



FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary ^{VFV}

DATE: August 29, 2024

SUBJECT: AOR 2024-07 (Team Graham, Inc.)
Comment from Campaign Legal Center

Attached is AOR 2024-07 (Team Graham) – Comment from Campaign Legal Center. This matter is on the August 29, 2024 Open Meeting.

Attachment



RECEIVED

By Office of General Counsel at 9:14 am, Aug 29, 2024

RECEIVED

By Office of the Commission Secretary at 9:32 am, Aug 29, 2024

August 29, 2024

Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First St. NE
Washington, DC 20463
ao@fec.gov

Re: Advisory Opinion Request 2024-07 (Team Graham, Inc.)

Dear Ms. Stevenson:

Campaign Legal Center (“CLC”) respectfully submits this comment on the Federal Election Commission’s (the “FEC” or “Commission”) draft advisory opinions regarding Advisory Opinion Request 2024-07 (Team Graham, Inc.), which are designated as Agenda Document Nos. 24-32-A (Draft A) and 24-32-B (Draft B) for the Commission’s August 29, 2024, open meeting.¹

Team Graham is Senator Lindsey Graham’s principal campaign committee.² It seeks to engage in joint fundraising with Graham’s leadership PAC, the National Republican Senatorial Committee, and Security is Strength PAC, a federally registered super PAC.³ Team Graham claims that the super PAC’s participation in the joint fundraising committee (“JFC”) will not result in the JFC or the super PAC making coordinated communications, *i.e.*, unlawful in-kind contributions to Graham’s campaign.⁴ Both drafts agree with this position and conclude that the proposed JFC does not raise any coordination concerns.⁵ CLC urges rejection of both

¹ See Agenda Doc. No. 24-32-A, AO 2024-07 (Team Graham) – Draft A (Aug. 22, 2024), <https://www.fec.gov/resources/cms-content/documents/mtgdoc-24-32-A.pdf> (“Draft A”); Agenda Doc. No. 24-32-B, AO 2024-07 (Team Graham) – Draft B (Aug. 27, 2024), <https://www.fec.gov/resources/cms-content/documents/mtgdoc-24-32-B.pdf> (“Draft B”).

² Draft A at 2.; Draft B at 2.

³ Draft A at 2; Draft B at 2; Team Graham, Inc., Comment re: Advisory Op. Request 2024-07 (Team Graham) at 1 (July 30, 2024), https://www.fec.gov/files/legal/aos/2024-07/202407C_3.pdf.

⁴ Advisory Op. Request 2024-07 (Team Graham) at 3-5 (June 12, 2024), https://www.fec.gov/files/legal/aos/2024-07/202407R_1.pdf (“Request”).

⁵ Draft A at 8-12; Draft B at 8-12.

drafts because candidates, political parties, and super PACs creating a JFC and working *together* to plan public communications is the precise opposite of the independence that federal courts require as a predicate to the very existence of super PACs.⁶

Team Graham states in its request that the campaign may be materially involved with, or have substantial discussions regarding, the JFC’s “solicitations, invitations, and similar fundraising event announcements.”⁷ It will also share data about its donors, to facilitate the JFC’s compliance obligations, and will disclose information about the Senator’s schedule to coordinate event logistics.⁸ The drafts’ rationales for why these conversations and data-sharing efforts will not result in the JFC producing coordinated communications or the super PAC learning “nonpublic campaign plans, projects, activities, or needs” defy logic and the clear language of the FEC’s coordination regulations.⁹

The drafts conclude that the JFC’s communications will not be coordinated communications funded by the super PAC and benefiting the Graham campaign because, according to the drafts, the communications do not satisfy the payment prong of the coordination test.¹⁰ The drafts state that because each participant in the JFC will “pay its proportionate share of the joint fundraising expenses,” no participant will be paying for communication costs attributable to another participant.¹¹ The drafts liken this arrangement to that in Advisory Opinion 2004-37 (Waters), where the Commission concluded that brochures featuring multiple federal candidates but paid for by one campaign would not be coordinated communications so long as each featured candidate “reimbursed the full production and distribution costs attributed to that candidate.”¹²

