TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 574

May 12, 2022

ISSUE

Whether a corporation may coordinate with candidates or political committees on the content, timing, and distribution of advertisements that criticize or praise candidates—including those with whom the corporation coordinates and their opponents—for opposing or supporting certain legislative policies. ***(AOR-659)***

SUMMARY

No. Texas law prohibits corporations from making campaign contributions, which includes making an expenditure for advertisements coordinated with a candidate or political committee that criticize or praise a candidate or the candidate's opponent. Such advertisements are campaign contributions because they constitute things of value given with the intent that they be used in connection with a campaign for elected office and with the prior consent or approval of the candidate or committee on whose behalf the expenditure is made.

FACTS

The requestor, a corporation, seeks guidance on whether advertisements distributed by the corporation are political contributions if the advertisements are coordinated with a political party or candidate. The requestor states that the intended advertisements will "criticize and/or praise certain Texas legislative policies and criticize and/or praise legislators for opposing and/or supporting such policies." The stated purpose is to "educate the public about these issues and the records of Texas legislators." The requestor states that the advertisements will mention legislators who are candidates, but will not "expressly advocate" for or against candidates.

In connection with making decisions about the content, timing, and distribution of the communications, the requestor wants to seek input from political party committees, state legislative candidates who may be supported in the communications or whose opponents may be criticized, and the agents of these candidates and committees. Specifically, if permitted by law, the requestor would like to: (1) allow political parties, candidates, and their agents to weigh in on potential topics for the communications; (2) allow political parties, candidates, and their agents to be materially involved in discussions regarding the creation, production, or distribution of the communications; and (3) obtain information from political parties, candidates, and their agents

regarding their issue-related plans or needs that are material to the communication and not available to the public.

ANALYSIS

Texas law prohibits corporations from making political contributions, including coordinated in-kind contributions, to candidates and committees.

Texas law prohibits corporations like the requestor from making campaign contributions. Tex. Elec. Code §§ 253.091; 253.094(a) (prohibiting corporations from making "political contribution[s]"); 251.001(5) (defining "political contributions" as including both "campaign contributions" and "officeholder contributions"). But it does not—and cannot—prohibit corporations from making certain campaign expenditures, including "direct campaign expenditures," *i.e.*, campaign expenditures that are "made without the prior consent or approval of the candidate or officeholder on whose behalf the expenditure is made." Tex. Elec. Code § 251.001(8); Tex. Ethics Comm'n Op. No. 489 (2010) (citing *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010)). By definition, a "direct campaign expenditure" is not a "campaign contribution." Tex. Elec. Code § 251.001(8) (defining "direct campaign expenditure" as "a campaign expenditure that does not constitute a campaign contribution by the person making the expenditure").

This distinction echoes United States Supreme Court precedent, which has "subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions." *McConnell v. FEC*, 540 U.S. 93, 134 (2003) (citing *FEC v. Beaumont*, 539 U.S. 146 (2003); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000); *Buckley v. Valeo*, 424 U.S. 1 (1976)); *see also FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."). In those cases, the Court "recognized that contribution limits, unlike limits on expenditures, 'entai[l] only a marginal restriction upon the contributor's ability to engage in free communication.'" *McConnell*, 540 U.S. at 134-35 (quoting *Buckley*, 424 U.S. at 20-21).

And, even while the Court has found certain restrictions on corporate expenditures unconstitutional, it has repeatedly left the federal ban on corporate contributions intact. *See* 52 U.S.C. § 30118(a) (generally prohibiting corporations from making contributions); 11 C.F.R. § 114.2(b) (same); *Massachusetts*, 479 U.S. at 263 ("Our conclusion is that § 441b's restriction of *independent* spending is unconstitutional as applied to MCFL") (emphasis added); *see also King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 732 (Tex. 2017) ("legislatively enacted bans on corporate political contributions are constitutional under the First Amendment."). Under both federal and Texas law, corporations may make contributions to political committees that make only independent expenditures, *see Citizens United v. FEC*, 558 U.S. 310 (2020); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 538 (5th Cir. 2013), but they may not make contributions, including coordinated in-kind contributions, to candidates.

If made with the prior consent or approval of candidates or committees, the requestor's intended expenditures are prohibited campaign contributions.

The Election Code, defines a "contribution" as any "transfer of money, goods, services, or any other thing of value," and a "campaign contribution" as any "contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure." Tex. Elec. Code §§ 251.001(2), 251.001(3); 257.001 (each state or county political party may designate a general-purpose political committee as the principal political committee for that party in the state or county). Contributions need not be monetary; they can take the form of in-kind goods or services paid for by contributors. *Id*. at §§ 251.001(2); 251.001(21) (defining "in-kind contribution").

The requestor incorrectly asserts that Commission rule 20.1(18) limits what "in connection with a campaign" means for purposes of the Election Code's definition of campaign contribution. It does not. As described more fully below, rule 20.1(18) relates to independent campaign *expenditures*, not coordinated campaign contributions. The requestor also contends that its intended communications are not campaign contributions in part because they will not be distributed within 30 days of an election. However, the Election Code expressly states that, "[w]hether a contribution is made before, during, or after an election does not affect its status as a campaign contribution." *Id*. at § 251.001(3).

