



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ADVISORY OPINION 2016-21 (GREAT AMERICA PAC)

CONCURRING STATEMENT OF VICE CHAIR CAROLINE C. HUNTER AND COMMISSIONERS LEE E. GOODMAN AND MATTHEW S. PETERSEN

Today, the Commission issued an advisory opinion to Great America PAC addressing the PAC's proposal to employ people previously employed by a candidate or political party to engage in door-to-door canvassing and phone-banking. The legal question was whether their work for the PAC would constitute "coordinated communications" under 11 C.F.R. § 109.21. *See* Advisory Opinion 2016-21. As footnote 3 in the advisory opinion explains, "[t]he Commission could not agree whether door-to-door canvassing would constitute a 'public communication' under 11 C.F.R. § 100.26 and therefore whether such activity could constitute a coordinated communication under 11 C.F.R. § 109.21." The Commission's longstanding position, however, is that door-to-door canvassing is not a "public communication" under 11 C.F.R. § 100.26, and therefore does not constitute a "coordinated communication" under 11 C.F.R. § 109.21.

Congress defined the term "public communication" as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising."¹ "The forms of mass communication enumerated in the definition of 'public communication[,] . . . including television, radio, and newspapers, each lends itself to distribution of content through an entity ordinarily owned or controlled by another person."² Accordingly, "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."³ Door-to-door canvassing is fundamentally different. Individual people make individual contact with voters and talk directly to voters one-on-one. This is not the kind of mass communication contemplated in the Act.

Because Congress did not include door-to-door canvassing in the list of media enumerated in the statutory definition of "public communication," door-to-door canvassing could "qualify as a 'public communication' only if it is a form of advertising and therefore falls within

¹ 52 U.S.C. § 10101(22); *see also* 11 C.F.R. § 100.26. However, "[t]he term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person's website." 11 C.F.R. § 100.26.

² *Final Rules on Internet Communications*, 71 Fed. Reg. 18589, 18594 (Apr. 12, 2006).

³ *Id.*

the catch-all category of ‘general public political advertising.’”⁴ Door-to-door canvassing is not a form of advertising, let alone advertising that is aimed at the general public. In MUR 5564 (Alaska Democratic Party), the Commission confirmed this position and did not treat a state party’s door-to-door canvassing as a “public communication.”⁵ Commissioners later issued two statements of reasons, both explicitly stating that door-to-door canvassing is not a “public communication” under 11 C.F.R. § 100.26.⁶

A policy of such longstanding agency acceptance cannot be changed by three commissioners in one footnote of an advisory opinion.⁷ Accordingly, the Commission’s longstanding interpretation of the Act that door-to-door canvassing is not a “public communication” under 11 C.F.R. § 100.26 remains the law.

⁴ *Id.*

⁵ *See* MUR 5564 (Alaska Democratic Party), Factual and Legal Analysis at 14 (May 4, 2006).

⁶ *See* MUR 5564 (Alaska Democratic Party), Statement of Reasons of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky at 9 (Dec. 21, 2007) (“Door-to-door canvassing is not ‘general public political advertising’ . . . [t]hus, door-to-door canvassing is [not] a ‘public communication.’”); MUR 5564 (Statement of Reasons of Chairman Robert D. Lenhard at 4 (Dec. 31, 2007) (“Most of the costs related to the ADP’s field program were payments by the ADP for salaries and benefits of its employees, and for costs related to maintaining office space. As such, these costs were not for ‘public communications’ (such as radio ads and direct mail) as that term is defined in our regulations. These costs include door to door canvassing, manning campaign offices and other traditional grass roots activities.”) (citations omitted).

⁷ *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2315-16 (“In the context of a change in policy . . . an agency, in the ordinary course, should acknowledge that it is in fact changing its position and ‘show that there are good reasons for the new policy.’”) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)); *see also* MUR 5564 (Alaska Democratic Party), Statement of Reasons of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky at 2-3, 10 (When the Commission has not proceeded against a certain type of respondent previously, it should not proceed against similarly situated respondents in the future unless the public has notice through a rulemaking.); *CBS Corporation v. FCC*, 533 F.3d 167 (3d Cir. 2008) (An agency cannot, in an enforcement action, take a substantial deviation from prior enforcement policies without sufficient notice of change in policy.).