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Office of General Counsel
Attn: Lindsay Bird, Esq. and Robert Knop, Esq.
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Advisory Opinion Request 2023-06

Dear Ms. Bird and Mr. Knop:

We answer your supplemental questions below.

- 1. What is the requestor’s position as to whether the Paid Canvass, even if not a “coordinated communication” under 11 CFR 109.21, is nonetheless an in-kind contribution under 11 CFR 109.20(b)?**

Because the Paid Canvass is a communication and because communications are not covered by 11 C.F.R. § 109.20(b), the Paid Canvass is not an in-kind contribution under 11 C.F.R. § 109.20(b).

Eighty years ago, in *Martin v. City of Struthers*, the U.S. Supreme Court recognized that door-to-door canvasses are communications protected by the First Amendment. Writing for the majority, Justice Black observed that “as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support.”¹ Justice Black noted that “[w]hile door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society *engaged in the dissemination of ideas in accordance with the best tradition of free discussion*. The widespread use of *this method of communication* by many groups espousing various causes attests its major importance.”² In fact, TMP stipulates that the Paid Canvass “will **not** have non-communicative components; for example, [it] will not include offers to drive voters to polling places.”³

Therefore, the Paid Canvass is a communication. Section 109.21 of the Federal Election Commission’s (“**FEC**” or “**Commission**”) regulations prescribes when a communication (such as the Paid Canvass) is a “coordinated communication” and, therefore, an in-kind contribution. For

¹ *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943).

² *Id.* at 145 (emphasis added).

³ Request by Texas Majority PAC, FEC Adv. Op. 2023-06 (Texas Majority PAC) at 2 (Sept. 12, 2023).

the reasons set forth in TMP’s request, the Paid Canvass is not a “coordinated communication” and therefore not an in-kind contribution under section 109.21.

In a comment, the Campaign Legal Center (“**CLC**”) contends that the Paid Canvass is nonetheless an in-kind contribution under a *separate regulation*, 11 C.F.R. § 109.20(b). But when the Commission promulgated its coordination regulations twenty years ago, it foreclosed the argument that CLC advances today. The Commission’s Explanation and Justification from 2003 explicitly states that section 109.20 “addresses expenditures *that are not made for communications* but that are coordinated with a candidate, authorized committee, or political party committee.”⁴ As then-Commissioner Lenhard correctly observed in a 2007 matter involving a paid canvass: “if 109.20 were read to apply to communications it would render meaningless the Commission’s coordinated communications and party coordinated communications at 11 CFR 109.21 and 109.37.”⁵ And the U.S. Supreme Court has “cautioned against reading a text in a way that makes part of it redundant.”⁶

Consistent with the Commission’s 2003 directive and standard canons of textual interpretation, the Office of General Counsel (“**OGC**”) has consistently opined that a communication qualifies as an in-kind contribution only if it meets the three-prong test set forth in section 109.21 and, as a matter of law, communications are not in-kind contributions under section 109.20.⁷ Some prominent examples:

- In 2009, the OGC expressly stated that section 109.20 “applies only to those coordinated expenditures which are not made for communications” and “[a]ccordingly . . . is inapplicable” to a communication.⁸ The Commission dismissed the complaint.⁹
- In 2016, the OGC considered a complaint alleging that Facebook posts constituted in-kind contributions to a campaign committee. The OGC rejected the application of 11 C.F.R. § 109.20(b): “The Complaint alleges that the Facebook communications were coordinated pursuant to 11 C.F.R § 109.20(b). As noted, that regulation applies to expenditures that are not communications.”¹⁰ The Commission dismissed the complaint.¹¹
- In 2019, the OGC wrote that “[u]nder Commission regulations, expenditures for

⁴ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (emphasis added).

⁵ Statement of Reasons of Commissioner Robert D. Lenhard at 4 n.5, MUR 5564 (Alaska Democratic Party, *et al.*) (Dec. 31, 2007).

⁶ *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669, 127 S. Ct. 2518, 2536, 168 L. Ed. 2d 467 (2007).

⁷ See First Gen. Counsel’s Rpt., MUR 6477 (Right Turn USA, *et al.*) (Dec. 27, 2011); First Gen. Counsel’s Rpt., MUR 6502 (Nebraska Democratic Party, *et al.*) (May 17, 2012); First Gen. Counsel’s Rpt., MUR 6522 (Lisa Wilson-Foley for Congress, *et al.*) (Feb. 5, 2013); First Gen. Counsel’s Rpt., MUR 6657 (Akin for Senate, *et al.*) (May 6, 2013); First Gen. Counsel’s Rpt., MUR 6722 (House Majority PAC, *et al.*) (Aug. 6, 2013); First Gen. Counsel’s Rpt., MUR 7268 (Russian Federation, *et al.*) (Feb. 23, 2021).

⁸ First Gen. Counsel’s Rpt. at 13, MUR 6037 (Oregon Democratic Party, *et al.*) (Sept. 17, 2009).

