

**RECEIVED**

By Office of the Commission Secretary at 2:36 pm, Feb 21, 2024



FEDERAL ELECTION COMMISSION  
Washington, DC

**AGENDA DOCUMENT NO. 24-08-A**  
**AGENDA ITEM**  
**For meeting of February 29, 2024**

February 21, 2024

**MEMORANDUM**

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*  
Acting General Counsel

Neven F. Stipanovic *NFS*  
Associate General Counsel

Robert Knop *NFS for RMK*  
Assistant General Counsel

Lindsay Bird *LCB*  
Attorney

Subject: Draft AO 2024-01 (Texas Majority PAC) Draft A

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 p.m. (Eastern Time) on February 28, 2024.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2024-01

2

3 Jonathan S. Berkon, Esq.

4 Courtney T. Weisman, Esq.

5 Sarah N. Mahmood, Esq.

6 Elias Law Group LLP

**DRAFT A**

7 250 Massachusetts Avenue, NW

8 Suite 400

9 Washington, DC 20001

10

11 Dear Counsel:

12

13 We are responding to your advisory opinion request on behalf of Texas Majority

14 PAC (“TMP”), asking several questions regarding the application of the Federal Election

15 Campaign Act, 52 U.S.C. §§ 30101- 30145 (the “Act”), and Commission regulations to

16 TMP’s proposal to hire vendors to canvass potential voters, namely whether canvassing

17 literature and scripts, and their associated costs, are public communications, coordinated

18 communications, or coordinated expenditures, and whether TMP can provide data

19 acquired during the canvass to a federal candidate or party committee at less than fair

20 market value.

21 The Commission concludes that the canvassing literature and scripts are public

22 communications and coordinated communications under Commission regulations.

23 However, the costs to produce and distribute the campaign literature and scripts are not

24 coordinated expenditures. The Commission further concludes that if TMP provides the

25 data acquired during its paid canvass to a federal candidate or party committee at less

26 than its fair market value, it would be an in-kind contribution.

27 ***Background***

28 The facts presented in this advisory opinion are based on your letter received on

29 January 12, 2024, and email received on January 22, 2024. TMP is a nonfederal

1 “general-purpose committee” registered with the Texas Ethics Commission.<sup>1</sup> TMP’s  
2 major purpose is to elect Democrats to state and local office in Texas.<sup>2</sup> TMP is not  
3 registered with the Commission and states that it is not established, financed, maintained,  
4 or controlled by any federal, state, or local candidate, party committee, or their agents.<sup>3</sup>

5 TMP seeks to retain and pay third-party vendors, managed by TMP’s paid staff,  
6 to execute a paid canvassing program (“Paid Canvass”).<sup>4</sup> The vendors will design and  
7 produce canvassing literature (“Canvassing Literature”) and a script (“Script”) to be used  
8 solely for the Paid Canvass.<sup>5</sup> The vendors will also hire, train and manage canvassers,  
9 who will go to voters’ homes to distribute the Canvassing Literature, read the Script, and  
10 record answers to the scripted questions.<sup>6</sup> The canvassers will not engage in any other  
11 work or complete any other assignments for TMP.<sup>7</sup>

12 TMP will preselect the voters who will be visited by the canvassers.<sup>8</sup> The Paid  
13 Canvass will not be limited to the homes of individuals who have opted-in or otherwise

---

1 Advisory Opinion Request (“AOR”) at 001. Texas law defines “[g]eneral-purpose committee” as a political committee that has among its principal purposes supporting or opposing: two or more candidates who are unidentified or are seeking offices that are unknown; one or more measures that are unidentified; or assisting two or more officeholders who are unidentified. Texas Elec. Code § 251.001(14).

2 AOR003.

3 AOR001-3. TMP states that its major purpose does not include federal campaign activity.  
AOR003.

4 AOR002.

5 *Id.* The Canvassing Literature and Script will not be used for any purpose other than TMP’s proposed Paid Canvass. AOR014.

