FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**

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

DATE: **February 5, 2024**

SUBJECT: **AOR 2024-01 (Texas Majority PAC) Comment from CLC**

Attached is AOR 2024-01 (Texas Majority PAC) Comment from Campaign Legal Center.

Attachment

RECEIVED
By Office of General Counsel at 6:27 pm, Feb 02, 2024

RECEIVED
By Office of the Commission Secretary at 8:35 am, Feb 05, 2024

CLC
ADVANCING DEMOCRACY THROUGH LAW

February 2, 2024

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

Re: Advisory Opinion Request 2024-01 (Texas Majority PAC)

Dear Ms. Stevenson:

Campaign Legal Center ("CLC") respectfully submits this comment on advisory opinion request ("AOR") 2024-01, submitted to the Federal Election Commission (the "FEC" or "Commission") by Texas Majority PAC ("TMP"), a nonfederal committee.[1]

TMP proposes to pay for canvasses in coordination with federal candidates and campaigns. Specifically, TMP plans to pay vendors to "design and produce canvassing literature" and hire and train individuals to knock on voters' doors, read a script, and hand out the literature.[2] The literature and scripts will refer to federal candidates and include express advocacy.[3] TMP contends that although it will "consult with federal candidates . . . on these paid canvassing programs,"[4] this activity cannot be treated as coordinated expenditures—*i.e.*, in-kind contributions—to the participating candidates and campaigns.[5]

In reaching this faulty conclusion, TMP's convoluted analysis ignores the simple fact that exempting entire categories of spending coordinated with federal candidates and campaigns from regulation as in-kind contributions fundamentally undermines the statutory text and purposes of the Federal Election Campaign Act ("FECA"), as

[1] *See* AOR 2024-01 (TMP) (Jan. 12, 2024), https://www.fec.gov/files/legal/aos/2024-01/202401R_1.pdf ("AOR").

[2] *Id.* at 2.

[3] *Id.* at 3.

[4] *Id.*

[5] *See generally id.*

supported by the FEC's longstanding regulatory framework for coordinated election spending. TMP's proposed analytical framework also conflicts with a federal district court's decision in *Correct the Record* (*CLC v. FEC*), and, moreover, TMP's request arrives at its errant legal conclusion by misconstruing Commission precedent. For all of these reasons, as further explained below, the Commission should explicitly reject TMP's invitation to effectively recognize a new and unregulated category of coordinated electoral spending that evades the contribution limits set forth in FECA. The Commission should conclude that at least some of the costs of TMP's proposed "paid canvass" activity are in-kind contributions to the candidates and campaigns with which that activity is coordinated.

TMP's Request Contravenes FECA's Text and Foundational Purposes

FECA includes "anything of value" in its definition of "expenditure,"[6] and it treats as contributions all "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents."[7] Congress recognized the necessity of treating coordinated expenditures as contributions because to do otherwise would allow candidates and committees to circumvent FECA's contribution limits and risk quid pro quo corruption.[8] As the Supreme Court explained in *Buckley v. Valeo*, Congress carefully designed FECA to block "attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions."[9]

TMP's assertion that paid canvasses cannot be treated as coordinated expenditures thus conflicts with FECA's unambiguous goal of treating all coordinated election spending as contributions. While FECA includes a few narrow exemptions for goods or services that cannot be treated as "contributions" or "expenditures," there is no exemption for paid canvasses—and the Commission cannot create such an exemption when there is no basis in the statutory text, particularly when doing so would allow groups to make the sort of "disguised contributions" that Congress was concerned with policing.[10]

A federal district court underscored this very conclusion in the *Correct the Record* litigation, rejecting the Commission's position that all spending in support of "unpaid online communications" is exempt from treatment as coordinated expenditures:

> To state the obvious: the Commission's opinion would create a loophole . . . through which a truck could drive. Its self-described "bright-line rule" excluding from

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[6] 52 U.S.C. § 30101(9)(A)(i).

[7] *Id.* § 30116(a)(7)(B)(i).

[8] *See Shays v. FEC*, 414 F.3d 76, 97 (D.C. Cir. 2005) ("Without a coordination rule, politicians could evade contribution limits and other restrictions by having donors finance campaign activity directly.").

[9] *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

[10] *See id.*

> regulation any input to an unpaid online communication would seemingly allow any coordinated expenditure to escape treatment as a contribution, so long as that expenditure somehow informs a blog post or improves a tweet. This massive expansion . . . that essentially swallows the rule cannot stand.[11]

The same reasoning would clearly apply to TMP's proposal; if one were to replace "unpaid online communication" with "canvass," and "blog post" and "tweet" with "door knock" and "flier," it is obvious that the court would reject TMP's request to bundle a wide variety of coordinated expenditures as an unregulated communication. A canvass openly coordinated with a candidate is precisely the type of "wholesale coordinated [] operation" that *Correct the Record* warned must be treated as an in-kind contribution.[12] TMP's request completely ignores the animating principle of FECA as explained in the *Correct the Record* decision: whole categories of expenses cannot simply be removed from the purview of FECA's coordination framework.