⁹ Notification to Democratic Party of Oregon & Laura Calvo, MUR 6037 (Oregon Democratic Party, *et al.*) (Nov. 24, 2009).

¹⁰ First Gen. Counsel’s Rpt. at 12 n.38, MUR 7080 (Public Integrity Alliance) (Dec. 15, 2016).

¹¹ Notification to Public Integrity Alliance, MUR 7080 (Public Integrity Alliance) (Oct. 30, 2017).

‘coordinated communications’ are addressed under a three-prong test at 11 C.F.R. § 109.21 and other coordinated expenditures are addressed under 11 C.F.R. § 109.20(b). The Commission has explained that section 109.20(b) applies to ‘expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee.’”¹² The Commission dismissed the complaint.¹³

- In 2020, in a matter also concerning Facebook posts, the OGC concluded that section 109.20 applied only to an expenditure “for something other than a communication.”¹⁴ The Commission dismissed the complaint.¹⁵
- In 2021, the OGC assessed whether Twitter had made in-kind contributions to a candidate committee, both in the form of expenditures for communications and expenditures that were unrelated to communications. The OGC exclusively applied section 109.21 to the communications and section 109.20 to the expenditures that were not communications, opining that “a communication is considered coordinated and thus treated as an in-kind contribution when it is: (1) paid for by a third-party; (2) satisfies one of five content standards; and (3) satisfies one of five conduct standards [under section 109.21(a)],” whereas section 109.20 applied to any payments that “were not made for communications.”¹⁶ The Commission dismissed the complaint.¹⁷
- In another 2021 matter, the OGC reiterated that “section 109.20(b) applies to ‘expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee.’”¹⁸ The Commission dismissed the complaint.¹⁹
- In another 2021 matter, the OGC applied 11 C.F.R. § 109.21 to assess whether certain advertisements constituted an in-kind contribution, noting that “[e]xpenditures for ‘coordinated communications’ are addressed under a three-prong test at 11 C.F.R. § 109.21 and other coordinated expenditures are addressed under 11 C.F.R. § 109.20(b). The Commission has explained that section 109.20(b) applies to ‘expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee.’”²⁰ The Commission dismissed the complaint.²¹

¹² First Gen. Counsel’s Rpt. at 6, MUR 7521 (*Swing Left, et al.*) (Oct. 30, 2019); *see also* First Gen. Counsel’s Rpt. at 6, MUR 7654 (*America First Action, et al.*) (Aug. 7, 2020).

¹³ Notification to *Swing Left*, MUR 7521 (*Swing Left, et al.*) (Oct. 6, 2021).

¹⁴ First Gen. Counsel’s Rpt. at 9, MUR 7641 (*Facebook, Inc.*) (Feb. 14, 2020)

¹⁵ Notification with Factual & Legal Analysis MUR 7641 (*Facebook, Inc.*) (Feb. 4, 2022).

¹⁶ Notification with Factual & Legal Analysis at 11, 18, MUR 7821 (*Twitter, Inc., et al.*) (Aug 16, 2021) (internal quotation marks omitted).

¹⁷ Notification with Factual & Legal Analysis, MUR 7821 (*Twitter, Inc., et al.*) (Aug. 16, 2021).

¹⁸ First Gen. Counsel’s Rpt. at 63-64, MUR 7274 (*Internet Research Agency*) (Feb. 23, 2021); *see also* First Gen. Counsel’s Rpt. at 16, MUR 7834 (*Facebook, Inc., et al.*) (Aug. 11, 2021); First Gen. Counsel’s Rpt. at 29 n.107, MUR 7313 (*Michael D. Cohen, et al.*) (Dec. 7, 2020); First Gen. Counsel’s Rpt. at 11, MUR 7497 (*National Rifle Association of America Political Victory Fund, et al.*) (May 10, 2019); First Gen. Counsel’s Rpt. at 63-64, MUR 7623 (*Donald J. Trump, et al.*) (Feb. 23, 2021).

¹⁹ Notification to *Internet Research Agency*, MUR 7274 (*Internet Research Agency*) (Aug. 18, 2021).

²⁰ First Gen. Counsel’s Rpt. at 18, MUR 7853 (*Lance Harris, et al.*) (Aug. 31, 2021).

²¹ Certification, MUR 7853 (*Lance Harris, et al.*) (May 16, 2022).