Rather than its timing, coordination is central to answering whether something is an in-kind "campaign contribution" or a "direct campaign expenditure." If an expenditure is made *without* "the prior consent or approval of the candidate or officeholder on whose behalf the expenditure is made," then it is a direct campaign expenditure, and thus not a prohibited campaign contribution. *Id*. at § 251.001(8). But, if it is made *with* the candidate's prior consent or approval, then it "constitute[s] a campaign contribution by the person making the expenditure," and thus may not be made by a corporation. *Id*.; *see also Osterberg v. Peca*, 12 S.W.3d 31, 36 n. 2 (Tex. 2000) ("What Chapter 253 defines as a 'direct campaign expenditure' corresponds with what the Federal Election Campaign Act and United States Supreme Court call an 'independent expenditure"); *Colo. Rep. Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 610 (1996) (clarifying that an "independent" expenditure is an expenditure "not coordinated with the candidate or candidate's campaign"); Tex. Ethics Comm'n Op. No. 336, n. 1 (1996) ("Although the term 'independent campaign expenditure' is not used in Texas law, it is often more easily grasped than the term 'direct expenditure,' which Texas law uses to describe a campaign expenditure made without the prior consent or approval of the candidate benefited.").

Here, the requestor would like to coordinate with candidates and committees on the content, timing, and distribution of its communications. The communications will identify specific legislators who are candidates and "criticize and/or praise" those legislators. The legislators with whom the requestor would like to coordinate include "candidates who may be mentioned in the [communications] and/or whose opponents may be mentioned." And the coordination would include those candidates being "materially involved" in discussions regarding the creation, production, or distribution of the advocacy. Given these facts, we conclude that the communications would constitute a "thing of value" given "with the intent that it be used in connection with a campaign for elected office" and with "the prior consent or approval" of the candidate or committee on whose behalf the expenditure is made. Tex. Elec. Code

§§ 251.001(2), 251.001(3); 251.001(8); *see also id*. at § 251.0015 (a candidate or officeholder's "material involve[ment]" in decisions regarding the creation, production, or distribution of a campaign communication is evidence of "prior consent or approval"). Consequently, the communications are campaign contributions, and the requestor, a corporation, is prohibited from coordinating with candidates and committees in connection with their creation, timing, or distribution. Tex. Elec. Code §§ 253.091, 253.094(a).

The U.S. Constitution does not preclude the regulation of coordinated campaign contributions of non-express advocacy.

Citing *Buckley v. Valeo*, 424 U.S. 1 (1976), the requestor contends that the First Amendment prohibits nearly any regulation of political advocacy that does not use the so-called "magic words" of "express advocacy." But, while the Supreme Court has considered whether independent political *expenditures* may be restricted even if they do not contain express advocacy "or its functional equivalent," no binding authority has held that coordinated campaign *contributions* cannot be regulated unless they contain express advocacy. In fact, *Buckley* held otherwise. The Court upheld limits on in-kind contributions because they were designed to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." *Buckley*, 424 U.S. at 47. But it struck down limits on independent expenditures because "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id*.

As explained by the Court in *McConnell v. FEC*, 540 U.S. 93 (2003), this country has a long history of prohibiting political contributions by corporations. *See McConnell*, 540 U.S. at 115-22. In 1907, Congress "completely banned corporate contributions of 'money … in connection with' any federal election." *Id*. at 115. In 1925, Congress extended the prohibition of "contributions" "to include 'anything of value,' and made acceptance of a corporate contribution as well as the giving of such a contribution a crime. *Id*. at 116. After the 1972 Presidential elections, Congress enacted comprehensive campaign finance reform that, among other things, imposed limits not only on individual political contributions, but also on "expenditure[s] … relative to a clearly identified candidate. *Id*. at 118-121.

Confronting the limitation on expenditures, the *Buckley* Court narrowed the term "expenditure" to encompass only those funds that were used for communications that "expressly advocated" for the election or defeat of a "clearly identified candidate." *Buckley*, 424 U.S. at 80. These communications included those using the words "vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, or reject," later referred to as the "magic words" test. *Id*. at 44, n.52; *see McConnell*, 540 U.S. at 126. The Court concluded, however, "that as so narrowed, the provision would not provide effective protection against the dangers of *quid pro quo* arrangements, because persons and groups could eschew expenditures that expressly advocated the election or defeat of a clearly identified candidate while remaining 'free to spend as much as they want to promote the candidate and his views.'" *McConnell*, 540 U.S. at 121 (quoting *Buckley*, 424 U.S. at 45). Conversely, the Court upheld the law's limits on individual contributions. *Buckley*, 424 U.S. at 29 ("the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms ….").