6 AOR002.

7 AOR014.

8 AOR002.

1 sought out a visit by the canvassers.<sup>9</sup> The vendors and individual canvassers will not  
2 have a contractual or business relationship with the voters whose homes will be visited.<sup>10</sup>  
3 TMP anticipates the Paid Canvass will disseminate identical or substantially similar  
4 Campaign Literature and Scripts to more than 500 homes within a 30-day period.<sup>11</sup>

5 The Paid Canvass will include three categories of expenditures: (1) production  
6 costs, (2) distribution costs, and (3) data costs.<sup>12</sup> The production costs are the  
7 “[p]ayments to one or more vendor(s) to design and produce the Canvassing Literature  
8 and Script . . . including the actual costs of design and production, and a commercially  
9 reasonable profit for the vendor.”<sup>13</sup> The distribution costs are the “[p]ayments to one or  
10 more vendor(s) to recruit, hire, train, and manage canvassers . . . including payments to  
11 compensate the canvassers for their time, actual costs to the vendor to recruit, hire, train,  
12 and manage the canvassers, and a commercially reasonable profit for the vendor(s).”<sup>14</sup>  
13 The data costs are the “[p]ayments to one or more vendor(s) to store (on a data platform)  
14 and analyze the voters’ answers to the questions posed by paid canvassers . . . including  
15 the actual costs of maintaining the platform and analyzing the data and a commercially  
16 reasonable profit for the vendor(s).”<sup>15</sup> TMP states that except for the data costs, the Paid

---

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> AOR002, 14.

<sup>12</sup> AOR002.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> AOR002-3.

1 Canvass “will not have non-communicative components; for example, unlike some  
2 grassroots efforts, [it] will not include offers to drive voters to polling places.”<sup>16</sup>

3 The Paid Canvass will disseminate the Canvassing Literature and Scripts within  
4 the pre-election timeframes described in Commission regulations,<sup>17</sup> will refer to federal  
5 candidates and political parties, and may also include express advocacy or its functional  
6 equivalent with respect to federal candidates.<sup>18</sup> TMP will consult with federal  
7 candidates, party committees, and their agents on the canvassing program.<sup>19</sup>

8 Accordingly, TMP anticipates “it will come into possession of nonpublic plans, projects,  
9 activities, or needs of candidates (federal and nonfederal) and/or political parties,” and  
10 thus will engage in substantial discussion as defined in Commission regulations.<sup>20</sup>

11 However, the canvassing program will not involve the dissemination, distribution, or  
12 republication of federal candidate campaign materials.<sup>21</sup>

---

<sup>16</sup> AOR003.

<sup>17</sup> See 11 C.F.R. § 109.21(c)(4).

<sup>18</sup> AOR003.

<sup>19</sup> AOR003-4.

<sup>20</sup> AOR003. See also 11 C.F.R. § 109.21(d)(3).

<sup>21</sup> AOR003. See 11 C.F.R. § 109.23.

1 **Questions Presented**

2 1. *Are the Canvassing Literature and Script “public communications” under 11*

3 *C.F.R. § 100.26?*

4 2. *Are the Canvassing Literature and Script “coordinated communications” under*

5 *11 C.F.R. § 109.21?*

6 3. *Are the production costs or distribution costs “coordinated expenditures” under*

7 *11 C.F.R. § 109.20?*

8 4. *May TMP provide any of the data that arises from the paid canvasses to a federal*

9 *candidate or party committee at no charge or less than its fair market value?*

10 **Legal Analysis**

11 1. *Are the Canvassing Literature and Script “public communications” under 11*

12 *C.F.R. § 100.26?*

13 2. *Are the Canvassing Literature and Script “coordinated communications” under*

14 *11 C.F.R. § 109.21?*

15 Yes, the Canvassing Literature and Script are public communications and

16 coordinated communications.

17 Under the Act, expenditures that are coordinated with a candidate or political

18 party committee are treated as contributions to that candidate or political party

19 committee.<sup>22</sup> Specifically, Commission regulations provide that if a communication is

20 “coordinated with a candidate, an authorized committee, a political party committee, or

---

<sup>22</sup> 52 U.S.C. § 30116(a)(7)(B).

1 an agent of any of the foregoing,” the payment for the communication is an in-kind  
2 contribution to that candidate or the political party committee from the payor.<sup>23</sup>  
3 Commission regulations set forth a three-prong test to determine whether a  
4 communication is a coordinated communication.<sup>24</sup>

5 The first prong is the payment prong, which requires that the communication be  
6 paid for, in whole or in part, by a person other than the candidate or party committee.<sup>25</sup>  
7 Here, the payment prong is satisfied because TMP states that it would pay for the  
8 Canvassing Literature and Scripts, which would reference or depict the federal candidate  
9 or party committee.

10 The second prong of the coordinated communication test is the content prong.  
11 The content prong provides that a communication is a coordinated communication only if  
12 it is an “electioneering communication” or a “public communication” that meets at least  
13 one of five content standards.<sup>26</sup>

14 An “electioneering communication” is defined as “any broadcast, cable, or  
15 satellite communication” that refers to a clearly identified federal candidate, is publicly  
16 distributed within certain time periods, and is targeted to the relevant electorate.<sup>27</sup> TMP’s  
17 proposal does not involve any “broadcast, cable, or satellite communications” and thus,  
18 would not constitute electioneering communications.

