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October 27, 2023

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by RMK*
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Subject: Draft AO 2023-06 (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 November 1, 2023.

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 2023-06

2

3 Jonathan S. Berkon
4 Elias Law Group
5 250 Massachusetts Avenue, NW
6 Suite 400
7 Washington, DC 20001

DRAFT B

8

9 Dear Mr. Berkon:

10

11 We are responding to your advisory opinion request on behalf of Texas Majority
12 PAC (“TMP”), asking whether the costs associated with TMP’s paid canvassing program
13 would constitute contributions under the Federal Election Campaign Act, 52 U.S.C.
14 § 30101 *et seq.* (the “Act”), and Commission regulations. The Commission concludes
15 that the costs of the proposed paid canvassing program would constitute in-kind
16 contributions to the federal candidates or political party committees depicted or
17 referenced in the canvassing materials.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 August 22, 2023, email received on September 11, 2023, and supplementary information
21 received on September 30, 2023. TMP is a nonfederal “general-purpose committee”
22 registered with the Texas Ethics Commission.¹ TMP’s major purpose is to elect
23 Democrats to state and local office in Texas.² TMP is not registered with the

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; or one or more measures that are unidentified; or assisting two or more officeholders who are unidentified. Texas Elec. Code § 251.001(14).

2 AOR002.

1 Commission, and states that it is not established, financed, maintained, or controlled by
2 any federal, state, or local candidate, party committee, or their agents.³

3 TMP seeks to retain and pay third-party vendors, managed by TMP's paid staff,
4 to execute a paid canvassing program ("Paid Canvass").⁴ The vendors will design and
5 produce canvassing literature and will hire individuals to distribute the literature at
6 voters' homes.⁵ These individuals will also read prepared scripts to the voters and record
7 their responses to certain questions.⁶ TMP states that the Paid Canvass "will not have
8 non-communicative components; for example [it] will not include offers to drive voters
9 to polling places."⁷ TMP anticipates that the Paid Canvass will reach more than 500
10 homes within a 30-day period.⁸

11 TMP will preselect the voters who will be visited by the canvassers.⁹ The Paid
12 Canvass will not be limited to the homes of individuals who have opted-in or otherwise
13 sought out a visit by the canvassers.¹⁰ The vendors and individual canvassers will not
14 have a contractual or business relationship with the voters whose homes will be visited.¹¹

³ *Id.* TMP states that its major purpose does not include federal campaign activity. *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* TMP states that although the paid canvass will use multiple scripts, each script will be associated with at least 500 homes. Advisory Opinion Request Supplement ("AOR Supp.") at 5.

⁷ AOR Supp. at 1.

⁸ AOR Supp. at 4-5.

⁹ AOR002.

¹⁰ AOR Supp. at 5.

¹¹ AOR002.

1 The costs of the Paid Canvass include “the canvassing literature and the personnel that
2 will walk the literature to voters’ doors and read scripts to voters (if the voters permit
3 them to do so).”¹²

4 TMP’s canvassing literature and scripts will be disseminated within the pre-
5 election timeframes described in Commission regulations,¹³ will refer to federal
6 candidates and political parties, and may also expressly advocate the election or defeat of
7 clearly identified federal candidates.¹⁴ TMP will consult with federal candidates, party
8 committees, and their agents on the canvassing program.¹⁵ Accordingly, TMP anticipates
9 “it will come into possession of nonpublic plans, projects, activities, or needs of
10 candidates (federal and nonfederal) and/or political parties,” and thus will engage in
11 substantial discussion as defined in Commission regulations.¹⁶ However, the canvassing
12 program will not involve the dissemination, distribution, or republication of federal
13 candidate campaign materials.¹⁷

14 ***Question Presented***

15 *Are costs associated with TMP’s proposed paid canvassing program*
16 *“contributions” to any federal candidate or political party committee that is depicted or*
17 *referenced in the literature or script?*

12 *Id.*

13 *See* 11 C.F.R. § 109.21(c)(4).

