



FEDERAL ELECTION COMMISSION

Washington, DC

**MEMORANDUM**

**TO:** The Commission

**FROM:** Office of the Commission Secretary <sup>VFV</sup>

**DATE:** November 14, 2023

**SUBJECT:** AOR 2023-08 (Cowboy Analytics, LLC) Comment

**Attached is a comment received on Advisory Opinion Request  
2023-08.**

**Attachment**

**RECEIVED**

By Office of the Commission Secretary at 12:06 pm, Nov 14, 2023



November 13, 2023

Lisa J. Stevenson, Esq.  
Acting General Counsel  
Federal Election Commission  
1050 First St. NE  
Washington, DC 20463  
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**Re: Advisory Opinion Request 2023-08 (Cowboy Analytics, LLC)**

Dear Ms. Stevenson:

Campaign Legal Center (“CLC”) respectfully submits this comment on advisory opinion request (“AOR”) 2023-08, submitted to the Federal Election Commission (the “FEC” or “Commission”) by Cowboy Analytics, LLC (“Cowboy Analytics”).<sup>1</sup> We write to address two erroneous arguments that Cowboy Analytics advances as purported support for its flawed assertion that solicitations including express advocacy would not meet the definition of an independent expenditure under the Federal Election Campaign Act (the “Act”).

Cowboy Analytics argues that because the purpose of a solicitation is to raise money, a solicitation cannot expressly advocate the election or defeat of a candidate, as required under the Act’s definition of “independent expenditure.”<sup>2</sup> It also claims that the definition of “express advocacy” has “never been construed to extend to fundraising solicitations.”<sup>3</sup> These arguments are wrong.

First, as a practical matter, a communication can have two simultaneous purposes: it can raise money *and* encourage people to vote for or against a candidate. Second, turning to the law itself, the definition of “independent expenditure” does not exclude solicitations. An “independent expenditure” is “an expenditure by a person

<sup>1</sup> See AOR 2023-08 (Cowboy Analytics, LLC) (Oct. 25, 2023) (“AOR 2023-08”).

<sup>2</sup> See *id.* at 8-9.

<sup>3</sup> See *id.* at 8.

expressly advocating the election or defeat of a clearly identified candidate.”<sup>4</sup> A communication can do just that while also attempting to raise money.

Furthermore, in *FEC v. Christian Coalition*, the U.S. District Court for the District of Columbia unequivocally stated that “express advocacy also includes verbs that exhort one to campaign for, or *contribute to*, a clearly identified candidate.”<sup>5</sup> The FEC has also explained that “exhortations to contribute time or money to a candidate would also fall within the revised definition of express advocacy.”<sup>6</sup> Thus, there is clear authority that solicitations can “advocate the election or defeat of a clearly identified candidate,” and thus qualify as an independent expenditure.

Cowboy Analytics’ position is not only illogical and inconsistent with precedent, it is also problematic as it could be used to circumvent the Act’s reporting requirements for independent expenditures, which would frustrate the Act’s goal of ensuring transparency for voters. Under Cowboy Analytics’ flawed theory, super PACs and other “independent” spending groups could evade reporting information about their financing of independent expenditures by simply tacking a solicitation statement onto the end of their electoral ads, which would deprive voters of critical information regarding the sources of election spending.

Separately, Cowboy Analytics appears to argue that solicitations targeted to an audience outside of the state or district of the candidate mentioned in the solicitation cannot contain express advocacy because the target audience cannot vote for or against the candidate.<sup>7</sup> This argument is also inconsistent with the law. An independent expenditure is defined by the content of the communication—whether it “urge[s] the election or defeat of one or more clearly identified candidate(s);” neither the Act nor the Commission’s regulations contain an exception for express advocacy or independent expenditures that are (or are not) targeted to a particular audience.<sup>8</sup>

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<sup>4</sup> 52 U.S.C. § 30101(17); see 11 C.F.R. § 100.16(a). “Expressly advocating,” in turn, means language that urges the election or defeat of one or more clearly identified candidates. 11 C.F.R. § 100.22.

<sup>5</sup> *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 62 (D.D.C. 1999) (emphasis added).

<sup>6</sup> Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,294 (July 6, 1995).

<sup>7</sup> See AOR 2023-08 at 9.

<sup>8</sup> When Congress and the FEC intend to make geographic targeting part of a definition, they do so explicitly. See 52 U.S.C. § 30104(f)(3)(A)(III) (electioneering communications); 11 C.F.R. § 109.21(c)(4) (coordinated communication content prong). The Commission has also correctly refused to read in a targeting requirement where one does not exist at least once before. See Advisory Op. 1980-119 (NRSC) (holding that a party-sponsored communication, even when broadcast to voters outside of the featured candidate’s state (who thus cannot vote for or against the candidate), still counts against the party’s coordinated expenditure limit).

We respectfully urge the Commission, in responding to this request, to reject these flawed and problematic arguments regarding the scope and purpose of independent expenditures and express advocacy.

Respectfully submitted,

/s/ Shanna (Reulbach) Ports

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