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By Office of the Commission Secretary at 10:51 am, Sep 12, 2023

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## BY ELECTRONIC MAIL DELIVERY

Office of General Counsel  
Attn: Lisa J. Stevenson, Esq.  
Acting General Counsel  
Federal Election Commission  
1050 First Street NE  
Washington, DC 20463

### Re: Advisory Opinion Request

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108, we seek an advisory opinion on behalf of Texas Majority PAC (“*TMP*”). *TMP* seeks to confirm that the costs of paid door-to-door canvasses – that promote state and local candidates but also reference or depict federal candidates or party committees – do not constitute in-kind contributions under the Federal Election Campaign Act of 1971 (the “*Act*”) and Federal Election Commission (the “*Commission*”) regulations.

#### I. Background

*TMP* is a nonfederal political committee registered as a general-purpose committee (“*GPAC*”) with the Texas Ethics Commission.<sup>1</sup> It was not established by a candidate (federal, state, or local), party committee, or their agents.

Texas law permits *GPACs* to accept unlimited contributions but prohibits the use of corporate or labor treasury funds to make contributions to nonfederal candidates, party committees, or political committees other than committees that only undertake independent expenditure activity.<sup>2</sup> Texas law also does not limit contributions from *GPACs* to Texas nonfederal candidates or party committees. Corporate and labor treasury funds may only be used for establishment or administration costs, such as office space and equipment, and independent

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<sup>1</sup> Tex. Ethics Comm’n, Search Campaign Finance Reports, [\(https://jasper.prd.tecprd.ethicsefile.com/jasperserver-pro/flow.html?\\_flowId=viewReportFlow&standAlone=true&\\_flowId=viewReportFlow&ParentFolderUri/public/publicData&reportUnit=/public/publicData/datasource/CFS/By\\_Filer\\_Name&decorate=no&SuperName=texas%20majority&FilerType=ANY&FirstName=&CorrFlag=N&tec\\_pp=u=PUBLIC2&7CexpireTime=Tue%20Jul%2025%202023%2006:23:41%20GMT-0400%20\(Eastern%20Daylight%20Time\)\)](https://jasper.prd.tecprd.ethicsefile.com/jasperserver-pro/flow.html?_flowId=viewReportFlow&standAlone=true&_flowId=viewReportFlow&ParentFolderUri/public/publicData&reportUnit=/public/publicData/datasource/CFS/By_Filer_Name&decorate=no&SuperName=texas%20majority&FilerType=ANY&FirstName=&CorrFlag=N&tec_pp=u=PUBLIC2&7CexpireTime=Tue%20Jul%2025%202023%2006:23:41%20GMT-0400%20(Eastern%20Daylight%20Time)) (accessed Aug. 15, 2023).

<sup>2</sup> Tex. Admin. Code, tit. 1 § 24.19; Tex. Elec. Code Ann. § 252.003(a)(4).

expenditures.<sup>3</sup> Accordingly, TMP maintains corporate and labor treasury funds in a separate account. TMP would **not** – because, under Texas law, it may not – use corporate or labor treasury funds to pay for the paid canvassing expenses described in this request.

TMP wishes to fund paid canvassing programs. TMP will retain vendors to carry out the paid canvassing programs. Managed by TMP’s paid staff, the vendors will design and produce canvassing literature and hire individuals to distribute the canvassing literature (hereinafter, the “***Paid Canvass***”). These individuals will be instructed to go to the homes of preselected voters and trained to read a script and record the voters’ answers to certain questions. Neither the staff nor the vendors will have a contractual or other business relationship with the voters whose homes will be visited by the canvassers. Nor will the voters be customers of these vendors or canvassers. In other words, the canvassers will approach voters’ doors in the way that any volunteer canvasser might do so for a political or religious cause. The voters are free, of course, to not engage with the canvassers and/or ask them to leave their premises and not leave any literature. The costs associated with the Paid Canvass include the canvassing literature and the personnel that will walk the literature to voters’ doors and read scripts to voters (if the voters permit them to do so).

