



FEDERAL ELECTION COMMISSION
1050 FIRST STREET, N.E.
WASHINGTON, D.C. 20463

**STATEMENT OF COMMISSIONERS
ALLEN J. DICKERSON AND JAMES E. “TREY” TRAINOR, III
REGARDING ADVISORY OPINION 2023-09 (CORTEZ MASTO)**

On January 11, 2024, the Commission approved an advisory opinion concerning Senator Catherine Cortez Masto’s proposal to “establish a Nevada political committee exclusively to support state and local candidates” and advocate concerning “state ballot initiatives.”¹ The Commission determined that Senator Cortez Masto’s proposed state entity could be formed and “that it would not share a contribution limit with her federal leadership PAC.”² The approved draft also found that the Senator’s federal and nonfederal “committees would be treated as affiliated.”³

To be clear, we entirely agree that the Federal Election Campaign Act of 1971, as amended (“FECA” or “Act”), permits Senator Cortez Masto to establish her Nevada entity. Further, because that entity “will not raise funds for the purpose of influencing any election for federal office,” such funds “would not be considered ‘contributions’ under the Act and would not have to be aggregated with contributions made to Requestor’s federal leadership PAC.”⁴

We disagree, however, that the Senator’s state “committee for political action”⁵ would be affiliated with her federal leadership PAC. In our view, a state entity acting “exclusively in connection with nonfederal elections”⁶ is not a “committee” as that term is used in the Commission’s definition of “affiliated committee.”⁷

¹ Request by Senator Catherine Cortez Masto at 1, Advisory Op. 2023-09, Nov. 6, 2023.

² Draft A at 1, Advisory Op. 2023-09, Jan. 4, 2024.

³ *Id.* at 4.

⁴ *Id.*

⁵ Nev. Rev. Stat. 294A.0055(1) (capitalization altered).

⁶ Draft A at 1.

⁷ See 11 C.F.R. § 100.5(g); 11 C.F.R. § 110.3(a).

Most fundamentally, while “committee” is not defined in the Act or regulations, a state political committee of the type proposed here is nowhere contemplated in the Commission’s lengthy definition of “political committee.”⁸ The general definition turns on an entity receiving contributions or making expenditures “aggregating in excess of \$1,000.”⁹ But, as all commissioners agree, the funds raised and spent by Senator Cortez Masto’s proposed state entity are not “contributions” or “expenditures,” so it is not a political committee under that definition.¹⁰

Similarly, the Commission’s political committee definition reaches only a single type of state entity — “[a]ny local committee of a political party,” at least under certain circumstances — and its illustrative examples are exclusively federal with the exception of committees “which represent[] a political party... at the national, State, or local level.”¹¹ There is no question that the Senator’s proposed organization is none of these. Applying the *expressio unius est exclusio alterius* interpretive canon, the Commission’s decision to list this subset of state and local organizations implies a decision to exclude others, including garden-variety state PACs, from the definition of “political committee.”

It is true that 11 C.F.R. § 110.3(a)(1) states that “all contributions made or received by more than one affiliated committee, regardless of whether they are political committees under 11 CFR 100.5, shall be considered to be made or received by a single political committee.” But it also explicitly limits the context in which this is true; § 100.5 is disregarded only “[f]or the purposes of the contribution limitations”—and all commissioners concede that the contribution limitations are inapplicable here because no “contributions” are involved.¹² Again, the Commission’s decision to extend the definition of “affiliated committee” beyond the limitations of § 100.5, but only for a narrow purpose, implies that affiliated committees must qualify as “political committees” for all other purposes.

⁸ 11 C.F.R. § 100.5.

⁹ 11 C.F.R. § 100.5(a).

¹⁰ Draft A at 4.

¹¹ 11 C.F.R. §§ 100.5(c); (e)(4). The regulation also contemplates that a committee may be established, financed, maintained, or controlled by a state or local entity, § 100.5(g)(2)-(3), but that says nothing about the character of the committee itself.

¹² Draft A at 4.

This is also the best reading of the regulations taken as a whole. After all, the affiliation regulations are intended to advance “the Act’s anti-proliferation rule.”¹³ “Political committees” must raise or spend funds *in excess of \$1,000*. If “affiliated committee” were defined for all purposes to include only “political committees” under 11 C.F.R. § 100.5, a candidate or officeholder could simply proliferate innumerable organizations raising, say, \$500 and thereby evade the contribution limitations of 11 C.F.R. §§ 110.1 and 110.2.¹⁴ Section 110.3(a)(1) prevents such schemes. Accordingly, in that circumstance – and no other – “affiliated committees” need not meet the definition of “political committee.”

