



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary *LC*

DATE: February 21, 2024

SUBJECT: AOR 2024-01 (Texas Majority PAC)
Comment Responses from Elias Law Group

**Attached is AOR 2024-01 (Texas Majority PAC)
Comment Responses from Elias Law Group.**

Attachment



RECEIVED

By Office of the Commission Secretary at 9:59 am, Feb 21, 2024

February 20, 2024

Federal Election Commission
Office of the General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463
ao@fec.gov

Re: Advisory Opinion Request 2024-1

Dear Acting General Counsel Stevenson:

We write in response to comments submitted by the Campaign Legal Center (“*CLC*”).

I. CLC does not contend that any of the production or distribution costs enumerated in the request are “coordinated expenditures.”

We agree with CLC that not “all expenses related to a communication must be bundled together and analyzed under 11 C.F.R. § 109.21” and that the “district court in *Correct the Record* rejected that very argument.” Accordingly, in its request, TMP asks the Commission to opine on whether specific production, distribution, and data costs are “coordinated expenditures” under section 109.20 or are instead exempt costs associated with a non-public communication under section 109.21.

It is notable that CLC does *not* ask the Commission to find that any *specific* production or distribution cost enumerated in the request is a “coordinated expenditure.” Eschewing the expense-by-expense inquiry prescribed by the *Correct the Record* courts to date, the CLC instead asks the Commission to “conclude that at least some of the costs of TMP’s proposed ‘paid canvass’ activity are in-kind contributions.” At least some? Which ones? CLC does not say. Having been afforded the opportunity to select items off the menu *a la carte*, CLC has thrown up its hands and demanded that the Commission figure out what to order.

The salary paid to TMP employees is the only specific cost that the CLC argues is an in-kind contribution. But these salary costs are not part of TMP’s request; TMP has not asked the Commission to opine on whether these costs are “coordinated expenditures.” In responding to an advisory opinion request, the Commission is limited to answering the questions that it is asked. It may not order off-menu, as the CLC asks it to do.

Incorporating the holding in *Correct the Record*, TMP articulates a two-part test that the Commission can apply to each expense: *first*, does it bear a direct connection to one or more specific exempt communication(s) and, *second*, is it not easily repurposed for a non-exempt or non-communicative use? Expenses that satisfy this test are communication expenditures associated with an exempt non-public communication and are not contributions. In its request, TMP articulates why each expense meets this standard. CLC neither objects to these arguments nor does it propose a different test. CLC offers no path forward for the Commission to implement *Correct the Record*.

II. CLC misstates the standard for what constitutes a “public communication.”

Citing a long line of precedents, TMP argues that the distribution of a script and literature via paid canvassing is *not* a “public communication.” Specifically, TMP argues that a communication must be distributed *via an intermediary* to qualify as a public communication and that the paid canvassers are not intermediaries. The evidence for TMP’s position is overwhelming. In 2006, the Commission opined in its Internet Rulemaking E&J:

The forms of mass communication enumerated in the definition of “public communication” in 2 U.S.C. 431(22), including television, radio, and newspapers, each lends itself to distribution of content through an entity ordinarily owned or controlled by another person. Thus, for an individual to communicate with the public using any of the forms of media listed by Congress, *he or she must ordinarily pay an intermediary (generally a facility owner) for access to the public through that form of media each time he or she wishes to make a communication.*¹

In their statement accompanying their dissenting vote in Advisory Opinion 2022-20, Commissioners Weintraub and Broussard stated:

Second, all general public political advertising communications rely on an intermediary to disseminate the message.

...

Thus, the category of general public political advertising encompasses communications for which the speaker *must rely on and pay a third-party intermediary* to access the speaker’s target audience “each time he or she wishes to make a communication.”²

CLC disputes the proposition, articulated by Commissions Weintraub and Broussard, that all public communications “rely on an intermediary to disseminate the message.” Its argument rests

¹ Internet Communications, 71 Fed. Reg. 18589, 18594 (Apr. 12, 2006).

² Statement of Comm’rs Shana M. Broussard & Ellen L. Weintraub Regarding Adv. Op. 2022-20 (Maggie for NH), FEC Adv. Op. 2022-20 (Maggie for NH) at 2 (Nov. 4, 2022).

on the fact that the word “intermediary” does not appear in the final version of Advisory Opinion 2022-20. But the final opinion, citing to the aforementioned E&J, makes clear that “[t]he listed forms of ‘general public political advertising’ 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.*”³ The portion of the E&J cited in the final opinion states that, for public communications, “the advertiser is paying for access to an established audience using a forum controlled by another person, *rather than using a forum that he or she controls* to establish his or her own audience.”⁴

To the extent that a “platform” or “forum” exists in paid canvassing, it is the home of the voter(s) to whom the canvasser is directed to go. And it would certainly be news to Texas homeowners and residents that TMP’s paid canvassers – not the homeowners or residents – control that platform. Moreover, Texas law permits residents to refuse to allow the canvasser to deliver the message by putting up a “no trespass” sign or asking the canvasser to leave their premises and not leave any literature.⁵ Paid canvassers exercise no control over the platform or forum involved in paid canvassing; they are agents of TMP, not intermediaries. Accordingly, the distribution of a script and literature via paid canvassing is *not* a “public communication.”

III. It is CLC – not TMP – that seeks to rewrite federal campaign finance law.

TMP does not seek to undermine FECA’s text or foundational purposes, as CLC claims. The proposition that a communication that fails the content prong of section 109.21(c) may be coordinated with a candidate has been a feature of federal campaign finance law since promulgation of section 109.21 in 2002. Commission majorities – led by the Office of General Counsel – have consistently upheld the principle a communication cannot qualify as a contribution if it fails the content prong.⁶

Nothing in the *Correct the Record* or *True the Vote* cases changes this longstanding rule. The court decisions in *Correct the Record* have not questioned whether unpaid Internet communications are exempt from the definition of “contribution”; they have simply required the Commission to apply a more rigorous standard to determine which input costs for such communications are similarly exempt. And the *True the Vote* case is not about communications or section 109.21 at all, because True the Vote’s program – unlike TMP’s – included multiple non-communicative elements. True the Vote did not invoke section 109.21 as a defense in its response to the administrative complaint; the controlling bloc of commissioners did not rely on section 109.21 in voting to dismiss; and the federal court decision did not analyze True the

³ FEC Adv. Op. 2022-20 (Maggie for NH) at 4 (Oct. 4, 2022) (emphasis added).

⁴ Internet Communications, 71 Fed. Reg. at 18594-95 (emphasis added).

⁵ See Tex. Penal Code Ann. § 30.05(a) (“A person commits an offense if the person enters or remains on or in property of another ... without effective consent and the person: (1) had notice that the entry was forbidden; or (2) received notice to depart but failed to do so.”).

⁶ See FEC Adv. Op. Req. 2024-1 (Texas Majority PAC) at 8-10.

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Vote's program under section 109.21.⁷ The case is simply inapposite to TMP's request. CLC's suggestion otherwise conflates legal issues that are distinct from one another.

Yours truly,

Jonathan S. Berkon
Courtney T. Weisman
Sarah N. Mahmood
Counsel to Texas Majority PAC

⁷ See Matter Under Review 7894 (True the Vote), Response of True the Vote, Inc. and Catherine Engelbrecht (June 9, 2021); Matter Under Review 7894 (True the Vote), Statement of Reasons of Chairman Allen J. Dickerson and Commissioner James E. "Trey" Trainor, III. (Sept. 13, 2022); Mem. Op., Common Cause Ga. v. FEC, Case No. 22-cv-3067 (Sep. 29, 2023), 2023 WL 6388883.