---

<sup>23</sup> 11 C.F.R. § 109.21(a), (b)(1).

<sup>24</sup> *Id.* § 109.21(a).

<sup>25</sup> *Id.* § 109.21(a)(1).

<sup>26</sup> *Id.* § 109.21(c)(2).

<sup>27</sup> 52 U.S.C. § 30104(F)(3); 11 C.F.R. § 100.29(a).

1           Therefore, only if the Canvassing Literature and Script are “public  
2 communications” could they be coordinated communications. A public communication  
3 is defined as “a communication by means of any broadcast, cable, or satellite  
4 communication, newspaper, magazine, outdoor advertising facility, mass mailing, or  
5 telephone bank to the general public, *or any other form of general public political*  
6 *advertising.*”<sup>28</sup>

7           Because paid door-to-door canvassing as proposed in the request is not expressly  
8 enumerated in the statutory or regulatory definition of “public communication,” the  
9 Commission must determine whether the Paid Canvass constitutes “general public  
10 political advertising.” The catch-all term “general public political advertising” is not  
11 defined by the Act or Commission regulations.<sup>29</sup> However, in a 2006 rulemaking  
12 concerning internet communications, the Commission clarified the types of  
13 communications that fall within the category of general public political advertising.<sup>30</sup>  
14 The Commission observed that “[b]y definition, the word ‘advertising’ connotes a  
15 communication for which a payment is required, particularly in the context of campaign

---

<sup>28</sup> 52 U.S.C. § 30101(22) (emphasis added); *see also* 11 C.F.R. § 100.26.

<sup>29</sup> *Id.* In *Shays v. FEC*, the court made clear that the catch-all phrase “general public political advertising” can include categories of communications that are not specifically listed in the statutory definition of “public communication,” even if such categories of communications were known to Congress at the time the statute was drafted. *Shays v. FEC*, 337 F. Supp. 2d 28, 66–69 (D.D.C. 2004), *aff’d sub nom. Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005). The court rejected the argument that communications over the internet were not “general public political advertising” because they were not included in the list of media in the statutory definition of “public communication,” but were included elsewhere in the statute. *Id.* The Court explained, “Congress, by the plain terms of the statute, clearly intended for the term “public communication” to capture all forms of “general public political advertising.” *Id.* at 68–69.

<sup>30</sup> Internet Communications, 71 Fed. Reg. 18589, 18594 (Apr. 12, 2006).



1 messages.”<sup>31</sup> The Commission further explained that a common element among all the  
2 listed types of public communications is that “each lends itself to distribution of content  
3 through an entity ordinarily owned or controlled by another person” and an individual  
4 “must ordinarily pay an intermediary . . . for access to the public through that form of  
5 media each time he or she wishes to make a communication.”<sup>32</sup> Thus, the category of  
6 general public political advertising encompasses communications for which the speaker  
7 must rely on and pay a third-party to access the speaker’s target audience “for each  
8 communication.”<sup>33</sup>

9       The Commission concludes that under the facts presented here, the Paid Canvass  
10 constitutes general public political advertising, and as a result, the Canvassing Literature  
11 and Script are public communications. TMP proposes to pay a third-party vendor to  
12 create and distribute communications to the general public.<sup>34</sup> And TMP would rely on  
13 the vendor and their paid canvassers to access TMP’s target audience for each  
14 communication.<sup>35</sup> Thus, the proposed Paid Canvass includes the common elements of  
15 general public political advertising, as identified by the Commission.

---

<sup>31</sup> *Id.* (citing dictionary definitions of “advertising” that include a payment element).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> The facts in this matter are distinguishable from those in Advisory Opinion 2022-20 (Maggie for NH), where the Commission concluded that short code text messages sent to individuals who opted-in to receive messages from the Committee were not public communications. Advisory Opinion 2022-20 (Maggie for NH) at 5. In that opinion, the Commission reasoned that because the text messages were only distributed to individuals who affirmatively opted-in to receive messages from the Committee, the messages were akin to speech disseminated through a political committee’s own website, which the Commission had previously concluded was not a public communication. *Id.* Here, the proposed communications will not be restricted to individuals who have opted-in or otherwise sought out the communication. Rather, the communications will be distributed to the general public.

