



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**MEMORANDUM**

**TO:** The Commission

**FROM:** Office of the Commission Secretary *LC*

**DATE:** February 28, 2024

**SUBJECT:** AOR 2024-01 (Texas Majority PAC)  
Comment from AFL-CIO

**Attached is AOR 2024-01 (Texas Majority PAC) Comment from AFL-CIO.**

**This matter will be discussed at the next scheduled Open Meeting on**

**February 29, 2024.  
Attachment**

**RECEIVED**

By Office of the Commission Secretary at 10:10 am, Feb 28, 2024

**RECEIVED**

By Office of General Counsel at 9:32 am, Feb 28, 2024

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February 28, 2024

*By email to ao@fec.gov*

Lisa J. Stevenson  
Acting General Counsel  
Federal Election Commission  
1050 First St., NE  
Washington, DC 20463

**Re: Advisory Opinion Request 2024-01  
Texas Majority PAC**

Dear Ms. Stevenson:

We write on behalf of the AFL-CIO, the national labor federation of 60 national and international unions representing over 12.5 million members, regarding the pending advisory opinion request (AOR) by Texas Majority PAC (TMP) and Drafts A and B of an advisory opinion that the Commission has made public. For the reasons explained below, we urge the Commission to adopt the conclusions in Draft B that TMP's prospective residential canvassing is not a form of "public communication" within the meaning of 11 C.F.R. § 100.26, so that canvassing cannot be an in-kind contribution to a candidate or political party under 11 C.F.R. § 109.21.

The AFL-CIO and many of its affiliated unions and their federal and nonfederal political committees have long engaged in residential canvassing with respect to public elections of candidates and ballot measures. These canvasses variously are directed to union members and the general public. Canvassing may be undertaken in different ways. Often a canvass is undertaken by an organization or a political committee deploying its own employees or volunteers to convey an oral message, sometimes supplemented with flyers that the organization itself produced or engaged a commercial vendor to devise featuring the organization's message, to a subset of residents selected by the organization. In such a circumstance there is no "rel[iance] on a third party," as Draft A puts it, at p. 8. Whatever the Commission concludes in addressing this AOR, it should cast no doubt on the proposition that such canvassing is *not* general public political advertising.<sup>1</sup>

Drafts A and B reach opposite conclusions on this issue solely due to disagreement concerning how to characterize the commercial vendor that TMP would retain in order to train and deploy canvassers on its behalf: would the commercial vendor be a "go-between" or "intermediary" bearing "the common elements of general public political advertising," per Draft A, at pp. 8-9 and n. 15, or

<sup>1</sup> Draft A, at p. 10, n. 40, underscores that it applies to "only TMP's proposed paid canvass as described in the request" and not "door-to-door canvassing in general." If the Commission adopts Draft A it should retain this qualifying language.

“simply act as TMP’s agent[] in carrying out a canvassing program that TMP controls,” per Draft B, at p. 9?<sup>2</sup> We submit that Draft B’s conclusion is correct.

The Commission since at least 2006 has embraced the view that the undefined phrase “general public political advertising,” both as illustrated by the specific media listed in 11 C.F.R. § 100.26 and as a category that may include unspecified other media, entails paying “for access to an established audience using a forum controlled by another person rather than using a forum that he or she controls to establish his or her own audience”<sup>3</sup>; such advertising “lends itself to distribution of content through an entity ordinarily owned or controlled by another person” that is “generally a facility owner,” as distinct from, for example, “a communication to the general public on one’s own website.”<sup>4</sup> The Commission reaffirmed that analysis last year when it amended its regulations regarding disclaimers on Internet public communications.<sup>5</sup> And, in AO 2022-20, the Commission concluded that text messages to an opt-in audience resembled one’s own website rather than “traditional forms of paid advertising” specified in 11 C.F.R. § 100.26 “where a speaker pays to disseminate a message through a medium controlled, and to an audience established, by a third party”<sup>6</sup>; the opinion also described those media as “typically requir[ing] the person making the communication to pay to use a third party’s platform to gain access to the third party’s audience.”<sup>7</sup>

Canvassing is a form of communication that aggregates in-person one-on-one communications. Canvassing with and without flyers is a means of political communication that long predates any of those enumerated in 11 C.F.R. § 100.26 (with the exception of newspapers, which date to the Colonial Era), yet Congress has never suggested that canvassing should be regulated, the Commission has never taken regulatory action to define canvassing as a public communication, and the Commission’s treatment of the question otherwise has been inconclusive. The grassroots in-person contacts that comprise the communications in canvassing are “fundamentally different” from the “mass communication contemplated in the Act,” as three Commissioners aptly observed six years ago in concluding that canvassing is not a public communication.<sup>8</sup> Three other Commissioners in 2007

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<sup>2</sup> Both drafts conclude that the canvass, if coordinated, would not be a coordinated “expenditure” within the meaning of 11 C.F.R. § 109.20(b) because only 11 C.F.R. § 109.21 provides the coordination standard for communications. This is plainly correct for the reasons each draft articulates, and as explained by TM PAC’s AOR, at pp. 8-12, and by the AFL-CIO’s comments on TMP’s previous AOR 2023-26. The Commission’s final advisory opinion also should so conclude.

