



FEDERAL ELECTION COMMISSION

Washington, DC

**MEMORANDUM**

**TO: The Commission**

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

**DATE: August 9, 2024**

**SUBJECT: AO 2024-06 American Target Advertising/The Conservative Caucus  
Draft A (Comments)**

**Attached is a comment received from Vantage. This matter is on the August 15, 2024 Open Meeting Agenda.**

**Attachment**

**RECEIVED**

By Office of the Commission Secretary at 3:45 pm, Aug 09, 2024



August 9, 2024

Federal Election Commission  
1050 First Street, NE  
Washington, DC 20463

**RECEIVED**

By Office of General Counsel at 3:09 pm, Aug 09, 2024

Re: Comments on Advisory Opinion 2024-06 (American Target Advertising/The Conservative Caucus) Draft A

Dear Commissioners,

I write to comment on Draft A of the above-referenced advisory opinion request (the "Request"). I write in my personal capacity as an attorney who represents clients that send out political fundraising solicitations that may be impacted by this matter. These comments are not meant to represent the views of any of my firm's clients.

The Commission should seek clarification from the requester regarding the precise content of the fundraising mailers at issue. Draft A simply accepts the Request's premise that fundraising solicitations for donations to nonprofit organizations such as The Conservative Caucus are reportable independent expenditures. However, a controlling bloc of four Commissioners has rejected this position, and approving Draft A could contradict how the Commission has addressed fundraising solicitations that may be materially indistinguishable from the ones at issue here. Moreover, Draft A may be endorsing a mischaracterization of a common political fundraising technique in a manner that may constitute the election crime of "vote-buying."

**1. The requesters' activity may be materially indistinguishable from the solicitations in LRA 1163 (Madison Project)**

The Request stipulates that American Target Advertising sends out "direct mail fundraising solicitation letters" on behalf of its clients "containing language that is unambiguously express advocacy exhorting recipients to 'Vote for Trump' or 'Elect Trump.'" However, the Request does not explain the context in which these phrases will be used. Context is crucial in this context. As Commissioners Lindenbaum, Dickerson, and Trainor explained in LRA 1163, while certain phrases, when "read in isolation[,] would constitute express advocacy under 100.22(a), when read in the context of the communication as a whole, the purpose of the statement [may be] to solicit contributions and inform the potential donor how the [recipient] might spend the funds it receives."<sup>1</sup>

This is especially a concern in this matter because the Request only provides one example donor reply card (Exhibit 1 of the Request) and does not provide any examples of

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<sup>1</sup> LRA 1163 (Madison Project), Statement of Reasons of Commissioners Allen J. Dickerson, Dara Lindenbaum, and James E. "Trey" Trainor, III (*hereinafter*, LRA 1163 Statement) at 6.



an accompanying fundraising letter. The example donor reply card does not include any actual express advocacy language and is far more nuanced.

Specifically, Exhibit 1 of the Request states at the top: “IMPORTANT DONATION REPLY/STAND WITH TRUMP FOR RE-ELECTION!” The example solicitation then asks recipients to:

**Rush** back a donation to help our coming efforts across America:

- **Reach** Trump supporters to ensure they are registered, explain how President Trump can win with their help, and motivate them to vote and vote early.
- **Distribute** pro-Trump, anti-socialism, anti-fake news media promotional materials.
- **Provide** a go-to pro-Trump, anti-Democrat socialism website where voters can go for election-related information, sample Letters to the Editor, issue talking points, campaign tools and up-to-date election news.

The example then asks donors to make their check “*payable to Stand With Trump for Re-Election*” (emphasis added), and clients’ banks presumably will deposit checks written in such manner to clients’ accounts.

What Commissioners Dickerson, Lindenbaum, and Trainor wrote concerning the materials at issue in LRA 1163<sup>2</sup> also may apply here:

the letter itself does not urge the reader to vote a certain way, but rather urges the reader to give money to the [recipient]. Although the Commission has explained that “exhortations to contribute time or money to a candidate” constitute express advocacy, the exhortation to contribute time or money here is to the [recipient], not a candidate.

In short, while the example presented in the Request describes how donations given in response to the fundraising solicitation will be used by the recipient to *make* independent expenditures, the example *itself* is not an independent expenditure.

Absent any additional information about the content of the accompanying fundraising letters, it appears that the “check package technique” described here may be materially indistinguishable from the fundraising technique and type of content that were presented as Attachment 1 of the Commissioners’ statement in LRA 1163. There, the Madison Project included a \$2 bill in its fundraising mailers and asked donors to return the money, along with their own donations, “to stop Nancy Pelosi’s Democrats” and “to take

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<sup>2</sup> LRA 1163 Statement at 5-6.

back the House in 2022.” Another mailer sent “[w]ith just 99 days left until Election Day” used the same technique to ask for donations “to take back the control of Congress from Nancy Pelosi’s Democrats” and specifically identified several congressional candidates that the Madison Project would use the funds to support.

A controlling bloc of four Commissioners voted to reject the positions of the Audit Division and Office of General Counsel that the solicitations in LRA 1163 were independent expenditures.<sup>3</sup>

Relatedly, in AO 2023-08 (Cowboy Analytics), the Commission deadlocked on Questions 3 and 4, which asked about whether a third party’s fundraising solicitations on behalf of candidates would qualify as reportable independent expenditures.<sup>4</sup>

## **2. Characterizing the requesters’ activity as independent expenditures may convert the mailers into “vote-buying”**

52 U.S.C. § 10307(c) makes it a criminal offense to pay anyone to vote in connection with a federal election. Vote-buying occurs even when the amount offered is nominal.<sup>5</sup>

The Request describes providing nominal payments in mailers that may properly be viewed as fundraising solicitations for American Target Advertising’s nonprofit clients. However, if, as Draft A does, the mailers are characterized as independent expenditure communications expressly advocating voters to vote for the candidates identified in the mailers, then the payments tied to the exhortations could amount to vote-buying.

While the federal criminal vote-buying statute does not fall within the Commission’s jurisdiction, the Commission also should not criminalize a common political fundraising technique if it can avoid doing so. Here, absent additional information about the solicitations’ content, Draft A may be endorsing a mischaracterization of the technique that would essentially convert it into vote-buying.

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<sup>3</sup> LRA 1163 (Madison Project), Vote Certification dated Feb. 28, 2023.

<sup>4</sup> Insofar as there were not four votes in AO 2023-08 to conclude that the requester’s solicitations were not independent expenditures, that was apparently because the requester was soliciting earmarked contributions as a conduit PAC that it would then transmit to candidates. By contrast, here, as in LRA 1163, the Request is describing solicitations to donate to the nonprofit organizations rather than to the candidates referred in the solicitations.

<sup>5</sup> See U.S. Dept. of Justice, Federal Prosecution of Election Offenses (rev. Aug. 2007) at 47, <https://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-rvs0807.pdf>.

Respectfully,



Eric Wang