup>4</sup> Shane Goldmacher and Reid J. Epstein, *Watchdog Group Accuses Senate G.O.P. Campaign Arm of Breaking the Law*, N.Y. Times (Sept. 21, 2022), <https://www.nytimes.com/2022/09/21/us/politics/fec-complaint-republican-campaign-finance.html>; Compl., MUR 8071 (Sept. 19, 2022), available at <https://campaignlegal.org/sites/default/files/2022-09/NRSC%20Complaint%20%28Final%29.pdf>.

<sup>5</sup> See Compl., MUR 8071; 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>.

<sup>6</sup> Compare Goldmacher & Epstein, *supra* (dated Sept. 21, 2022), with AOR 2022-21 at 1 (finalized Sept. 26, 2022).

## **FECA Prohibits the Use of Restricted Funds in “Legal Proceedings” Accounts to Make Expenditures**

Should the Commission nevertheless decide to issue an advisory opinion in response to this request, we respectfully urge the Commission to make abundantly clear that national party committees cannot use funds in a special purpose account for recounts and other legal proceedings to pay for public communications containing express advocacy, or indeed for anything that would result in an expenditure under FECA.

The Consolidated and Further Continuing Appropriations Act of 2015 allowed national party committees, like the NRSC and DSCC, to establish special purpose accounts that may accept up to 300% of the otherwise applicable annual contribution limits.<sup>7</sup> Although the Commission has, for the past seven years, failed to enact regulations implementing these statutory provisions,<sup>8</sup> both the legislative history of the 2015 Act and subsequent Commission precedents plainly indicate that these special purpose accounts may not be used “for the purpose of influencing” federal elections — *i.e.*, to make “expenditures.”<sup>9</sup> As such, the question before the Commission is whether any of the requestors’ proposed activities would result in expenditures.

That question answers itself: television ads that expressly advocate for or against federal candidates are obviously “for the purpose of influencing” a federal election and thus the payments for those ads are, by definition, expenditures.<sup>10</sup> Accordingly, national party committees cannot lawfully make such payments using restricted funds in a special purpose account for recounts and other legal proceedings.

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<sup>7</sup> See 52 U.S.C. § 30116(a)(9).

<sup>8</sup> See 52 U.S.C. § 30116(a)(9)(C).

<sup>9</sup> 52 U.S.C. § 30101(9)(A) (defining “expenditure”); see Factual and Legal Analysis at 7, MUR 7390 (RNC); Advisory Op. 2019-02 at 3-4 (Nelson) (citing 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)).

<sup>10</sup> See 52 U.S.C. § 30101(17) (defining “independent expenditure”); 11 C.F.R. § 100.22 (defining “expressly advocating”).

Should the Commission decide to respond to this request, we respectfully urge the Commission to confirm what is already clear in the statute by unequivocally stating that committees cannot use these accounts to make campaign expenditures.

Sincerely,

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