FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**

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

DATE: **November 1, 2023**

SUBJECT: **AOR 2023-06 (Texas Majority PAC) Comment from AFL-CIO**

Attached is AOR 2023-06 (Texas Majority PAC) Comment from AFL-CIO. This matter will be discussed at the Open Meeting of November 2, 2023.

Attachment

RECEIVED
By Office of the Commission Secretary at 3:28 pm, Nov 01, 2023

RECEIVED
By Office of General Counsel at 11:47 am, Nov 01, 2023

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November 1, 2023

By email to ao@fec.gov

Lisa J. Stevenson
Acting General Counsel
Federal Election Commission
1050 First St., NE
Washington, DC 20463

Re: Advisory Opinion Request 2023-06
Texas Majority PAC

Dear Ms. Stevenson:

We write on behalf of the AFL-CIO, the national labor federation of 60 national and international unions representing over 12.5 million members, regarding the pending advisory opinion request (AOR) by Texas Majority PAC and Drafts A and B of an advisory opinion that the Commission has made public to date.

The AFL-CIO and many of its affiliated unions and their federal and nonfederal political committees have long engaged in residential canvassing with respect to public elections of candidates and ballot measures. These canvasses variously are targeted to union members and the general public. The AOR concerns canvassing among the general public, and we respectfully recommend that the Commission advise that (1) such canvassing is not a "public communication" within the meaning of 11 C.F.R. § 100.26 and (2) canvassing therefore cannot be an in-kind contribution to a candidate or political party under 11 C.F.R. § 109.21 or § 109.20.

As the AOR explains, the Commission since at least 2006 has embraced the view that "general public political advertising," both as illustrated by the specific media listed in 11 C.F.R. 100.26 and as a category that may include unspecified other media, is marked by the involvement of an "intermediary" – that is, such advertising "lends itself to distribution of content through an entity ordinarily owned or controlled by another person" that is "generally a facility owner," as distinct from, for example, "a communication to the general public on one's own website."[1] The Commission reaffirmed that analysis last year when it amended its regulations regarding disclaimers on Internet public communications.[2]

[1] Federal Election Commission, "Internet Communications," 71. Fed. Reg. 18589, 18594 (April 12, 2006) ("Internet E&J").

[2] Federal Election Commission, "Internet Communications Disclaimers and definition of 'Public Communication'," 87 Fed. Reg. 77467, 77470, 77471 (December 19, 2022) (stating that the Commission "intends to regulate only communications placed for a fee 'through an entity ordinarily owned or controlled by another person,' analogous to the forms of 'public communication' already included in [11 C.F.R. § 100.26]" (citing the preceding NPRM).

And, in an advisory opinion last year, the Commission concluded that text messages to an opt-in audience resembled one's own website rather than "traditional forms of paid advertising" specified in 11 C.F.R. § 100.26 "where a speaker pays to disseminate a message through a medium controlled, and to an audience established, by a third party"[3]; the opinion also described those media as "typically requir[ing] the person making the communication to pay to use a third party's platform to gain access to the third party's audience."[4] The dissenting Commissioners agreed that "all general public political advertising communications rely on an intermediary to disseminate the message," but they concluded that an intermediary could be a vendor paid in order to use a medium where the vendor did not also select the audience, as is sometimes the case with "mass mailings," one of the specifically enumerated public communications in 11 C.F.R. § 100.26.

The Commission should adopt neither the Draft A nor Draft B final conclusions, and the dissenting Commissioners' conclusion in AO 2022-20 should not be extended to canvassing. Canvassing is a form of communication that aggregates in-person one-on-one communications. Canvassing with and without flyers is a means of political communication that long predates any of those enumerated in 11 C.F.R. § 100.26 with the possible exception of newspapers, which date to the colonial era, yet Congress has never suggested that canvassing should be regulated and the Commission has never mustered a majority to address the question explicitly in the affirmative. These grassroots contacts are "fundamentally different" from the "mass communication contemplated in the Act," as three Commissioners aptly observed six years ago in concluding that canvassing is not a public communication.[5] Three other Commissioners in 2007 reached the same sound conclusion in an enforcement case, two in explicit reliance on the Internet E&J's analysis that general public political advertising is marked by "advertisers pay[ing] 'for access to an established audience using a forum controlled by another person, rather than using a forum' they control to establish their own audience…."[6] So, Draft A is correct in its first conclusion that canvassing is a "traditional grassroots activity" that "involves individual people talking face-to-face with voters" unlike the media specified in 11 C.F.R. § 100.26, so it is not general public political advertising.