14 *Id.*

15 AOR002-3.

16 AOR002. *See* 11 C.F.R. § 109.21 (d)(3).

17 AOR Supp. at 4. *See* 11 C.F.R. § 109.23.

1 ***Legal Analysis***

2 Yes, the costs associated with the paid canvassing program described in the
3 request are in-kind contributions to the federal candidates or political party committees
4 depicted or referenced in the canvassing materials.

5 Under the Act, expenditures that are coordinated with a candidate or political
6 party committee are treated as contributions to that candidate or political party
7 committee.¹⁸ Specifically, Commission regulations provide that if a communication is
8 “coordinated with a candidate, an authorized committee, a political party committee, or
9 an agent of any of the foregoing,” the payment for the communication is an in-kind
10 contribution to that candidate or the political party committee from the payor.¹⁹
11 Commission regulations set forth a three-prong test to determine whether a
12 communication is a coordinated communication.²⁰

13 The first prong is the payment prong, which requires that the communication be
14 paid for, in whole or in part, by a person other than the candidate or party committee.²¹
15 In this instance, the payment prong is satisfied because TMP states that it would pay for
16 the canvassing communications that would reference or depict the federal candidate or
17 party committee.

¹⁸ 52 U.S.C. § 30116(a)(7)(B).

¹⁹ 11 C.F.R. § 109.21(a), (b)(1).

²⁰ *Id.* § 109.21(a). The Commission analyzes TMP’s proposed paid canvass under 11 C.F.R. § 109.21 (coordinated communications), rather than 11 C.F.R. § 109.20(b) (coordinated expenditures that are not communications), because TMP has limited its request to the “costs associated with . . . canvassing literature and the personnel that will walk the literature to the voters’ doors and read scripts to voters,” and has asserted that the paid canvass “will not have non-communicative components.” AOR002.

²¹ 11 C.F.R. § 109.21(a)(1).

1 The second prong of the coordinated communication test is the content prong.
2 The content prong provides that a communication is a coordinated communication only if
3 it is an electioneering communication or a “public communication” that meets at least
4 one of five content standards.²²

5 An “electioneering communication” is defined as “any broadcast, cable, or
6 satellite communication” that refers to a clearly identified federal candidate, is publicly
7 distributed within certain time periods, and is targeted to the relevant electorate.²³ TMP’s
8 proposal does not involve any “broadcast, cable, or satellite communications” and thus,
9 would not constitute electioneering communications.

10 Therefore, only if canvassing communications are “public communications”
11 could they be coordinated communications. A public communication is defined as “a
12 communication by means of any broadcast, cable, or satellite communication, newspaper,
13 magazine, outdoor advertising facility, mass mailing, or telephone bank to the general
14 public, *or any other form of general public political advertising.*”²⁴

15 Because paid door-to-door canvassing as proposed in the request is not expressly
16 enumerated in the statutory or regulatory definition of “public communication,” the
17 Commission must determine whether the Paid Canvass constitutes “general public
18 political advertising.” The catch-all term “general public political advertising” is not

²² *Id.* § 109.21(c)(2).

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

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

1 defined by the Act or Commission regulations.²⁵ However, in a 2006 rulemaking
2 concerning internet communications, the Commission clarified the types of
3 communications that fall within the category of general public political advertising.²⁶
4 The Commission observed that “[b]y definition, the word ‘advertising’ connotes a
5 communication for which a payment is required, particularly in the context of campaign
6 messages.”²⁷ The Commission further explained that a common element among all the
7 listed types of public communications is that “each lends itself to distribution of content
8 through an entity ordinarily owned or controlled by another person” and an individual
9 “must ordinarily pay an intermediary . . . for access to the public through that form of
10 media each time he or she wishes to make a communication.”²⁸ Thus, the category of
11 general public political advertising encompasses communications for which the speaker
12 must rely on and pay a third-party to access the speaker’s target audience “for each
13 communication.”²⁹

²⁵ *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.