The conclusion in Drafts A and B that the JFC’s communications will not satisfy the payment prong of the coordination test reflects two fundamental errors. First, the drafts both misleadingly paraphrase the coordination regulation in a way that conspicuously omits a key clause: whereas the drafts state that the payment prong requires a communication to “be paid for by a person other than the federal candidate, authorized committee, or political committee in question,”¹³ the actual regulation provides that the payment prong is satisfied when a communication “[i]s

⁶ See *Citizens United v. FEC*, 558 U.S. 310, 357 (2010) (invalidating longstanding prohibitions on corporate and union independent expenditures based on the Court’s determination that the “absence of prearrangement and coordination of an expenditure . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate”); *SpeechNow.org v. FEC*, 599 F.3d 686, 693 (D.C. Cir. 2010) (“The independence of independent expenditures was a central consideration in the [*Citizens United*] decision”).

⁷ Request at 2.

⁸ *Id.* at 3.

⁹ See Draft A at 8-12; Draft B at 8-12.

¹⁰ Draft A at 10-11; Draft B at 10-11.

¹¹ Draft A at 10-11; Draft B at 10-11.

¹² Draft A at 11; Draft B at 11.

¹³ Draft A at 9; Draft B at 9.

paid for, in whole *or in part*, by a person other than” the candidate or candidate’s committee.¹⁴

Second, the drafts’ reliance on Advisory Opinion 2004-37 is misplaced. In that advisory opinion, the Commission concluded that the payment prong was not satisfied where a brochure featured multiple federal candidates, each of whom paid for “the full production and distribution costs attributed to him or her.” In the context presented by this request, however, a super PAC is paying for part of every one of the JFC’s communications, *all of which* benefit every participant equally. Unlike the brochure at issue in Advisory Opinion 2004-37, there is no way to divide up a JFC communication and determine which portions benefit which participants. A twenty-year-old, inapposite advisory opinion that pre-dates *Citizens United* and the very creation of super PACs does not support the conclusion in Drafts A and B.

The drafts’ other conclusion—that the super PAC will be able to make independent expenditures after coordinating with the campaign on JFC communications—is equally misguided.¹⁵ In today’s political environment, JFCs’ event-related communications are not just announcements of where and when events will occur; they are routinely digital solicitations that double as campaign advertisements. Using the presidential race as an example, the Facebook ad library shows Harris Victory Fund¹⁶ solicitations with lengthy statements from Vice President Harris saying she is “proud to be running on the record of what Joe Biden and I have accomplished together,”¹⁷ and videos of Governor Walz delivering fundraising pleas while referencing his past as a football coach and asking people to “join our team.”¹⁸ As the Commission has previously recognized, candidates do not lend their names or images to communications without the candidate or their agents reviewing them.¹⁹ And, despite what the drafts say, that review process is likely to result in a JFC’s participants learning “nonpublic campaign plans, projects, activities, or needs.”²⁰

For example, imagine Harris Victory Fund presenting the Harris campaign with the digital solicitation stating she is proud of what she and President Biden have

¹⁴ 11 C.F.R. § 109.21(a)(1) (emphasis added).

¹⁵ See Draft A at 11-12; Draft B at 11-12.

¹⁶ The Harris Victory Fund is a JFC comprised of the Harris presidential campaign, the Democratic National Committee, and Democratic state party committees. See Harris Victory Fund, Amend. Statement of Org. (FEC Form 1) (July 21, 2024), <https://docquery.fec.gov/pdf/305/202407219665705305/202407219665705305.pdf>.

¹⁷ See, e.g., Library ID: 1555807998706988, Facebook Ad Library, https://www.facebook.com/ads/library/?active_status=active&ad_type=political_and_issue_ad_s&country=US&media_type=all&q=1555807998706988&search_type=keyword_unordered (last visited Aug. 27, 2024).