TMP’s major purpose is to elect Democrats to state and local office in Texas. TMP’s major purpose does **not** include “[f]ederal campaign activity (*i.e.*, the nomination or election of a [f]ederal candidate).”<sup>4</sup> Therefore, it is not a “political committee” under the Act and is not registered as such with the Commission. TMP anticipates that federal candidates, nonfederal candidates, and party committees will work together in Texas as they do in other states. TMP also plans to coordinate its activities with candidates and party committees in Texas to the extent permitted by law. Accordingly, TMP anticipates that it will come into possession of nonpublic plans, projects, activities, or needs of candidates (federal and nonfederal) and/or political parties within the meaning of 11 C.F.R. § 109.21(d)(3).

TMP wishes to refer to federal candidates and political parties in its canvassing literature and scripts. It plans to do so within the pre-election timeframes described in 11 C.F.R. § 109.21(c)(4). TMP also plans that some of its canvassing literature and scripts will include express advocacy or its functional equivalent with respect to federal candidates. TMP’s paid canvasses that refer to federal candidates or party committees will **not** have non-communicative components; for example, they will not include offers to drive voters to polling places.

TMP will not permit candidates (federal, state, or local), party committees, or their agents to finance, maintain, or control TMP. Specifically, candidates, party committees, and their agents will **not** be permitted to:

- direct or participate in the governance through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;
- hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of TMP;

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<sup>3</sup> Tex. Admin. Code, tit. 1 § 24.18(b); Tex. Elec. Code Ann. § 253.100(a).

<sup>4</sup> Political Committee Status, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).

- have common or overlapping officers or employees with TMP; or
- make contributions, monetary or in-kind, in significant amounts or on an ongoing basis to TMP.

Candidates (federal, state, or local), party committees, and their agents will not have any spending authority within TMP. They will not have any authority to approve TMP budgets or TMP expenditures, nor will they have authority to sign checks or initiate wires. Nor will federal candidates, party committees, or their agents have final approval authority with respect to any paid canvassing plan or piece of literature. TMP itself will exercise full direction and control over all such programs. In short, even though TMP plans to consult with federal candidates, party committees, and their agents on these paid canvassing programs, “[b]y themselves, such consultations do not constitute spending” by federal candidates, party committees, or their agents.<sup>5</sup>

## II. Question Presented

Are costs associated with the Paid Canvass “contributions” to any federal candidate or political party committee that is depicted or referenced in the literature and/or script?

## III. Legal Analysis

No. Because literature and scripts distributed via the Paid Canvass are neither an “electioneering communication” nor a “public communication,” they are not “coordinated communications” under 11 C.F.R. § 109.21. The Commission should therefore confirm that the costs associated with the Paid Canvass are not “contributions” to any federal candidate or political party committee that is depicted or referenced in the Paid Canvass literature and/or script.

### A. The Paid Canvass is not an electioneering communication.

An “electioneering communication” includes only “broadcast, cable, or satellite communication[s].”<sup>6</sup> A paid door-to-door canvass is plainly not a broadcast, cable, or satellite communication. Accordingly, the Paid Canvass is not an electioneering communication.

### B. The Paid Canvass is not a public communication.

A “public communication” is “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.”<sup>7</sup> A paid door-to-door canvass is plainly not a broadcast, cable, or satellite communication, as noted above; nor is a paid door-to-door canvass a newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank. “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

<sup>5</sup> FEC Adv. Op. 2005-02 (Corzine) at 8.

<sup>6</sup> 11 C.F.R. § 100.29(a).

<sup>7</sup> *Id.* § 100.26.

therefore falls within the catch-all category of ‘general public political advertising.’”<sup>8</sup>

“The term ‘general public political advertising’ is not defined by the Act or Commission regulations.”<sup>9</sup> In its Explanation and Justification for the 2006 Internet Communication rulemaking (hereinafter, “*the 2006 E&J*”), however, “the Commission clarified the types of communications that qualify as ‘general public political advertising.’”<sup>10</sup> The Commission noted that “[t]he forms of mass communication enumerated in the definition of ‘public communication’ ... each lends itself to distribution of content through an entity ordinarily owned or controlled by another person.”<sup>11</sup> 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.”<sup>12</sup> The Commission contrasted these types of communications – those requiring payment *to an intermediary* – from those communications that are “analogous to a communication made from a soapbox in a public square” where no intermediary is required to disseminate the communication.<sup>13</sup> This latter category of communications were *not* “general public political advertising” and therefore *not* “public communications.”