Commission Precedent Does Not Support TMP's Position that Paid Canvassing is Not a "Public Communication"

TMP's request also misreads Commission precedent to arrive at a flawed legal conclusion. The request argues that canvassing literature and scripts are not "public communications" based largely on Advisory Opinion 2022-20 (Maggie for NH), which TMP wrongly claims established "a three-part test" for determining whether a communication is "general public political advertising"[13]—the last of the enumerated types of "public communication" set forth in FECA.[14] It asserts that, pursuant to the test, a communication is "general public political advertising" if an "intermediary" distributes the communication, and then provides a detailed explanation of why a political committee's vendor—as an agent of the committee—does not meet the specific definition of the term "intermediary."[15] However, the Commission never even used the specific term "intermediary" in Advisory Opinion 2022-20, nor did the opinion set out "a three-part test" for general public political advertising;[16] all of this is just TMP's gloss on the opinion.

Indeed, Advisory Opinion 2022-20 simply states that "the listed forms of 'general public political advertising' [in FECA] share several common elements, one of which is that they typically require the person making the communication to pay to use a third party's platform to gain access to the third party's audience," using as an illustrative example "when a political committee places an advertisement in a

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[11] *CLC v. FEC*, 646 F. Supp. 3d 57, 64 (D.D.C. 2022).

[12] *See id.* at 65.

[13] *See* AOR at 5–6.

[14] 52 U.S.C. § 30101(22); *see* 11 C.F.R. § 100.26.

[15] AOR at 5–6.

[16] *See* Advisory Op. 2022-20 (Maggie for NH).

newspaper[.]"[17] The Commission determined that the activities at issue in Advisory Opinion 2022-20—text messages sent to a list of voters who affirmatively opted-in to receive those messages—did not constitute "general public political advertising" and thus were not "public communications."[18] It stated that the text messages were similar to communications posted on a committee's own website, which the Commission had previously declared were not "public communications," and that the common thread between these "non-public communications" is that the audience "sought out the speaker and speech through a forum controlled by the speaker."[19]

TMP's proposed canvass program clearly involves paying a third party (the vendor providing the canvassing service) to distribute the messages contained in the canvassing literature and script to an audience who "may have little to no interest in receiving the communication."[20] A canvass, where people are showing up to voters' doors without the voters' prior consent, is markedly different from opted-in text messages and communications on a committee's own website, and is thus more like a paid ad in a newspaper or digital medium. Accordingly, Advisory Opinion 2022-20 does not support TMP's position that a canvass should be included among the types of communicative activity that are not "public communications."

TMP's Position on Bundling "Input Costs" Related to a Communication Contravenes *Correct the Record*

TMP also errs in arguing that all expenses related to a communication must be bundled together and analyzed under 11 C.F.R. § 109.21.[21] Indeed, the federal district court in *Correct the Record* rejected that very argument, explaining that FECA would have no teeth if "political committees could avoid reporting (and therefore limiting) almost any coordinated expenditure merely by" making a communication "that purports to rely on that expenditure as an 'input cost.'"[22] A more recent court case, *Common Cause Georgia v. FEC*, also implicitly rejected that bundling framework.[23] TMP's proposal would sweep in as an "input cost" almost every conceivable expense attending a communication and would therefore lead to the same outcome that one federal district court has already declared unlawful and another has refused to embrace.

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[17] *Id.* at 4.

[18] *Id.* at 5.

[19] *Id.*

[20] *See id.*

[21] *See* AOR at 8–12.

[22] *CLC*, 646 F. Supp. 3d at 64.

[23] *See* Mem. Op., *Common Cause Ga. v. FEC*, Case No. 22-cv-3067 (Sep. 29, 2023), 2023 WL 6388883, https://www.fec.gov/resources/cms-content/documents/usdcdc-mem-opinion-09-29-2023.pdf. The court concluded that it was unreasonable for a controlling bloc of the Commission to conclude that a nonprofit group's "election integrity" program, which included expenditures for "a voter hotline, ballot-curing support, signature verification training, [and] absentee ballot drop box monitoring," was not coordinated with a political party. *Id.* at *2, *7–*8. The court did not exempt any of those activities because the "election integrity" program involved some communications with voters. *See id.*

Finally, TMP's request is conspicuously silent on how staff salaries must be categorized in connection with its staffers' work on the proposed coordinated canvassing program. TMP explicitly states that its "paid staff" will "manage" the vendors hired to design and produce the canvassing literature and to recruit and train the canvassers.[24] The paid staff will also select the voters whose homes the canvassers will visit.[25] But under *Correct the Record*, staff salaries are an input cost that must be analyzed separately under 11 C.F.R. § 109.20; the court specifically listed "salaries" as one of the "far broader categories of expenses" that is "far less directly connected to a specific . . . communication" to be bundled together with the costs of the communication.[26] As such, any staff salary expense supporting TMP's coordinated canvassing program must be analyzed under section 109.20, resulting in an allocated in-kind contribution to the candidate or committee that the canvass is coordinated with.

Conclusion

TMP's analysis is severely flawed, and its desired outcome undermines FECA's text and basic purposes. Exempting entire categories of coordinated activity from treatment as in-kind contributions is plainly contrary to law. The fact that a federal district court reached the same conclusion in a similar context makes that conclusion all the more obvious. TMP plans to pay for a series of expenses to produce and print fliers, and hire and train canvassers, and it wants to do so in open coordination and consultation with federal candidates and campaigns. Any reasonable reading of FECA and the federal judicial opinions interpreting it must conclude that at least some of those expenses are coordinated expenditures and thus in-kind contributions to the candidates.

Respectfully submitted,

/s/ Saurav Ghosh

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[24] AOR at 2.

[25] *Id.*

[26] *CLC v. FEC*, 466 F. Supp. 3d 141, 157 (D.D.C. 2020).