RECEIVED
By Office of the Commission Secretary at 2:35 pm, Mar 18, 2024

ELIAS LAW GROUP

250 Massachusetts Ave NW, Suite 400 | Washington, DC 20001

March 14, 2024

BY ELECTRONIC MAIL DELIVERY

Office of General Counsel
Attn: Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Advisory Opinion Request 2024-05

Dear Ms. Stevenson:

We write in response to a Commissioner's question regarding how the Commission should apply the reasoning in Advisory Opinion 2003-12 (Flake) to Nevadans for Reproductive Freedom ("***NFRF***") request. For the reasons explained below, the Commission should not apply the reasoning in Advisory Opinion 2003-12 to NFRF's request.

The Bipartisan Campaign Finance Reform Act of 2002 ("***BCRA***") prohibits, among other things, federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending funds in connection "with an election for Federal office" or "any election other than an election for Federal office" unless the funds are subject to the Federal Election Campaign Finance Act's (the "***Act's***") amount and source restrictions.[1]

In Advisory Opinion 2003-12, the Commission was asked to determine the extent to which a ballot measure committee's activities were in connection with "any election other than an election for federal office" under subparagraph (B) of 52 U.S.C § 30125(e)(1).[2] The Commission concluded that such activities "are not in connection with any election other than election for federal office" before the ballot measure qualifies for the ballot. However, once the ballot measure committee qualifies an initiative or referendum for the ballot, its post-qualification activities are "in connection with any election other than an election for Federal office" under subparagraph (B) of 52 U.S.C § 30125(e)(1).

In drawing this distinction, the Commission noted that Congress intended for the phrase "in connection with any election other than an election for Federal office" to apply to "a different category of elections than those covered by subparagraph (A)," which applies to "an election for Federal office."[3] The Commission further noted that subparagraph (B) differs from other

[1] 52 U.S.C § 30125(e)(1).
[2] *See* FEC, AO 2003-12 at 4-6.
[3] *Id.*

provisions of the Act that extend beyond Federal elections, such as the national bank prohibition (now codified at 52 U.S.C. § 30118), which applies "in connection with any election to any political office."[4] According to the Commission, in BCRA, Congress had decided to limit the national bank prohibition to any election for "political office," while "intending a broader sweep" for subparagraph B of 52 U.S.C § 30125(e)(1), because it applies to "any election." In the Commission's view in Advisory Opinion 2003-12, this difference in wording, where Congress retained "political office" in one section of the Act but not another section, meant that the scope of the soft money prohibition in subparagraph (B) is not limited to elections for "political office," and, as such, the ballot measure committee's activities as described in the request were in connection with "an election other than an election for Federal office."[5]

Finally, the Commission held that all ballot measure committees established, financed, maintained, or controlled by a federal candidate are "in connection with any election other than an election for Federal office" regardless of whether the activities occur prior to or after the ballot measure qualifies for the ballot.[6]

The Commission's reasoning in Advisory Opinion 2003-12 should not apply to NFRF's request.

First, the distinction reached by the Commission in Advisory Opinion 2003-12 that ballot measure activities are not in connection with an election *before* the ballot measure qualifies but are in connection with an election *after* the ballot measure qualifies is legally flawed. As discussed in NFRF's request, there is nothing in the legislative history that supports the conclusion that Congress intended for the Commission to regulate ballot measure activities, regardless of whether the activities occur pre-qualification or post-qualification. To the contrary, Members of Congress who voted for BCRA expressed their view that BCRA does not apply to ballot measures.

Second, the Commission has recently explained that ballot measure activities are not in connection with an "election" as used in the Act and Commission regulations, rejecting an analysis similar to Advisory Opinion 2003-12 that the Office of General Counsel advanced, in the foreign national context.[7] The Commission acknowledged that "there has been no intervening change in the law"—including the enactment of BCRA, "that has altered the longstanding distinction between elections and ballot initiative activity" under the Act.[8]

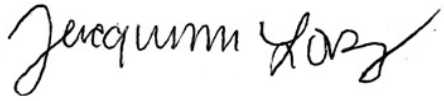
Third, Advisory Opinion 2003-12 is plainly distinguishable from NFRF's request. Representative Flake "had an active and significant role in the formation of" the ballot measure committee in Advisory Opinion 2003-12.[9] However, unlike in Advisory Opinion 2003-12, where the

---

[4] *Id.*
[5] *Id.* at 6.
[6] *Id.*
[7] *Compare* FEC, MUR 7523 (Stop I-186 to Protect Mining and Jobs, et al.), First General Counsel's Report at 13-19, *with* FEC, MUR 7523, Factual and Legal Analysis at 3-6.
[8] FEC, MUR 7523, Factual and Legal Analysis at 8. Moreover, this advisory opinion predates *Citizens United v. FEC*, 558 U.S. 310 (2010) and other court precedents regarding independent political expenditures.
[9] FEC, AO 2003-12. Specifically, Representative Flake was among the individuals who formed the ballot measure committee, and signed documents creating the committee and served as its chair. FEC, AO 2003-12 at 7. Further, a part-time campaign consultant for Representative Flake was also involved with the committee, opening a bank account and helping it with state filings.

Commission concluded that the facts demonstrated that Representative Flake had established, financed, maintained, or controlled the ballot measure committee,[10] no federal candidate or officeholder established NFRF, nor will it be maintained, financed, or controlled by any candidate or officeholder. Accordingly, Advisory Opinion 2003-12 is distinguishable from the instant request.[11]

Very truly yours,



Jacquelyn Lopez
Ezra Reese
Jonathan Peterson
Emma Anspach
Counsel to Nevadans for Reproductive Freedom

[10] *Id.*

[11] In addition, the conclusion that Representative Flake established, maintained, financed, or controlled the ballot measure committee, affected many of the Commission's responses to the other questions presented in Advisory Opinion 2003-12. *See* Advisory Opinion 2003-12 at 7-8 (holding in question 2 that the ballot measure committee was subject to the hard money contribution limit of $5,000 due to the relationship between Rep. Flake and the committee); *id.* at 10 (holding in question 8 that any solicitation of funds by Rep. Flake on behalf of the committee must comply with the soft money prohibitions based, in part, on the fact that he established the committee); *id.* at 10-12 (holding in question 9 that because Rep. Flake established the committee: (1) activities of the ballot measure committee that qualify as federal election activity must be paid with federal funds; (2) the ballot measure committee and Rep. Flake must comply with the soft money prohibitions on any fundraising; (3) that the general solicitation provision for a 501(c) organization does not apply to organizations established, financed, maintained, or controlled by a federal candidates or officeholders); *id.* at 13-14 (referring to question 9 response for questions 10, 11, 13, 14, and 24).