Thirty years later, the Supreme Court expressly rejected the magic words test for expenditures. *See McConnell*, 540 U.S. at 191-92 (2003) ("a plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command."). The Court again recognized that advertisers could "easily evade the line by eschewing the use of magic words, … [a]nd although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." *Id*. at 193. Consequently, the Court abandoned *Buckley*'s distinction between "express advocacy" and "issue advocacy," focusing instead on the difference between a "*genuine* issue ad," on one hand, and "the functional equivalent of express campaign advocacy," on the other. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 476, n. 8 (2007) (emphasis added). As the Court later explained:

> This Court has long recognized "the governmental interest in preventing corruption and the appearance of corruption in election campaigns. *Buckley*, 424 U.S. at 45. This interest has been invoked as a reason for upholding *contribution* limits. As *Buckley* explained, "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id*. at 26-27. We have suggested that this interest might also justify limits on electioneering *expenditures* because it may be that, in some circumstances, "large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions." *Id*. at 45.
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> *McConnell* arguably applied this interest—which this Court had only assumed could justify regulation of express advocacy—to ads that were the "functional equivalent" of express advocacy. *See* 540 U.S. at 204-06.

Wis. Right to Life, 551 U.S. at 478.

The requestor also cites Ethics Advisory Opinion 198, which construed the state's corporate expenditure prohibition in light of *Buckley*, but before *McConnell* and *Wisconsin*. While the opinion concludes that corporations may not be prohibited from making independent expenditures that do not include express advocacy, it also rejected the "magic words" test. Tex. Ethics Comm'n Op. No. 198 (1994). Instead, the Commission found that, "whether an actual communication constitutes express advocacy can be answered only on a case-by-case basis," and it left open the possibility that communications that included "candidates' voting records and positions on issues, poll results, and third-party endorsements" might constitute express advocacy even absent any magic words. *Id*. In any event, the opinion was about expenditures, not contributions, and it concluded that the Texas Legislature intended the Election Code "to prohibit political expenditures by corporations and labor organizations to the full extent allowed by the Constitution, as interpreted by the United States Supreme Court." *Id*.

As illustrated by these decisions, the Supreme Court's discussion of express advocacy and its "functional equivalent" address independent expenditures, not coordinated contributions. The communications that are the subject of this opinion, however, are coordinated campaign contributions.

Rule 20.1(18) does not define what constitutes a campaign contribution.

As previously mentioned, the requestor contends that the Commission has adopted a rule that defines when a *contribution* is made "in connection with a campaign." Not so. Rule 20.1(18) addresses campaign expenditures, not campaign contributions.

To be a "campaign expenditure," an expenditure must be "made by any person in connection with a campaign for an elective office or on a measure." *See* Tex. Elec. Code § 251.001(7). Rule 20.1(18)(A) states that "[a]n *expenditure* is made in connection with a campaign for elective office if it is" any of the following:

> (i) made for a communication that expressly advocates the election or defeat of a clearly identified candidate by:
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> (I) using such words as "vote for," "elect," "support," "vote against," "defeat," "reject," "cast your ballot for," or "Smith for city council;" or
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> (II) using such phrases as "elect the incumbent" or "reject the challenger," or such phrases as "vote pro-life" or "vote pro-choice" accompanied by a listing of candidates described as "pro-life" or "pro-choice;"
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> (ii) made for a communication broadcast by radio, television, cable, or satellite or distributed by print or electronic media, including any print publication, mailing, Internet website, electronic mail, or automated phone bank, that:
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> (I) refers to a clearly identified candidate;
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> (II) is distributed within 30 days before a contested election for the office sought by the candidate;
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> (III) targets a mass audience or group in the geographical area the candidate seeks to represent; and
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> (IV) includes words, whether displayed, written, or spoken; images of the candidate or candidate's opponent; or sounds of the voice of the candidate or candidate's opponent that, without consideration of the intent of the person making the communication, are susceptible of no other reasonable interpretation than to urge the election or defeat of the candidate;
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> (iii) made by a candidate or political committee to support or oppose a candidate; or
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> (iv) a campaign contribution to:
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> (I) a candidate; or
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> (II) a group that, at the time of the contribution, already qualifies as a political committee.

1 Tex. Admin. Code § 20.1(18)(A) (emphasis added).

The requestor says that the intended communications "will ***not*** expressly advocate for or against candidates," and "will ***not*** be distributed in a legislative district within 30 days of an election in that district," so they would not be campaign expenditures under either clause (i) or (ii). The

requestor is not a candidate, and it says that it will not engage in any other activity that would require it to register as a political committee, so the communications would not be campaign expenditures under clause (iii) either.

That leaves clause (iv), which says that any campaign contribution to a candidate or political committee also qualifies as a campaign expenditure. Accordingly, the requestor's intended communications are not "campaign expenditures" unless they are "campaign contributions," and thus satisfy clause (iv) of rule 20.1(18)(A). In other words, rule 20.1(18) begs the question of what constitutes a campaign contribution; it does not answer it.

In summary, rule 20.1(18) tracks *McConnell*'s and *Wisconsin*'s holdings. It clarifies that, for purposes of determining whether an expenditure can be regulated as a campaign expenditure, it must either: (1) be express advocacy or its functional equivalent as defined by clauses (i) and (ii), or (2) be made directly by a campaign (clause (iii)) or in coordination with a campaign (clause (iv)). *See* 1 Tex. Admin. Code § 20.1(18).