

RECEIVED

By Office of the Commission Secretary at 2:39 pm, Feb 21, 2024



FEDERAL ELECTION COMMISSION
Washington, DC

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

February 21, 2024

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson
Acting General Counsel

Neven F. Stipanovic
Associate General Counsel

Robert Knop
Assistant General Counsel

Lindsay Bird *LCB*
Attorney

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

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

7 250 Massachusetts Avenue, NW

8 Suite 400

9 Washington, DC 20001

DRAFT B

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 not

22 public communications, and as a result are not coordinated communications under

23 Commission regulations. Further, the costs to produce and distribute the canvassing

24 literature and scripts are not coordinated expenditures. Finally, the Commission

25 concludes that if TMP provides the data that arises from its paid canvass to a federal

26 candidate or party committee at less than its fair market value, it would be an in-kind

27 contribution.

1 ***Background***

2 The facts presented in this advisory opinion are based on your letter received on
3 January 12, 2024, and email received on January 22, 2024. TMP is a nonfederal
4 “general-purpose committee” registered with the Texas Ethics Commission.¹ TMP’s
5 major purpose is to elect Democrats to state and local office in Texas.² TMP is not
6 registered with the Commission and states that it is not established, financed, maintained,
7 or controlled by any federal, state, or local candidate, party committee, or their agents.³

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

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.

1 TMP will preselect the voters who will be visited by the canvassers.⁸ The Paid
2 Canvass will not be limited to the homes of individuals who have opted-in or otherwise
3 sought out a visit by the canvassers.⁹ The vendors and individual canvassers will not
4 have a contractual or business relationship with the voters whose homes will be visited.¹⁰
5 TMP anticipates the Paid Canvass will disseminate identical or substantially similar
6 Campaign Literature and Scripts to more than 500 homes within a 30-day period.¹¹

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

8 AOR002.

9 *Id.*

10 *Id.*

11 AOR002, 14.

12 AOR002.

13 *Id.*

14 *Id.*

1 reasonable profit for the vendor(s).”¹⁵ TMP states that except for the data costs, the Paid
2 Canvass “will not have non-communicative components; for example, unlike some
3 grassroots efforts, [it] will not include offers to drive voters to polling places.”¹⁶

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

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

12 However, the canvassing program will not involve the dissemination, distribution, or
13 republication of federal candidate campaign materials.²¹

¹⁵ AOR002-3.

¹⁶ AOR003.

¹⁷ See 11 C.F.R. § 109.21(c)(4).

¹⁸ AOR003.

¹⁹ AOR003-4.

²⁰ AOR003. See also 11 C.F.R. § 109.21(d)(3).

²¹ 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 No, the Canvassing Literature and Script are not public communications and,

16 therefore, are not 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.²² Specifically, Commission regulations provide that if a communication is

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

²² 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.²³
3 Commission regulations set forth a three-prong test to determine whether a
4 communication is a coordinated communication.²⁴ All three prongs of this test must be
5 met in order for a communication to be deemed a coordinated communication.

6 The Commission concludes that the Canvassing Literature and the Scripts do not
7 constitute coordinated communications because they do not meet content prong of the
8 coordinated communication test. The content prong provides that a communication is a
9 coordinated communication only if it is an “electioneering communication” or a “public
10 communication” that meets at least one of five content standards.²⁵

11 An “electioneering communication” is defined as “any broadcast, cable, or
12 satellite communication” that refers to a clearly identified federal candidate, is publicly
13 distributed within certain time periods, and is targeted to the relevant electorate.²⁶ TMP’s
14 proposal does not involve any “broadcast, cable, or satellite communications” and thus,
15 would not constitute electioneering communications.

16 Therefore, only if the Canvassing Literature and Script are “public
17 communications” could they be coordinated communications. A public communication
18 is defined as “a communication by means of any broadcast, cable, or satellite

23 11 C.F.R. § 109.21(a), (b)(1).

24 *Id.* § 109.21(a).

25 *Id.* § 109.21(c)(2).

26 52 U.S.C. § 30104(F)(3); 11 C.F.R. § 100.29(a).

