FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**

FROM: **Office of the Commission Secretary** LC

DATE: **August 29, 2024**

SUBJECT: **AOR 2024-11 (Caroline Gleich) Comment from the Utah Republican Party**

The following is an AOR 2024-11 (Caroline Gleich) Comment from the Utah Republican Party. This matter will be discussed on the next Open Meeting of August 29, 2024.

Attachment

RECEIVED
By Office of the Commission Secretary at 8:05 am, Aug 29, 2024

RECEIVED
By Office of General Counsel at 4:35 pm, Aug 28, 2024

UTAH REPUBLICAN PARTY

August 28, 2024

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

Re: Advisory Opinion Request 2024-11 (Caroline Gleich)

Dear Ms. Stevenson:

As Chairman of the Utah Republican Party, I write this comment to address the second question presented in Advisory Opinion Request 2024-11 (the "AOR"): Requestor's proposed interpretation of the "*bona fide* business communications" safe harbor for commercial advertisements codified at 11 C.F.R. § 109.21(i).

The answer to this part of the AOR must be a resounding "*no*." Requestor's proposal would expand the FEC's limited exclusion from the coordinated communications rules beyond that which the FEC (by its own words) ever intended when the safe harbor was promulgated—and, in so doing, potentially open a vast new corporate spending loophole. Whether the safe harbor should be updated to accommodate modern advancements in the digital economy is perhaps a fair question. Yet whether such expansive changes can (consistent with FECA) or should be made must be addressed through the considered process of notice-and-comment rulemaking—in the same way the original safe harbor was carefully formulated—not an advisory opinion.

Indeed, we do not even need to speculate as to what the Commission intended the limited reach of its safe harbor to be. It expressly told us that the exclusion is "limited to public communications in which a candidate is referred to solely in his or her capacity as owner or operator of *the business*."[1] As the Commission explained in both its Explanation & Justification implementing the carveout and in its Notice of Proposed Rulemaking proposing it, the Commission "intended" the safe harbor merely "to encompass the types of commercial and business communications that were the subjects of several [then] recent enforcement actions."[2]

[1] Final Rule, *Coordinated Communications*, 75 Fed. Reg. 55,947, 55,959 (Sept. 15, 2010) (emphasis added).
[2] *Id.*; Notice of Proposed Rulemaking, *Coordinated Communications*, 74 Fed. Reg. 53,893, 53,909 (Oct. 21, 2009).

And each those MURs—MUR 6013 (Teahen), MUR 5517 (Stork), MUR 5410 (Oberweis)—"concerned advertisements *paid for by businesses owned by* Federal candidates that had been operating prior to the respective candidacies."[3]

The AOR proposes something very different. The corporations that would be financing public advertisements featuring Requestor—including ads running in her target jurisdiction within 90 days of her election—are third parties, *not* Requestor's own business. Requestor simply leverages her personal brand to sell other corporation's products in the digital economy.

Knowing Requestor falls on the wrong side of her ask, the AOR attempts a sleight of hand, disingenuously asserting that "[t]he fact that the Requestor's business is not the sponsor of the Commercial Advertisements and is not referenced in the Commercial Advertisements is immaterial."[4] But the distinction very much matters. In adopting the safe harbor, the Commission explicitly noted its concerns that too broad an exclusion "could be used to circumvent the Act's contribution limitations and prohibitions."[5] The Commission also had sought comment, in the NPRM, about potentially expanding the scope of the proposed rule, if candidates "involved in other commercial activity currently [were being] impeded under the coordinated communications rules from being able to conduct their business activities,"[6] but did not do so when it adopted the final regulation. As the Commission explained it, cabining the safe harbor to advertisements financed by the candidate's own business serves as a purposeful "safeguard" to help "limit[] its reach to businesses with a *bona fide* business or commercial reason to use the candidate's name or likeness in their communications."[7] Opening it up beyond that, as the AOR seeks to do, could wrongly look "'to accommodate business activities 'at the expense of [the Bipartisan Campaign Reform Act's] statutory goals," which "the Commission is 'certainly not at liberty'" to do.[8]

Boiled down, the AOR claims that because the world has changed, the law should change, too. According to the AOR, the burgeoning influencer economy in which "thousands of people earn income every day because the marketplace finds commercial value in their personal brand" necessitates an expansion of the existing safe harbor for commercial advertisements to accommodate influencer candidates. The AOR certainly may have a point, the safe harbor was adopted in September 2010 and a lot has changed in the meantime.[9]

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[3] 75 Fed. Reg. at 55,959 (emphasis added); *see also id.* (explaining that in each of the MURs, the "advertisement included the name, image, and voice of the candidate associated with the business that paid for the advertisement").
[4] AOR 5.
[5] 75 Fed. Reg. at 55,959.
[6] 74 Fed. Reg. at 53,909.
[7] 75 Fed. Reg. at 55,959.
[8] 74 Fed. Reg. at 53,909 (quoting *Shays v. FEC*, 508 F. Supp. 2d 10, 51 (D.D.C. 2007)).
[9] When the safe harbor was adopted in September 2010, Facebook had only 550 million active users worldwide, and Twitter had only 14 million active users in the United States. Statista, *Number of Monthly Active Facebook Users Worldwide As Of 4th Quarter 2023*, *available at* https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide; *id.*, *Number of Monthly Active Twitter Users in the United States From 1st*

But if the Commission believes that change to its rules is appropriate in light of changed circumstances, it needs to approach addressing the question—a complicated one at that, which involves the balancing of various competing interests—by proposing a notice-and-comment rulemaking.

As Chairman of the Utah Republican Party, I urge the Commission to abstain from making substantive changes to the current legal regime through the advisory opinion process—a mere 68 days out from election day—especially changes that would impact a U.S. Senate race.

Sincerely,

Robert Axson
Chairman, Utah Republican Party

Quarter 2010 to 1st Quarter 2019, *available at* https://www.statista.com/statistics/274564/monthly-active-twitter-users-in-the-united-states. Instagram—the primary platform through which Requestor disseminates her sponsored content—did not even exist when the safe harbor was created; it launched through the App Store three weeks after the rule took effect. MG Siegler, *Instagram Launches With Hope of Igniting Communication Through Images*, TechCrunch (Oct. 6, 2010), https://techcrunch.com/2010/10/06/instagram-launch.