



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary *LC*

DATE: February 26, 2024

SUBJECT: AOR 2024-01 (Texas Majority PAC)
Comment Drafts A and B from Neil Reiff

Attached is AOR 2024-01 (Texas Majority
PAC) Comment Drafts A and B from Neil Reiff.

This matter will be discussed on the next
Open Meeting scheduled for February 29,
2024.

Attachment

February 26, 2024

Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
Office of General Counsel
1050 First Street, NE
Washington, DC 20463
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RECEIVED

By Office of General Counsel at 3:27 pm, Feb 26, 2024

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By Office of the Commission Secretary at 3:37 pm, Feb 26, 2024

**COMMENT ON ADVISORY OPINION 2024-01
(TEXAS MAJORITY PAC) DRAFTS A&B**

Ms. Stevenson:

I write to provide comments related to the two Draft Opinions issued for the Advisory Opinion Request in AOR 2024-01. The opinions stated herein are my own and do not reflect the opinion of any firm client or other attorney in my office. My interest in this matter stems from my representation of political party committees and political committees who engage in extensive grassroots activities and for whom the result of this matter is of great consequence. To be sure, I recently have been required to address this very issue in recent Audits and, in each instance, it appears the Commission was unable to reach a conclusion as to whether similar activities undertaken by party committees qualified is a “public communication.”¹

After reviewing both Draft Opinions, I urge the Commission to approve Draft B as it relates to all four questions presented by the Requestor. The Draft properly concludes that the act of distributing grassroots literature such as handbills and brochures by paid canvassers is not a “public communication” since the literature will not be “disseminated through a medium controlled, and to an audience established, by a third party.”² More importantly, the Draft concludes that:

...door-to-door canvassing is a traditional grassroots activity fundamentally different from the types of mass media enumerated in the statutory definition of

¹ Final Audit Rep. of the Comm., Ky. State Democratic Cent. Exec. Comm. (Oct. 13, 2022); Final Audit Rep. of the Comm., Democratic Party of Arkansas (Oct. 18, 2022).

² AOR 2024-01 (Texas Majority PAC), Draft B at p. 8. The practical result of this conclusion is that the Requestor may coordinate these activities with federal candidates and party committees without such activities being classified as a “coordinated communication.” as defined by 11 C.F.R. § 109.21(b). Consequently, the costs of production and dissemination of the committee’s materials will not be deemed as an in-kind contribution to any federal candidate or party committee.

“public communication [citation omitted].” Unlike communications made via television, newspapers, magazines, mass mailings, or telephone banks, door-to-door canvassing involves individual people talking face-to-face with voters. It is not the type of mass communication contemplated in the definition of “public communication.”³

I agree with this conclusion wholeheartedly. As someone who has spent the past twenty-five years representing state and local party committees, I believe that door-to-door canvassing is the quintessential example of grassroots activity and in no way should it be considered a form of “general public political advertising.” Taken at its purest form, it requires no additional technology and provides for direct person-to-person interaction between the canvasser and the prospective listener.⁴

To be sure, door-to-door canvassing was the traditional model of campaigning in the United States until technological developments transformed campaigns into candidate and interest group centered activities. This transformation led to the meteoric rise in the cost of campaigning and has also led to increasing polarization in American politics.⁵

I believe that the Commission should pursue policies that enhance grassroots activity, not stifle it. The canvassing programs described by the Requestor are the kinds of political communications that we should be promoting in American politics. If the Commission determines that door-to-door canvassing is a “public communication,” organizations like political parties will surely eschew such activities and redirect their funds to more media-centric advertising.

With regards to Draft A, I believe it wrongly concludes that door-to-door canvassing and the literature distributed through canvassers are “public communications” and therefore “coordinated communications.” Draft A concludes that a “paid canvass” is a “public communication” relying on the fact that the Requestor intends to compensate a vendor to assist with the dissemination of its communication.⁶

This analysis misses the most important point: The Commission should not analyze whether a type of communication is a “public communication” based on whether the

³ *Id.* at p. 9. The Requestor in this matter has provided voluminous analysis as to why door-to-door canvassing does not qualify as a “public communication.” I concur with the Requestor’s analysis and incorporate it herein by reference. AOR 2024-01, Letter to the Commission of January 12, 2024 from Jonathan S. Berkon, et. al, at pp. 4-8.

⁴ Door-to-door canvassing accomplishes three basic goals: 1) it allows an individual to have a one-on-one conversation with a listener; 2) in some instances, canvassers may ask the listener to identify who they support in a particular election or collect other information about the listener; and 3) it allows the canvasser to leave a brochure with the listener. In many instances, a canvasser will merely leave the brochure at a home without any direct contact with the resident of the home.

⁵ See, Raymond J. La Raja and Brian F. Schaffner, *Campaign Finance and Political Polarization: When Purists Prevail.*, pp. 60-86.

⁶ AOR 2024-01 (Texas Majority PAC), Draft A at p.8.

disseminating organization compensates a third party to assist in its dissemination. Rather, the Commission should limit its analysis to the method of communication, not the financial arrangements made by the organization to disseminate the information. What if the Requestor had hired the canvassers directly? Would the Draft come to a different conclusion? It would still be a “paid canvass” but there would not be a financial intermediary in between the canvasser and the disseminating committee. What if the Requestor distributed the same materials through the use of volunteers? This distinction should not matter.