²⁶ Internet Communications, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006).

²⁷ *Id.* (citing dictionary definitions of “advertising” that include a payment element).

²⁸ *Id.*

²⁹ *Id.*

1 The Commission concludes that under the facts presented here, the Paid Canvass
2 constitutes general public political advertising. TMP proposes to pay third-party vendors
3 to create and distribute communications to the general public.³⁰ TMP would rely on the
4 vendors and their paid canvassers to access TMP’s target audience for each
5 communication. Thus, the proposed Paid Canvass includes the common elements of
6 general public political advertising, as identified by the Commission.

7 Additionally, the proposed Paid Canvass is functionally similar to forms of media
8 that are listed in the statutory definition of “public communication.” Like a telephone
9 bank, the Paid Canvass will initiate more than 500 scripted conversations of a
10 substantially similar nature within a 30-day period.³¹ And like a mass mailing, the Paid
11 Canvass will distribute more than 500 pieces of literature of identical or substantially
12 similar nature to homes within a 30-day period.³²

13 Notably, the Commission has previously concluded that materials distributed
14 door-to-door by hand can constitute general public political advertising. In MUR 4741
15 (Mary Bono Committee *et al.*), the Commission concluded a door hanger was a form of

³⁰ 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. AO 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.

³¹ AOR Supp. at 5. 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.

³² AOR Supp. at 5. 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.

1 general public political advertising, in part because “the door hanger was distributed to
2 the general public at their place of residence . . . just as if they had received it in the
3 mail.”³³ Similarly, in MUR 6778 (David Hale for Congress *et al.*), the Commission
4 concluded that door hangers were “general public political advertising,” and thus public
5 communications that required a disclaimer.³⁴

6 Because the proposed Paid Canvass falls within the category of general public
7 political advertising, the proposed canvassing communications are public
8 communications under the Act and Commission regulations.³⁵

9 Having established that TMP’s proposed canvassing communications are “public
10 communications,” the Commission must next consider whether they meet any of the five
11 content standards outlined in 11 C.F.R. 109.2(c), which include, in relevant parts, a
12 public communication that expressly advocates the election or defeat of a clearly
13 identified candidate for federal office;³⁶ a public communication that clearly references a
14 federal candidate or political party within certain pre-election timeframes;³⁷ and a public

³³ 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).

³⁴ 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.”).

³⁵ 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.

³⁶ 11 C.F.R. § 109.21(c)(3).

³⁷ *Id.* § 109.21(c)(4).

1 communication that is the functional equivalent of express advocacy.³⁸ TMP states that
2 its canvassing communications will include express advocacy or its functional equivalent
3 and will refer to federal candidates or political parties within the relevant pre-election
4 timeframes.³⁹ Thus, the content standard has been met.

5 A communication meets the third and final “conduct prong” if it satisfies any one
6 of six conduct standards, including that a federal candidate, party committee, or their
7 agent engages in “substantial discussion” about the communication with the person
8 paying for the communication.⁴⁰ Here, TMP acknowledges that it will engage in
9 substantial discussion, stating it “anticipates that it will come into possession of
10 nonpublic plans, projects, activities, or needs of candidates. . . and/or political parties
11 within the meaning of 11 C.F.R. §109.21(d)(3).”⁴¹ Thus, TMP’s proposed
12 communications meet the conduct prong.

13 Because all three prongs are satisfied, the Commission concludes that TMP’s
14 proposed Paid Canvass would constitute coordinated communications under 11 C.F.R. §
15 109.21. Accordingly, the costs of these communications would be in-kind contributions
16 to any federal candidate or political party committee that is depicted in the
17 communication.

38 *Id.* § 109.21(c)(5).

39 AOR002.

40 11 C.F.R. § 109.21(d)(3).

41 AOR002.