<sup>35</sup> TMP states in its request that its Paid Canvass cannot constitute general public political advertising because its third-party vendor would not meet the dictionary definition of “intermediary,”

1           Additionally, the proposed Paid Canvass is functionally similar to forms of media  
2 that are listed in the statutory definition of “public communication.” Like a telephone  
3 bank, the Paid Canvass will initiate more than 500 scripted conversations of a  
4 substantially similar nature within a 30-day period.<sup>36</sup> And like a mass mailing, the Paid  
5 Canvass will distribute more than 500 pieces of literature of identical or substantially  
6 similar nature to homes within a 30-day period.<sup>37</sup>

7           Notably, the Commission has previously concluded that materials distributed  
8 door-to-door by hand can constitute general public political advertising. In MUR 4741  
9 (Mary Bono Committee *et al.*), the Commission concluded a door hanger was a form of  
10 general public political advertising, in part because “the door hanger was distributed to  
11 the general public at their place of residence . . . just as if they had received it in the  
12 mail.”<sup>38</sup> Similarly, in MUR 6778 (David Hale for Congress *et al.*), the Commission

---

which requires the third-party to act as a “go-between or mediator between two other people.” AOR005. According to TMP, its paid vendors would not meet the definition of “intermediary” because they would be acting only as agents of TMP, and not the voters. AOR005. However, TMP’s proposal does, in fact, require the vendors to act as the “go-between” for TMP and the voters — delivering TMP’s communications to the voters and then delivering the voters’ communications back to TMP. AOR002. Further, neither the Act nor Commission regulations define the term “intermediary,” nor has the Commission ever used the dictionary definition of “intermediary” as the test for determining whether a communication constitutes general public political advertising.

<sup>36</sup> AOR014. A telephone bank is defined as “more than 500 telephone calls of an identical or substantially similar nature within any 30-day period.” 11 C.F.R. § 100.28.

<sup>37</sup> AOR014. A mass mailing is defined as “a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period.” 11 C.F.R. § 100.27.

<sup>38</sup> Factual and Legal Analysis (“F&LA”) at 4-5, MUR 4741 (Mary Bono Committee *et al.*) (Jan. 19, 1999). This enforcement matter pre-dates the “public communication” definition and analyzed the term “general public political advertising” as that phrase is used in the statutory disclaimer provision, now codified at 52 U.S.C. § 30120(a).

1 again concluded that door hangers were “general public political advertising,” and thus  
2 public communications that required a disclaimer.<sup>39</sup>

3 Because the proposed Paid Canvass falls within the category of general public  
4 political advertising, the Canvassing Literature and Script are public communications  
5 under the Act and Commission regulations.<sup>40</sup>

6 Having established that the Canvassing Literature and Script are “public  
7 communications,” the Commission must next consider whether they meet any of the five  
8 content standards outlined in 11 C.F.R. § 109.2(c), which include, in relevant parts, a  
9 public communication that expressly advocates the election or defeat of a clearly  
10 identified candidate for federal office;<sup>41</sup> a public communication that clearly references a  
11 federal candidate or political party within certain pre-election timeframes;<sup>42</sup> and a public  
12 communication that is the functional equivalent of express advocacy.<sup>43</sup> TMP states that  
13 its canvassing communications will include express advocacy or its functional equivalent  
14 and will refer to federal candidates or political parties within the relevant pre-election  
15 timeframes .<sup>44</sup> Thus, the content standard has been met.

---

<sup>39</sup> F&LA at 5, MUR 6778 (David Hale for Congress *et al.*) (undated, circa Nov. 5, 2015). *But see* F&LA at 5, MUR 6673 (David Lee) (Sept. 13, 2013) (concluding that a handbill that was used in connection with volunteer activities qualified for the “coattails” exception and was therefore not a “public communication.”).

<sup>40</sup> This advisory opinion addresses only TMP’s proposed paid canvass as described in the request. It does not address door-to-door canvassing in general.

<sup>41</sup> 11 C.F.R. § 109.21(c)(3).

<sup>42</sup> *Id.* § 109.21(c)(4).

<sup>43</sup> *Id.* § 109.21(c)(5).

<sup>44</sup> AOR003.

1           A communication meets the third and final “conduct prong” if it satisfies any one  
2 of six conduct standards, including that a federal candidate, party committee, or their  
3 agent engages in “substantial discussion” about the communication with the person  
4 paying for the communication.<sup>45</sup> Here, TMP acknowledges that it will engage in  
5 substantial discussion, stating it “anticipates that it will come into possession of  
6 nonpublic plans, projects, activities, or needs of candidates. . . and/or political parties  
7 within the meaning of 11 C.F.R. § 109.21(d)(3).”<sup>46</sup> Thus, the Canvassing Literature and  
8 Script meet the conduct prong.