¹⁸ See, e.g., Library ID: 1644140226179320, Facebook Ad Library, https://www.facebook.com/ads/library/?active_status=active&ad_type=political_and_issue_ad_s&country=US&media_type=all&q=1644140226179320&search_type=keyword_unordered (last visited Aug. 27, 2024).

¹⁹ See Advisory Op. 2003-25 (Weinzapfel) at 6 (“[I]t is highly implausible that a Federal candidate would appear in a communication without” being involved in decisions about the communication).

²⁰ See Draft A at 12; Draft B at 12.

accomplished. If her campaign had responded to the draft ad by requesting removal of all references to Biden, anyone privy to the review process—such as, hypothetically, a super PAC participating in the JFC—would immediately know that the campaign thinks it is strategically advantageous to minimize Harris’s ties to the Biden legacy. The super PAC would carry that knowledge with it when it produces its own communications advocating Harris’s election. Likewise, imagine if the campaign team had asked for removal of references to Governor Walz’s coaching past. A super PAC participating in the review process would know not to include coaching allusions in its own election communications because the campaign would not find those communications to be helpful.

A super PAC’s utilization of insider knowledge of a campaign’s communications strategy is precisely the type of conduct that makes a super PAC’s communications “coordinated.” The drafts, however, would allow Team Graham and Security is Strength PAC, which has been making independent expenditures in support of Senator Graham since 2015,²¹ to review and edit public communications together, without any safeguards to stop the campaign from explicitly or implicitly informing the super PAC about its strategy, or the super PAC from incorporating that non-public information into its future “independent” expenditures. The drafts fail to account for this clear risk of coordination, and the Commission should accordingly reject them. To the extent the Commission is nevertheless inclined to approve Team Graham’s request, it should, at a minimum, note explicitly that any sharing of nonpublic campaign information with the super PAC or its agents renders all public communications by the super PAC coordinated with—and therefore contributions to—the campaign committee.

The Commission has recently taken unprecedented steps to “deregulat[e]” super PAC coordination,²² and campaigns are seizing on those actions to give super PACs and their donors control over major campaign functions.²³ This is irreconcilable with the very concept of a super PAC.²⁴ Drafts A and B demonstrate the same legal

²¹ Security is Strength PAC, Filter: Independent Expenditures (2015-2024), FEC, https://www.fec.gov/data/independent-expenditures/?two_year_transaction_period=2020&data_type=processed&q_spender=C00573733&cycle=2016&cycle=2018&cycle=2020&cycle=2022&cycle=2024&is_notice=false&most_recent=true (last visited Aug. 27, 2024).

²² Shane Goldmacher, *A Democrat, Siding With the G.O.P., Is Removing Limits on Political Cash at ‘Breathtaking’ Speed*, N.Y. Times (June 10, 2024), <https://www.nytimes.com/2024/06/10/us/politics/fec-deadlock-deregulation.html> (quoting Commissioner Cooksey’s observation that, at the FEC, “[t]he deregulators are winning”); see Advisory Op. 2024-01 (Texas Majority PAC).

²³ Alex Isenstadt, *Trump Camp Plans Sit-Down with Outside Groups After FEC Relaxes Coordination Rules*, Politico (Apr. 26, 2024), <https://www.politico.com/news/2024/04/26/trump-2024-fec-00154727>; Ximena Bustillo, Lisa Hagen, and Michel Martin, *Trump Moves Many Campaign Responsibilities to Outside Group, Turning Point Action*, NPR (June 7, 2024), <https://www.npr.org/2024/06/07/nx-s1-4992927/trump-turns-over-many-campaign-responsibilities-to-outside-group-turning-point-usa>; Vivian Jones, *U.S. Rep. Andy Ogles Campaign Effort Again Relies on Support from Americans for Prosperity*, The Tennessean (July 2, 2024), <https://archive.is/aHjWh>.

²⁴ See *supra* note 6.

misunderstanding, and the Commission should therefore reject them both.

Respectfully submitted,

/s/ Shanna (Reulbach) Ports

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