To be sure, the Commission already exempts a wide swath of activity from the definition of “public communication” that commonly utilizes paid consultants and vendors to disseminate the information. For example, most emails, websites, and social media content that are disseminated by political committees are prepared and/or disseminated by paid staff and consultants. Nevertheless, this distinction does not make those communications “public communications” and consequently “coordinated communications.”

To provide another example of the inherent problem in the underlying logic of Draft A, in 1979, the Federal Election Campaign Act exempted the distribution of campaign materials by party committees from the definition of “contribution” and “expenditure.”⁷ Under this exemption, campaign materials must be distributed by volunteers. Consider this scenario: A state party headquarters keeps a stack of bumper stickers at the front door of the party headquarters which is manned by a party employee. The party employee is instructed to distribute a bumper sticker to any individual who enters the party office and requests a bumper sticker. The party assumed, at the time of production of the bumper stickers, that the bumper stickers would be distributed by volunteers under the campaign materials exemption. Presumably, the distribution of the bumper stickers as described above would not comply with the requirements of the campaign materials exemption. However, does that require a result that the cost of those bumper stickers distributed at the party headquarters would result in an in-kind contribution to the federal candidate(s) who are listed on the bumper sticker? I would posit that answer is “no” since the bumper stickers would not qualify as a “public communication” nor as a “coordinated communication.” This conclusion, while not necessarily in conformance with the 1979 exemption, is a clear, objective result dictated by the Commission’s definitions of “public communication” and “coordinated communication” as subsequently promulgated in 2002 to provide “consistency within the regulations.”⁸

In addition, Draft A appears to rely on two Commission enforcement matters that should be of limited value in a determination as to whether canvassing is a “public communication.”⁹ First, MUR 4741 was decided in 1999, three years before Congress added the definition of “public communication” to the Federal Election Campaign Act. Second, both matters cited by Draft A relate solely to the inclusion of disclaimers on campaign materials, neither address

⁷ 52 U.S.C. §§ 30101(8)(B)(ix) & (9)(B)(viii).

⁸ Explanation and Justification, *Coordinated and Independent Expenditures*, 68 *Fed. Reg.* 421, 430 (January 3, 2003). See also Statement of Reasons of Chairman Michael E. Toner and Commissioners David M. Mason and Hans A. von Spakovsky, MUR 5604, at pp. 4-5.

⁹ *Id.* At pp. 9-10. See MURS 4741 and 6778.

whether paid canvassing was a “public communication”, and both matters involved communications disseminated by candidate committees. Had the Commission been required to address whether the activities were “coordinated communications”, the matters would have required the Office of General Counsel to provide a much more thorough review of the activity in the context of the materials and the method of distribution.¹⁰ It is my belief that a more thorough analysis of the issue in that context would likely have led to a different result. It should be noted that Draft A also relegates a different, contradictory enforcement matter to a footnote. In MUR 6773, the Commission determined that a handbill was not a “public communication” since it determined that “the communication qualified for a separate exemption under the Act.”¹¹

I would also note that Draft A concludes that not only do the costs of distribution of the materials disseminated as described in this request constitute “public communication” but the costs of grassroots handbills and brochures themselves would similarly be counted. Would the Draft opinion have reached a different conclusion if the materials were distributed by volunteers or if the committee paid the canvassers directly? It would be unacceptable to reach variable conclusions based upon these factors as the nature of the activity would be identical in all three. Thus, the inquiry as to whether the proposed canvassing program is a “public communication” must be limited to the general nature and distribution method of the activity itself. As described above, if the Commission were permitted to delineate between paid and unpaid door-to-door canvassing, it could do the same with other modes of exempt political communications, such as email and websites as well as other forms of grassroots political activities. This would, in many cases, run contrary to the plain language of the Commission’s regulations and require regulated organizations to constantly seek advisory opinions based upon specialized facts, as opposed to well established and objective norms that could be easily understood by the regulated community.

Regardless of whether you agree with the normative outcome of Draft B, it provides a result that is clearly dictated by the Commission’s regulations and provides a clear standard for the regulated community. I urge you adopt Draft B.

¹⁰ The reliance of Draft A on MUR 6778 as precedent is made further dubious since the Matter was unanimously dismissed by the Commission. In addition, both MURs 4741 and 6778 appear to fixate on the fact that the campaign materials in question were “doorhangers” as opposed to other types of brochures or handbills.

¹¹ MUR 6673 (David Lee), F&LA at 5. The analysis in the F&LA is problematic. What if the materials were a mailing to more than 500 persons that was disseminated by volunteers? It would still qualify for the coattails exemption, but it would be incontrovertible that it would also be a “public communication” because it would qualify as “direct mail” under 11 C.F.R. § 100.26. Thus, the question of whether an activity qualifies as a “public communication” should not be paired with any analysis as to whether it qualifies for another exemption in a different part of the Federal Election Campaign Act.

If you have any questions or need additional information in connection with this Comment, I can be reached at (202) 479-1111 or reiff@sandlerreiff.com.

Sincerely,

A handwritten signature in blue ink, appearing to read "N. P. Reiff".

Neil P. Reiff