9           Because all three prongs are satisfied, the Commission concludes the Canvassing  
10 Literature and Script would constitute coordinated communications under 11 C.F.R. §  
11 109.21. Accordingly, the costs of these communications, including the production and  
12 distribution costs, would be in-kind contributions to any federal candidate or political  
13 party committee that is depicted in the communication.

14           3. *Are the production costs or distribution costs “coordinated expenditures” under*  
15           *11 C.F.R. § 109.20?*

16           No, the costs to produce and distribute the Campaign Literature and Script are not  
17 coordinated expenditures under 11 C.F.R. § 109.20. Coordinated expenditures are those  
18 “made in cooperation, consultation or concert with, or at the request or suggestion of, a

---

<sup>45</sup> 11 C.F.R. § 109.21(d)(3).

<sup>46</sup> AOR003.

1 candidate, a candidate’s authorized committee, or a political party committee,” but that  
2 are “not made for a coordinated communication under 11 C.F.R. § 109.21.”<sup>47</sup>

3 Here, the production and distribution costs are expenditures made for the sole  
4 purpose of creating and distributing the Canvassing Literature and Script, which will only  
5 be used for TMP’s Paid Canvass.<sup>48</sup> The payments to the vendor to produce and  
6 distribute the Canvassing Literature and Script will not be redeemed for any other  
7 purpose.<sup>49</sup> For the reasons provided in response to questions 1 and 2, the Canvassing  
8 Literature and Script are coordinated communications under 11 C.F.R. § 109.21.  
9 Accordingly, the costs to produce and distribute the coordinated communications are not  
10 coordinated expenditures as defined by 11 C.F.R. § 109.20, which excludes expenditures  
11 made for coordinated communications.

12 4. *May TMP provide any of the data that arises from the paid canvasses to a federal*  
13 *candidate or party committee at no charge or less than its fair market value?*

14 If TMP provides the data that arises from the paid canvass to a federal candidate  
15 or party committee for less than its fair market value, it would result in an in-kind  
16 contribution to the candidate or party committee.

---

<sup>47</sup> 11 C.F.R. § 109.20(a)-(b). The Commission has explained that section 109.20(b) applies to “expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee.” Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (“2003 Coordination E&J”); *see also* Advisory Opinion 2011-14 (Utah Bankers Association).

<sup>48</sup> AOR002, 14.

<sup>49</sup> AOR011-12,14.

1           A contribution includes “any gift, subscription, loan, advance, or deposit of  
2 money or anything of value made by any person for the purpose of influencing any  
3 election for Federal office.”<sup>50</sup> “[T]he provision of any goods or services without charge  
4 or at a charge that is less than the usual and normal charge” is an “in-kind”  
5 contribution.<sup>51</sup> Commission regulations define “usual and normal charge” as the price of  
6 goods in the market from which they ordinarily would have been purchased at the time of  
7 the contribution, or the commercially reasonable rate prevailing at the time services were  
8 rendered.<sup>52</sup>

9           TMP acknowledges that the data gathered from its Paid Canvass is a thing of  
10 value.<sup>53</sup> Indeed, it characterizes the data as a “marketable asset that can be sold or rented  
11 to others.”<sup>54</sup> Accordingly, if TMP provides the data to a federal candidate or party  
12 committee for “less than the usual and normal charge” it would result in an in-kind  
13 contribution.

14           This response constitutes an advisory opinion concerning the application of the  
15 Act and Commission regulations to the specific transaction or activity set forth in your  
16 request.<sup>55</sup> The Commission emphasizes that, if there is a change in any of the facts or  
17 assumptions presented, and such facts or assumptions are material to a conclusion

---

<sup>50</sup> 52 U.S.C. § 30101(8)(A)(i).

<sup>51</sup> 11 C.F.R. § 100.52(d)(1).

<sup>52</sup> *Id.* § 100.52(d)(2).

<sup>53</sup> *See* AOR013.

<sup>54</sup> AOR013.

<sup>55</sup> *See* 52 U.S.C. § 30108.

1 presented in this advisory opinion, then the requestor may not rely on that conclusion as  
2 support for its proposed activity. Any person involved in any specific transaction or  
3 activity which is indistinguishable in all its material aspects from the transaction or  
4 activity with respect to which this advisory opinion is rendered may rely on this advisory  
5 opinion.<sup>56</sup> Please note that the analysis or conclusions in this advisory opinion may be  
6 affected by subsequent developments in the law including, but not limited to, statutes,  
7 regulations, advisory opinions, and case law. Any advisory opinions cited herein are  
8 available on the Commission's website.

9 On behalf of the Commission,

10

11 Sean J. Cooksey,

12

13 Chairman

14

15

---

<sup>56</sup> See *id.* § 30108(c)(1)(B).