Bypassing the above concerns, the Commission appears to have assumed, without analysis, that anything Nevada calls a “committee” is a “committee” for purposes of our affiliation regulations. We disagree. For one thing, federal regulations with the force of law cannot change their meaning based solely upon the labeling decisions of another sovereign.¹⁵ Nevada is free to call whatever it likes a committee, including entities failing to meet federal constitutional standards for political regulation or even completely non-political organizations.

In fact, Nevada law considers any entity a “committee for political action” if it receives (state) contributions or makes (state) expenditures aggregating \$5,000 – even if it “does not have as its primary purpose affecting the outcome of any” election.¹⁶ Without pre-judging the constitutionality of Nevada’s statute, it plainly cannot countermand the Supreme Court’s clear instruction that, for *our* purposes, a committee must be either “under the control of a candidate” or have “the major

¹³ Statement of Reasons of Vice Chairman Cooksey and Comm’rs Dickerson and Trainor at 2, MUR 7912 (Senate Leadership Fund), Mar. 1, 2023.

¹⁴ A similar scheme by the Nixon re-election campaign was, after all, a significant spur to the adoption of today’s FECA. *Buckley v. Valeo*, 519 F.2d 821, 839 n.36 (D.C. Cir.1975) (*en banc*) (“The [dairy] industry pledged \$2,000,000 to the 1972 campaign, a pledge known to various White House officials, with President Nixon informed directly by Charles Colson in September 1970... the milk producers, on legal advice, worked on a \$2500 limit per committee, they evolved a procedure, after consultation in November 1970 with Nixon fund raisers, to break down the \$2 million into numerous smaller contributions to hundreds of committees in various states which could then hold the money for the President’s reelection campaign, so as to permit the producers to meet independent reporting requirements without disclosure”).

¹⁵ See *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 875 (8th Cir. 2012) (“Allowing states to sidestep strict scrutiny by simply placing a ‘disclosure’ label on laws imposing the substantial and ongoing burdens typically reserved for PACs risks transforming First Amendment jurisprudence into a legislative labeling exercise”).

¹⁶ Nev. Rev. Stat. 294A.0055(1)(b)(2).

purpose” of “nominat[ing] or elect[ing]...a candidate.”¹⁷ Under these circumstances, we cannot simply import a (fluctuating)¹⁸ state law definition into our regulations *sub silencio*.

Finally, labeling a purely-state entity a “committee” has little meaningful effect and would raise practical difficulties. For example, how would the existing reporting regime for affiliated federal committees apply, if at all? What reporting obligations, if any, would exist where funds are for “any election other than an election for Federal office” given Congress’s decision not to impose the disclosure requirements applicable to entities involved in federal elections?¹⁹ What are the state law implications of declaring state entities affiliated “committees” under our rules? And what concrete advice will attorneys be able to provide in the absence of Commission guidance on these, and other, points?²⁰

* * *

We acknowledge the complexity of the Commission’s woefully outdated affiliation regulations, which predate substantial changes in the law.²¹ Until much-needed revisions are made, advisory opinions like this will be the best, and often only, way for political actors to learn their rights and obligations—at least as applied to their specific circumstances.²² Mindful that “[a]dvisory opinions are shields, not swords,” we appreciate the Request and the Commission’s engagement with these

¹⁷ *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (*per curiam*).

¹⁸ Nevada law was amended relatively recently to create these “non-major-purpose” committees. SB 246, 77th Leg., (Nev. 2013) (codified at Nev. Rev. Stat. 294A.0055(1)(b)).

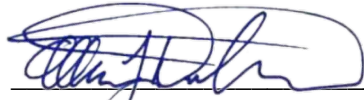
¹⁹ Compare 52 U.S.C. §§ 30125(e)(1)(A) with 30125(e)(1)(B).

²⁰ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 324 (2010) (“The First Amendment does not permit laws that force speakers to retain a campaign finance attorney...before discussing the most salient political issues of our day”).

²¹ See Statement of Reasons of Vice Chairman Cooksey and Comm’rs Dickerson and Trainor at 2-4, MUR 7912 (Senate Leadership Fund), Mar. 1, 2023.

²² 52 U.S.C. § 30108(b) (“Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of Title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 30111(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section”).

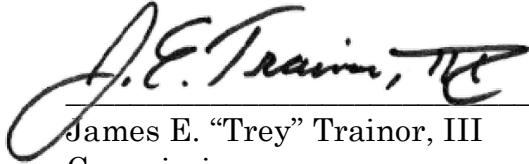
challenging questions and look forward to addressing these difficulties in a future regulatory effort.²³



Allen J. Dickerson
Commissioner

January 11, 2024

Date



James E. "Trey" Trainor, III
Commissioner

January 11, 2024

Date

²³ See Statement of Reasons of Chairman Dickerson and Comm'rs Cooksey and Trainor at 4, MUR 7491 (Am. Ethane), Oct. 27, 2022.