1 communication, newspaper, magazine, outdoor advertising facility, mass mailing, or
2 telephone bank to the general public, *or any other form of general public political*
3 *advertising.*²⁷

4 Because paid door-to-door canvassing as proposed in the request is not expressly
5 enumerated in the statutory or regulatory definition of “public communication,” the
6 Commission must determine whether the Paid Canvass constitutes “general public
7 political advertising.” The catch-all term “general public political advertising” is not
8 defined by the Act or Commission regulations. However, “the Commission interprets
9 each term listed in the definition of ‘public communication’ or in [52 U.S.C. § 30120(a)]
10 as a specific example of one form of ‘general public political advertising.’”²⁸

11 In a 2006 rulemaking concerning internet communications, the Commission
12 discussed the common elements of communications that fall within the category of
13 general public political advertising.²⁹ The Commission observed that one of the common
14 elements is that such communications typically require the person making the
15 communication to pay “for access to an established audience using a forum controlled by
16 another person, rather than using a forum that he or she controls to establish his or her
17 own audience.”³⁰

²⁷ 52 U.S.C. § 30101(22) (emphasis added); *see also* 11 C.F.R. § 100.26.

²⁸ *See* Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,963 (Dec. 13, 2002).

²⁹ Internet Communications, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006).

³⁰ *Id.* at 18,594-95.

1 The Commission discussed this common element in Advisory Opinion 2022-20
2 (Maggie for NH). In that opinion, the Commission observed that general public political
3 advertising “typically require[s] the person making the communication to pay to use a
4 third party’s platform to gain access to the third party’s audience.”³¹ The Commission
5 explained that traditional forms of paid advertising generally require a speaker to pay “to
6 disseminate a message through a medium controlled, and to an audience established, by a
7 third party.”³² The Commission concluded that short-code text messages — which were
8 only sent to individuals who agreed to receive messages from the Committee — lacked
9 this common element and therefore did not constitute “general public political
10 advertising.”³³

11 Here, the Canvassing Literature and Script will not be disseminated “through a
12 medium controlled, and to an audience established, by a third party.”³⁴ Unlike a
13 newspaper or television company, the canvassing vendors will have no preexisting
14 relationship with the canvass’s audience and will have no more right to communicate
15 with the audience than TMP.³⁵ The vendors will also not establish or identify the

³¹ Advisory Opinion 2022-20 (Maggie for NH) at 4-5.

³² *Id.*

³³ *Id.* at 5. The Commission further noted that text messages sent only to individual subscribers who affirmatively opt-in to the messaging— and “therefore have sought out the speaker and speech through a forum controlled by the speaker”— are analogous to “to speech disseminated through a political committee’s own website, which the Commission previously concluded is not a public communication.” *Id.*

³⁴ *See id.*

³⁵ AOR002, 6.

1 audience for the canvassing program.³⁶ Instead, TMP will preselect the voters whose
2 homes will be visited.³⁷ The vendors will simply act as TMP’s agents in carrying out a
3 canvassing program that TMP controls. Under TMP’s proposal, the canvassing vendors
4 neither establish the audience nor control the forum. Accordingly, the proposed Paid
5 Canvass is distinguishable from the types of communications that fall within the
6 definition of “general public political advertising.”

7 Furthermore, door-to-door canvassing is a traditional grassroots activity
8 fundamentally different from the types of mass media enumerated in the statutory
9 definition of “public communication.”³⁸ Unlike communications made via television,
10 newspapers, magazines, mass mailings, or telephone banks, door-to-door canvassing
11 involves individual people talking face-to-face with voters. It is not the type of mass
12 communication contemplated in the definition of “public communication.”

13 Accordingly, the Commission concludes that the Canvassing Literature and Script
14 are not “public communications,” and thus would not satisfy the content prong of the
15 coordinated communications test. Because the content prong is not satisfied, the
16 Canvassing Literature and Script are not coordinated communications.³⁹

³⁶ AOR002.

³⁷ *Id.*

³⁸ 52 U.S.C. § 30101(22).

³⁹ Because the Paid Canvass would not satisfy the content prong of the coordinated communication test, the Commission need not, and does not, address the third and final part of the test, the conduct prong. *See* 11 C.F.R. § 109.21(a)(3), (d).

1 3. *Are the production costs or distribution costs “coordinated expenditures” under*
2 *11 C.F.R. § 109.20?*

3 No, the costs to produce and distribute the Campaign Literature and Script are not
4 coordinated expenditures under 11 C.F.R. § 109.20, because they are expenditures made
5 for communications.