In Advisory Opinion 2022-20, the Commission opined that short-code text messages – a category of text messages that can only be sent to users who affirmatively opt-in to receive messages from the sender – are *not* “public communications.” Applying the analysis set forth in the 2006 E&J, the Commission reasoned that disseminating public communications “typically require[s] the person making the communication to pay to use a third party’s platform to gain access to the third party’s audience” and such communications are therefore sent “through a medium controlled, and to an audience established, by a third party.”<sup>14</sup> The opinion, in other words, established a three-part test for a communication to qualify as “general public political advertising”: it must (1) require payment; (2) make use of a medium controlled by a third party intermediary; *and* (3) be received by an audience established by the third party intermediary “many of whom may have little or no interest in receiving the committee’s communications and do so only incidentally while reading the news” or “because they wish to use the third party’s website.”<sup>15</sup>

The Commission’s opinion received four votes. The two dissenting commissioners also cited favorably to the 2006 E&J. But rather than adopt the majority’s three-part test, the dissenters concluded that “[t]hese types of communications share *two* key characteristics. First, they are all communications for which a payment is required ... Second, *all general public political*

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<sup>8</sup> Concurring Statement of Vice Chair Caroline C. Hunter & Comm’rs Lee E. Goodman & Matthew S. Petersen, FEC Adv. Op. 2016-21 (Great America PAC) at 1-2 (Jan. 12, 2017) (quoting Internet Communications, 71 Fed. Reg. 18589, 18594 (Apr. 12, 2006)) (internal quotations omitted).

<sup>9</sup> Statement of Comm’rs Shana M. Broussard & Ellen L. Weintraub Regarding Adv. Op. 2022-20 (Maggie for NH), FEC Adv. Op. 2022-20 (Maggie for NH) at 1 (Nov. 4, 2022).

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

<sup>11</sup> Internet Communications, 71 Fed. Reg. at 18594.

<sup>12</sup> *Id.*

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

<sup>14</sup> FEC Adv. Op. 2022-20 (Maggie for NH) at 4-5 (Oct. 4, 2022).

<sup>15</sup> *Id.*

*advertising communications rely on an intermediary to disseminate the message.*<sup>16</sup> The dissenters parted ways with the majority only on the third prong of the majority’s proposed test: the requirement that the audience be established by the intermediary.<sup>17</sup> Notably, the dissenters agreed that a public communication encompasses only those communications that rely on an intermediary to disseminate the message.

The Paid Canvass is not a “public communication” under either the majority test or minority test because it does *not* rely on an intermediary to disseminate the message. The term “intermediary” means “an intermediate agent or agency; a go-between or mediator.”<sup>18</sup> Vocabulary.com elaborates that “[a]n *intermediary* is someone who acts as a go-between or a mediator between two other people”<sup>19</sup> and that:

The word *intermediary* comes from the Latin *intermedius*, which is also the root word for *intermediate*. *Inter-* means between, and *medius* means the middle — *intermediary* retains that sense of being in the middle. Intermediaries are used to negotiate between two countries who are at odds, between a company and a client over a contract, between two bickering children, or between a boss and an employee in salary negotiations.<sup>20</sup>

An intermediary, in other words, does not include someone who is acting as the agent of one party (in this case, TMP) but not the other party (in this case, the voters).<sup>21</sup> The vendors that TMP plans to hire and the individual canvassers hired by those vendors are agents of TMP for purposes of 11 C.F.R. § 109.3. Conversely, the individual canvassers have no contractual, business, or other relationship with the voters being canvassed. They have no more right to communicate with the voters than a campaign’s volunteers; voters may ask paid canvassers to leave their property or not leave behind the literature just like with volunteers. Hiring paid canvassers to go door-to-door, therefore, is no different than hiring a paid speaker to stand atop the proverbial “soapbox in a public square.” In both circumstances, there is no intermediary. And therefore, in both circumstances, there is no public communication.

This is why a bipartisan group of FEC commissioners agreed in 2007 that paid canvassing communications are not “public communications.”<sup>22</sup> And why three commissioners found in

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<sup>16</sup> Statement of Comm’rs Shana M. Broussard & Ellen L. Weintraub Regarding Adv. Op. 2022-20 at 1, *supra* n.9 (emphasis added).