Canvassing may be undertaken in different ways. Often a canvass is undertaken by an organization of a political committee deploying its own employees or volunteers to convey an oral message, sometimes supplemented with flyers that the organization itself produced. In such a circumstance there is no intermediary under any analysis. Whatever the Commission concludes in addressing this AOR, it should cast no doubt on the proposition that such canvassing is not general public political advertising.

Canvassing may also entail the services of a vendor in assisting with the drafting of a script or flyer, the development of targeting, or the provision of canvassers. All such expenses are integral

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[3] Advisory Opinion 2022-20, p. 5 (October 4, 2022).

[4] *Id.*, p. 4 (footnote omitted).

[5] Concurring Statement of Vice Chair Caroline C. Hunter and Commissioners Lee E. Goodman and Matthew S. Petersen, Advisory Opinion 2016-21 (January 12, 2017).

[6] MUR 5564, Statement of Reasons of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky at 8-9 (December 21, 2007); see also *id*., Statement of Reasons of Chairman Robert D. Lenhard at 4 (December 31, 2007).

aspects of the canvassing communication, but in no case does the vendor maintain an ongoing "platform" or "forum" for the organization or political committee to access. The vendor is simply an instrument for reaching voters in person, not a medium itself, so Draft B's application of the term "intermediary" to such a vendor redefines that term to mean something other than what the Commission described in the Internet E&J and otherwise. And while it is true that 11 C.F.R. § 100.26 identifies mass mailings and telephone banks as public communications, and they do not necessarily consist of a forum or platform that an organization or political committee accesses, both are traditional means of mass "general public advertising," whereas personal visits to people's homes are not. Draft B's facile equation of canvassing with mass mailings overlooks that they entail completely different kinds of interactions with voters.

Draft A goes awry by finally concluding that canvassing, albeit not a public communication, nonetheless is an in-kind contribution if coordinated with a candidate or party because it entails "expenditures" under 11 C.F.R. § 109.20, namely, "hiring vendor consultants, hiring and training paid canvassers, and creating and managing a canvass questionnaire," which Draft A asserts "are not for canvassing communications themselves…and at least some are not sufficiently direct inputs or components of the canvassing communications to be considered part of the communications." There are two flaws in this conclusory analysis.

First, as noted above, these costs in fact are integral to the communications, unlike, say, the cost of housing a canvasser who has traveled away from home in order to participate in a canvass, or the capital costs of a computer or email list highlighted by the court in *Campaign Legal Center v. Federal Election Commission*, 646 F. Supp. 3d 57 (D.D.C. 2022). Second, because they are integral they cannot be subjected under 11 C.F.R. § 109.20 to a coordinated in-kind contribution analysis as a kind of catch-all back-up to 11 C.F.R. § 109.21. The actual coordination-communication regulations feature a content standard that the Commission painstakingly developed in order to legally distinguish between communications that are and are not subject to such treatment. In promulgating 11 C.F.R. § 109.20, the Commission stated clearly that 11 C.F.R. § 109.20(b) "addresses expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee.[7] If 11 C.F.R. § 109.20 reached communications that are not "public communications," the touchstone of 11 C.F.R. § 109.21(c), then the latter – and indeed all of 11 C.F.R. § 109.21 – would be superfluous. But of course that is not the case, as the Commission itself has clearly stated in its current briefing to the District of Columbia Circuit in the "Correct the Record" litigation. "The Commission's regulations construing coordination requirements set forth different requirements for 'coordinated communications' and other coordinated expenditures. 11 C.F.R. §§ 109.20(b), 109.21....[C]ommunications [that] do not fit within the 'coordinated communication' definition…are not deemed in-kind contributions.'"[8]

Accordingly, we respectfully suggest that the Commission render an advisory opinion that is consistent with the preceding analysis. Thank you for your consideration.

[7] Federal Election Commission, "Coordinated and Independent Expenditures," 68 Fed. Reg. 421, 425 (January 3, 2003).

[8] Brief for the Federal Election Commission at 7-8, 33-34 (May 24, 2023), *Campaign Legal Center v. Federal Election Commission*, No. 22-5336 (D.C. Cir.).

Respectfully submitted,

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