6 Coordinated expenditures are defined in 11 C.F.R. § 109.20(b), which provides:

7 Any expenditure that is coordinated within the meaning of paragraph (a) of this
8 section, but that is not made for a coordinated communication under 11 CFR
9 109.21. . . is either an in-kind contribution to, or a coordinated party expenditure
10 with respect to, the candidate or political party committee with whom or with
11 which it was coordinated. . .⁴⁰

12
13 The Commission has explained that section 109.20(b) applies to “expenditures that *are*
14 *not made for communications* but that are coordinated with a candidate, authorized
15 committee, or political party committee.”⁴¹

16 The Canvassing Literature and Script are communications.⁴² TMP’s proposed
17 production costs are limited to payments to the vendor to design and produce these
18 specific communications, which will not be used outside of the Paid Canvass.⁴³

⁴⁰ 11 C.F.R. § 109.20(b). Section 109.20(a) defines “coordinated” as “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee.” 11 C.F.R. § 109.20(a).

⁴¹ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (emphasis added); *see also* Advisory Opinion 2011-14 (Utah Bankers Association).

⁴² *See communication*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “communication” as “1. The interchange of messages or ideas by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception. 2. The messages or ideas so expressed or exchanged.”).

⁴³ AOR002, 14.

1 Similarly, TMP’s proposed distribution costs are limited to payments to the vendor to
2 recruit, hire, train, and manage the canvassers who will disseminate the canvassing
3 communications.⁴⁴ The canvassers will not engage in any work for TMP other than
4 disseminating the communications and recording voters’ answers to scripted questions.⁴⁵
5 The payments to the vendor(s) to produce and distribute the Canvassing Literature and
6 Script will not be redeemed for any other purpose.⁴⁶ Because the expenditures at issue
7 here will be made solely to produce and distribute communications, they do not constitute
8 coordinated expenditures under 11 C.F.R. § 109.20(b), which only applies to expenditures
9 that are “not made for communications.”⁴⁷

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

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

15 A contribution includes “any gift, subscription, loan, advance, or deposit of
16 money or anything of value made by any person for the purpose of influencing any
17 election for Federal office.”⁴⁸ “[T]he provision of any goods or services without charge

44 AOR002.

45 AOR014.

46 AOR011.

47 Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (emphasis added).

48 52 U.S.C. § 30101(8)(A)(i).

1 or at a charge that is less than the usual and normal charge” is an “in-kind”
2 contribution.⁴⁹ Commission regulations define “usual and normal charge” as the price of
3 goods in the market from which they ordinarily would have been purchased at the time of
4 the contribution, or the commercially reasonable rate prevailing at the time services were
5 rendered.⁵⁰

6 TMP acknowledges that the data gathered from its Paid Canvass is a thing of
7 value.⁵¹ Indeed, it characterizes the data as a “marketable asset that can be sold or rented
8 to others.”⁵² Accordingly, if TMP provides the data to a federal candidate or party
9 committee for “less than the usual and normal charge” it would result in an in-kind
10 contribution.

11 This response constitutes an advisory opinion concerning the application of the
12 Act and Commission regulations to the specific transaction or activity set forth in your
13 request.⁵³ The Commission emphasizes that, if there is a change in any of the facts or
14 assumptions presented, and such facts or assumptions are material to a conclusion
15 presented in this advisory opinion, then the requestor may not rely on that conclusion as
16 support for its proposed activity. Any person involved in any specific transaction or
17 activity which is indistinguishable in all its material aspects from the transaction or
18 activity with respect to which this advisory opinion is rendered may rely on this advisory

⁴⁹ 11 C.F.R. § 100.52(d)(1).

⁵⁰ *Id.* § 100.52(d)(2).

⁵¹ *See* AOR013.

⁵² AOR013.

⁵³ *See* 52 U.S.C. § 30108.

1 opinion.⁵⁴ Please note that the analysis or conclusions in this advisory opinion may be
2 affected by subsequent developments in the law including, but not limited to, statutes,
3 regulations, advisory opinions, and case law. Any advisory opinions cited herein are
4 available on the Commission's website.

5 On behalf of the Commission,
6
7

8
9 Sean J. Cooksey,
10 Chairman

⁵⁴ See *id.* § 30108(c)(1)(B).