<sup>17</sup> *Id.* at 4 (“Our colleagues do not address this apparent inconsistency between their claim that ‘public communication’ can only be one in which the speaker pays to access a third party’s audience and the plain language of the statute which includes all mass mailings with no limitation based on how the audience was assembled.”).

<sup>18</sup> Dictionary.com, “Intermediary,” <https://www.dictionary.com/browse/intermediary> (accessed Aug. 15, 2023).

<sup>19</sup> Vocabulary.com, “Intermediary,” <https://www.vocabulary.com/dictionary/intermediary>. (accessed Aug. 15, 2023).

<sup>20</sup> *Id.*

<sup>21</sup> See 11 C.F.R. § 110.6(b)(2)(i)(A), (D)-(E) (defining “conduit or intermediary” to *exclude* “[a]n individual who is an employee or a full-time volunteer working for the candidate’s authorized committee,” “[a] commercial fundraising firm retained by the candidate or the candidate’s authorized committee to assist in fundraising,” and “[a]n individual who is expressly authorized by the candidate or the candidate’s authorized committee to engage in fundraising . . .”).

<sup>22</sup> See Statement of Reasons of Vice Chairman David M. Mason & Comm’r Hans A. von Spakovsky at 9, MUR 5564 (Alaska Democratic Party) (Dec. 21, 2007) (“Door-to-door canvassing is not ‘general public political advertising’ . . . [t]hus, door-to-door canvassing is [not] a ‘public communication.’”); Statement of Reasons of

2006 that handbills are not “public communications.”<sup>23</sup> And why three commissioners observed in 2016 the “[t]he Commission’s longstanding position . . . 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.”<sup>24</sup> The absence of an intermediary simply forecloses the possibility that the Paid Canvass can qualify as a “public communication” under the Commission’s regulation and precedents.<sup>25</sup>

### C. The Paid Canvass is therefore not a “coordinated communication” or a “contribution.”

To qualify as a coordinated communication, a communication must satisfy a three-pronged test: the communication must (1) be paid for by a person other than the campaign or party committee to which it would be a contribution (the “*payment prong*”); (2) satisfy one of the content standards (the “*content prong*”);<sup>26</sup> and (3) be preceded by certain interactions between the sponsor of the communication and the federal candidate, authorized committee or political party committee (the “*conduct prong*”).<sup>27</sup> Since adoption of the most recent version of the coordinated communication regulation in 2010, the Commission has consistently held that a *communication* qualifies as a “contribution” only if it meets all three prongs of the “coordinated communication” test set forth in 11 C.F.R. § 109.21.<sup>28</sup>

A communication that fails the “content prong” cannot be a “contribution” under the

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Chairman Robert D. Lenhard at 4, MUR 5564 (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).

<sup>23</sup> Statement of Reasons of Chairman Michael E. Toner & Comm’rs David M. Mason & Hans A. von Spakovsky at 5, MUR 5604 (Friends of William D. Mason) (Dec. 11, 2006).

<sup>24</sup> See Concurring Statement of Vice Chair Caroline C. Hunter & Comm’rs Lee E. Goodman & Matthew S. Petersen, FEC Adv. Op. 2016-21 (Great America PAC), *supra* n.8.

<sup>25</sup> In a few instances since adoption of the coordinated communication regulation in 2002, the Office of General Counsel has published analysis suggesting that literature distributed via a paid canvasses *was* a public communication. But in these cases, the Office of General Counsel’s analysis played no role in the ultimate disposition of the matter. See Factual & Legal Analysis, MUR 6924 (Andrew Winer, et al.) (Aug. 21, 2017) (dismissing a complaint alleging that a nonfederal committee’s mailers and doorhangers were impermissibly coordinated with a federal candidate committee after finding that the conduct prong was not met; therefore, whether doorhangers met the content prong by constituting public communications was immaterial to the analysis); Factual & Legal Analysis, MUR 6778 (David Hale for Congress) (Nov. 5, 2015) (exercising prosecutorial discretion to dismiss complaint alleging that a disclaimer printed on a doorhanger did not comply with the Commission’s technical requirements for disclaimers); see also Final Audit Rep. of the Comm’n at 19-20, Ky. State Democratic Cent. Exec. Comm. (LRA 1107) (Dec. 14, 2021) (noting that the Commission did not approve the Office of the General Counsel’s view that doorhangers were public communications and that the Office of the General Counsel had initially concluded that doorhangers were *not* public communications in its legal analysis dated December 14, 2021). In none of these cases did the Office of General Counsel attempt to square its analysis with the Commission’s conclusion in the 2006 E&J that a “public communication” requires dissemination through an intermediary.