- And earlier this year, OGC explained that “[w]e have analyzed this web posting under 11 C.F.R. § 109.21 (concerning coordinated communications), rather than 11 C.F.R. § 109.20(b) (concerning coordinated expenditures generally) because this web posting is a communication of the type contemplated by § 109.21.”²² The Commission dismissed the complaint.²³

The Commission has taken the same approach in advisory opinions. In a 2011 advisory opinion, the Commission applied section 109.21 to determine that a sponsor’s “website and email communications to the general public soliciting contributions to certain Federal candidates will not result in in-kind contributions to those Federal candidates, because the communications will not be ‘coordinated communications’ under the Act and Commission regulations.”²⁴ In its analysis, the Commission noted that section 109.20(b) governed only those expenditures not made for communications.²⁵ The Commission took the same approach in a 2022 advisory opinion and applied section 109.21 to determine that communications that “do not satisfy the content prong of the coordinated communications test . . . are not in-kind contributions.”²⁶

It is rare for the Commission to have spoken so clearly and consistently for two decades. And it is equally notable that CLC’s comment does not cite a single Commission precedent or statement in support of its argument. No advisory opinions. No MURs. No Explanations and Justifications. Not one. It simply repeats the text of a regulation that the Commission has repeatedly said does not apply to communications.

The law here is straightforward: communications are governed solely by section 109.21; communications cannot, as matter of law, qualify as in-kind contributions under section 109.20. Absent a new rulemaking, “[a] policy of such longstanding agency acceptance” should not be changed.²⁷

2. Can the requestor confirm whether the Paid Canvass will include the dissemination, distribution, or republication of federal candidate campaign materials under 11 CFR 109.23?

The Paid Canvass will *not* include the dissemination, distribution, or republication of federal candidate campaign materials under 11 C.F.R. § 109.23.

3. Does TMP anticipate that the Paid Canvass will reach more than 500 homes within any 30-day period?

²² First Gen. Counsel’s Rpt. at 8 n.29, MUR 8056 (Bob Healey for Congress, *et al.*) (May 16, 2023).

²³ Notification with Factual & Legal Analysis to Robert Healey, Jr., Bob Healey for Congress & Ronald R. Gravino, MUR 8056 (Bob Healey for Congress, *et al.*) (July 18, 2023).

²⁴ FEC Adv. Op. 2011-14 (Utah Bankers Association) at 4 (Sept. 22, 2011).

²⁵ *Id.* at 4 n.3.

²⁶ FEC Adv. Op. 2022-20 (Maggie for NH) at 5 (Oct. 4, 2022).

²⁷ Concurring Statement Of Vice Chair Caroline C. Hunter And Commissioners Lee E. Goodman And Matthew S. Petersen, FEC Adv. Op. 2016-21 (Great America PAC) at 2 (Jan. 12, 2017) (*citing FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2315-16 (2012)).

TMP anticipates that the Paid Canvass will reach more than 500 homes within a 30-day period.

4. Does TMP anticipate that the scripts that the individual canvasser will read to the voters will be of an identical or substantially similar nature?

TMP anticipates that multiple written scripts would be used as part of the Paid Canvass; however, each script would be associated with at least 500 homes.

5. Will the individual canvasser have discretion to deviate from the script? If so, within what boundaries (if any)?

Yes. Canvassers are generally encouraged to have personalized discussions with voters. TMP would ask canvassers to emphasize one or more of the issues or message points on the written script but would also encourage canvassers to personalize that message in a way that resonates with individual voters. In addition, TMP would encourage canvassers to respond to voters' questions or concerns, which will differ based on the individual voter.

6. Will the Paid Canvass be limited to the homes of individuals who have opted-in or otherwise sought out a visit by the canvassers?

No. But in circumstances where there is no intermediary between the speaker and the voter – as is the case with paid canvassing, a worker handing out leaflets on a street corner, or a compensated speaker giving speeches on soapbox squares around the state – the voter may simply refuse to allow the speaker to deliver the message. The voter may do so by putting up a “no trespass” sign or asking the canvasser to leave, walking past the leafleteer, or avoiding the part of town where the speaker stands atop the soapbox, respectively.

In *Martin v. City of Struthers*, Justice Black – the stalwart defender of free speech – conceded that local regulations typically “leave[] the decision as to whether distributors of literature may lawfully call at a home where it belongs – with the homeowner himself.”²⁸ Courts have held that canvassers “have a First Amendment right to engage in door-to-door outreach *until they are legitimately turned away by the property owners or residents.*”²⁹ Likewise, “a city can enforce its trespass law against solicitors who enter or remain on private property *after the owner has indicated the solicitor is not welcome.* [The city] has already provided that a homeowner can bar all solicitors by posting a sign, or any particular solicitor at any time by asking the solicitor to leave.”³⁰ It is ultimately up to the voters, in other words, whether they wish to receive the message from the speaker.

²⁸ *Martin*, 319 U.S. at 148.

²⁹ *Rivero v. Montgomery Cnty.*, 259 F. Supp. 3d 334, 348 (D. Md. 2017), *appeal dismissed*, No. 17-1730, 2017 WL 6350583 (4th Cir. Nov. 9, 2017) (emphasis added).

³⁰ *See City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547, 1557 (7th Cir. 1986), *aff'd*, 479 U.S. 1048 (1987) (citation omitted) (emphasis added).