<sup>3</sup> Federal Election Commission, “Internet Communications,” 71 Fed. Reg. 18589, 18594-18595 (April 12, 2006) (“Internet E & J”).

<sup>4</sup> *Id.* at 18594.

<sup>5</sup> Federal Election Commission, “Internet Communications Disclaimers and Definition of ‘Public Communication,’” 87 Fed. Reg. 77467, 77470, 77471 (December 19, 2022) (stating that the Commission “intends to regulate only communications placed for a fee ‘through an entity ordinarily owned or controlled by another person,’ analogous to the forms of ‘public communication’ already included in [11 C.F.R. § 100.26]” (citing the preceding NPRM).

<sup>6</sup> Advisory Opinion 2022-20, p. 5 (October 4, 2022).

<sup>7</sup> *Id.*, p. 4 (footnote omitted).

<sup>8</sup> See Concurring Statement of Vice Chair Caroline C. Hunter and Commissioners Lee E. Goodman and Matthew S. Petersen, Advisory Opinion 2016-21 (January 12, 2017).

reached the same sound conclusion in an enforcement case, two in explicit reliance on the Internet E&J's analysis quoted above.<sup>9</sup>

A commercial vendor that hires, trains and handles the payroll for a canvass that conveys the contracting organization's message in that organization's name, in the manner dictated by that organization, to the residential subset that organization devises, as TMP plans, is no more than the agent for the organization because the vendor provides services that *the organization itself could have performed itself by its own direct hiring and training* but chose not to for administrative convenience. The canvass vendor acts entirely under the organization's control and is indistinguishable to the audience from the organization itself. The vendor is not a "go-between," an "intermediary," or akin to a digital platform, periodical publication, television or radio station, or billboard operator, all of which provide communications platforms that the communicating organization *could not create for itself*. The vendor is an instrument for reaching voters in person at their homes; residential doorways are not owned, controlled or maintained by the vendor for "advertisers" to pay to access. Draft B, at p. 9, is therefore correct in concluding that "canvassing involves individual people talking face-to-face with voters," a "traditional grassroots activity fundamentally different from the types of mass media enumerated in the statutory definition of 'public communication'" (footnote omitted).

Draft A, at p. 8, reasons that the very act of payment to a third party in order to communicate with the general public constitutes general public political advertising. However, that speech may entail a cost in order to reach potential voters is not the touchstone of a "public communication" under 52 U.S.C. § 30101(22); if it were, then that provision would apply to *any* "disbursement," as 52 U.S.C. § 30120(a) does with respect to express advocacy. But it doesn't; instead, it plainly contemplates a lesser reach, to a subset of paid communications called "general public political advertising" as illustrated with specific examples. And, the term "advertising" is key, as the Commission explained in the Internet E & J with citations to two sources that identified the kinds of media specified at 52 U.S.C. § 30101(22) and a third authority that, the Commission stated, reflected "[a]n extensive survey of advertising and marketing textbooks [that] revealed 'certain recurring elements [of advertising]: (1) Paid, (2), nonpersonal, (3) identified sponsor, (4) mass media, and (5), persuade or influence[.]'"<sup>10</sup> That analysis demonstrates why Draft A, at p. 9, errs in asserting that canvass distribution of literature is "functionally similar" to "mass mailings" and "telephone banks," which 52 U.S.C. § 30101(22) also

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<sup>9</sup> See MUR 5564, Statement of Reasons of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky at 8-9 (December 21, 2007); *id.*, Statement of Reasons of Chairman Robert D. Lenhard at 4 (December 31, 2007).

Draft A. at pp. 9-10, cites two dispositions of Matters Under Review (MURs) as demonstrating that "the Commission has previously concluded that materials distributed door-to-door by hand can constitute general public political advertising." But these were cursory dispositions of disclaimer violations that do not compel the Commission's advice to TMP. Each matter concerned an authorized candidate committee's compliance with 52 U.S.C. § 30120(a), which requires a disclaimer when there is a "disbursement" by a political committee either for "general public political advertising" or otherwise "for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate." In MUR 6778 (David Hale), the Commission approved a First General Counsel's Report that concluded without analysis that a candidate's door hanger satisfied both categories and that the Commission should exercise its prosecutorial discretion to dismiss the matter. In MUR 4741 (Mary Bono Committee), the Commission approved a General Counsel's Report that included a similarly conclusory finding that door hangers comprised "general public political advertising" three years before the Bipartisan Campaign Reform Act of 2002 defined "public communication" and, eventually, prompted the current regulatory architecture for that term and for what constitutes coordination.

<sup>10</sup> Internet E & J, 71 Fed. Reg. at 18594, citing and describing M. Curran, *Oracles on Advertising: Searching for a Definition*, 31 Journal of Advertising at 3 (June 2002).

enumerates: mass mailings and telemarketing are “nonpersonal” means of mass advertising that for generations have been deployed to promote commercial products to the public. They are utterly unlike visits to people’s homes for personal conversations with those willing to engage in them, accompanied sometimes by the offer of written material that the residents may or may not accept. The Commission should accord those grassroots contacts the regulatory space that befits them.

Accordingly, we respectfully suggest that the Commission render an advisory opinion that reaches the conclusions set forth in Draft B that are consistent with the preceding analysis. Thank you for your consideration.

Respectfully submitted,



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