<sup>26</sup> 11 C.F.R. § 109.21(c).

<sup>27</sup> *Id.* § 109.21(a).

<sup>28</sup> See First Gen. Counsel’s Rep. at 8, MUR 6477 (Turn Right USA) (Dec. 27, 2011); First Gen. Counsel’s Rep. at 13, MUR 6502 (Nebraska Democratic Party) (May 17, 2012); First Gen. Counsel’s Rep. at 7, MUR 6522 (Lisa Wilson-Foley for Congress) (Feb. 5, 2013); First Gen. Counsel’s Rep. at 6-7, MUR 6657 (Akin for Senate) (May 6, 2013); First Gen. Counsel’s Rep. at 4-5, MUR 6722 (House Majority PAC) (Aug. 6, 2013).

Commission’s regulations. In a 2011 advisory opinion, the Commission opined that a sponsor’s “website and email communications to the general public soliciting contributions to certain Federal candidates will not result in in-kind contributions to those Federal candidates, because the communications will not be ‘coordinated communications’ under the Act and Commission regulations.”<sup>29</sup> In the 2022 advisory opinion referenced above, the Commission once again confirmed that communications that “do not satisfy the content prong of the coordinated communications test ... are not in-kind contributions.”<sup>30</sup> And in a recent enforcement action, the Office of General Counsel opined that “[b]ecause [a nonauthorized committee’s] emails soliciting contributions to [a federal candidate] do not satisfy the content prong, they cannot be coordinated communications under 11 C.F.R. § 109.21. In turn, because [the nonauthorized committee’s] email solicitations are not coordinated communications, their costs are not treated as in-kind contributions.”<sup>31</sup>

The Paid Canvass fails the content prong. “For a communication to satisfy the content prong, it must, among, other things, be either an ‘electioneering communication’ or a ‘public communication.’”<sup>32</sup> As set forth above, the Paid Canvass is neither an electioneering communication nor a public communication. Because the Paid Canvass fails the content prong, it is not a coordinated communication; and because it is not a coordinated communication, its costs are not treated as in-kind contributions.

Very truly yours,



Jonathan S. Berkon  
Courtney T. Weisman  
Sarah N. Mahmood  
Counsel to Texas Majority PAC

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<sup>29</sup> FEC Adv. Op. 2011-14 (Utah Bankers Association) (Sept. 22, 2011).

<sup>30</sup> FEC Adv. Op. 2022-20 (Maggie for NH) at 5, *supra* n.14.

<sup>31</sup> First Gen. Counsel’s Rep. at 17, MUR 7943 (Common Good Virginia, *et. al.*) (March 8, 2023).

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

**From:** [Jon Berkon](#)  
**To:** [Lindsay Bird](#)  
**Cc:** [Robert Knop](#)  
**Subject:** RE: Texas Majority PAC  
**Date:** Monday, September 11, 2023 6:41:58 PM

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Confirmed – thank you, Lindsay.

**Jon Berkon**  
**Elias Law Group LLP**  
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**From:** Lindsay Bird <[lbird@fec.gov](mailto:lbird@fec.gov)>  
**Sent:** Monday, September 11, 2023 6:31 AM  
**To:** Jon Berkon <[jberkon@elias.law](mailto:jberkon@elias.law)>  
**Cc:** Robert Knop <[rkноп@fec.gov](mailto:rkноп@fec.gov)>  
**Subject:** Texas Majority PAC

Good morning Mr. Berkon,

Thank you for providing additional information to supplement your advisory opinion request on behalf of Texas Majority PAC. We would like to verify our understanding of the information. Please respond to this email to confirm the accuracy of the information below, or to clarify or correct any information as necessary. Please note that your response may become part of the advisory opinion request. If so, it will be posted on the Commission's website.

The Committee would preselect the voters who would be visited by the canvassers. The vendor would not establish or identify the audience for the canvassing program.

Sincerely,

Lindsay Bird  
Staff Attorney  
Federal Election Commission

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