FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**

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

DATE: **February 27, 2024**

SUBJECT: **AOR 2024-01 (Texas Majority PAC) Comment on Drafts A and B from Elias Law Group (Counsel to the Requestor)**

Attached is a comment received from Elias Law Group on behalf of the requestor regarding AOR 2024-01 (Texas Majority PAC) Drafts A and B. This matter will be discussed on the next Open Meeting scheduled for February 29, 2024.

Attachment

RECEIVED
By Office of General Counsel at 5:53 pm, Feb 26, 2024

ELIAS LAW GROUP

250 Massachusetts Ave NW, Suite 400 | Washington, DC 20001

RECEIVED
By Office of the Commission Secretary at 9:24 am, Feb 27, 2024

February 26, 2024

Federal Election Commission
Office of the General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463
ao@fec.gov

Re: Advisory Opinion Request 2024-1

Dear Acting General Counsel Stevenson:

We write in response to Drafts A and B. We urge the Commission to adopt Draft B.

I. Drafts A and B agree on several key points.

Before explaining why the Commission should adopt Draft B, we want to note that both Drafts A and B agree on the following points:

First, both Drafts A and B agree that the costs to produce and distribute the campaign literature and scripts are not "coordinated expenditures" under 11 C.F.R. § 109.20. Each draft bases that determination on the Commission's 2003 E&J concluding that 11 C.F.R § 109.20 applies only to "expenditures that are not made for communications."[1]

Second, both Drafts A and B agree that Texas Majority PAC's ("***TMP***") provision of the data that arises from the paid canvasses to a federal candidate or party committee at no charge or less than its fair market value would constitute a "contribution."[2]

Third, both Drafts A and B concur that the Canvassing Literature and Script would constitute a "coordinated communication" only if it qualifies as "general public political advertising."[3]

Fourth, both Drafts A and B agree that the Commission's 2006 E&J sets forth the criteria that must be considered when determining whether a communication qualifies as "general public political advertising."[4]

Federal law prescribes that "the term 'public communication' means a communication by means

[1] *See* Adv. Op. Req. 2024-1, Draft A (hereinafter, "***Draft A***") at 12, n. 47; Adv. Op. Req. 2024-1, Draft B (hereinafter, "***Draft B***") at 11-12.
[2] *See* Draft A at 12-13; Draft B at 12-13.
[3] *See* Draft A at 7-8; Draft B at 7-8.
[4] *See* Draft A at 7-8; Draft B at 8.

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."[5] As Draft A notes, "[b]ecause paid door-to-door canvassing as proposed in the request is not expressly enumerated in the statutory or regulatory definition of 'public communication,' the Commission must determine whether the Paid Canvass constitutes 'general public political advertising.'"[6] In Advisory Opinion 2020-22, the Commission observed that "[t]he term 'general public political advertising' is not defined by the Act or Commission regulations. However, the Commission interprets each term listed in the definition of 'public communication' or in [52 U.S.C. § 30120(a)] as a specific example of one form of 'general public political advertising.'"[7] The Commission's approach is consistent with the interpretive canon *ejusdem generis*, which counsels that "where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[8]

Consistent with its statutory obligation, the Commission articulated the common thread that unites all communications that qualify as "public communications" in the 2006 E&J:

> The forms of mass communication enumerated in the definition of "public communication" in 2 U.S.C. 431(22), including television, radio, and newspapers, each lends itself to distribution of content through an entity ordinarily owned or controlled by another person. Thus, 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.[9]

In Advisory Opinion 2020-22, the Commission reiterated that all public communications "share several common elements, one of which is that they typically require the person making the communication to pay to use a third party's platform to gain access to the third party's audience."[10] The dissenting opinion *concurred* on this point, noting that "all general public political advertising communications rely on an intermediary to disseminate the message."[11] The *cost* of the communication is immaterial to the analysis. A digital advertisement that costs $100 to produce and is placed for $1 on a third-party website is a "public communication";[12] a video that costs $25,000 to produce and is posted for free on YouTube is *not* a "public

[5] 52 U.S.C. § 30101(22).
[6] Draft A at 7.
[7] FEC Adv. Op. 2022-20 (Maggie for NH) at 4 (quotations and citations omitted).
[8] *Yates v. United States*, 574 U.S. 528, 545, 135 S. Ct. 1074, 1086, 191 L. Ed. 2d 64 (2015) (internal quotations and citations omitted).
[9] Internet Communications, 71 Fed. Reg. 18,589, 18,594 (April 12, 2006).
[10] Advisory Opinion 2022-20 (Maggie for NH) at 4.
[11] Statement of Comm'rs Shana M. Broussard and Ellen L. Weintraub in 2022-20 (Maggie for NH) at 2.
[12] Internet Communications, 71 Fed. Reg. at 18,595.

communication."[13] As Draft A correctly summarizes, "the category of general public political advertising encompasses communications for which the speaker *must rely on and pay* a third-party to access the speaker's target audience."[14]

II. Only Draft B correctly applies the test set forth in the 2006 E&J and affirmed in Advisory Opinion 2022-20.

The Script and Canvassing Literature are *not* the types of communications for which TMP *must rely on and pay* a third-party to access its target audience. TMP must pay television stations to access the television station's audience; TMP must pay radio stations to access the radio station's audience; TMP must pay Meta to access Meta's audience; TMP must pay the Postal Service to access the Postal Service's audience; and TMP must pay a billboard company to access its audience. There is simply no alternative. Here, however, TMP could hire an entirely different group of paid canvassers as employees and their access to the target audience would not be affected one iota – a clear distinction between canvassing and the aforementioned categories of "general public political advertising." As Draft B correctly observes, "[u]nlike a newspaper or television company, the canvassing vendors will have no preexisting relationship with the canvass's audience and will have no more right to communicate with the audience than TMP."[15]

Draft A's analytical error lies in its conflation of intermediaries and agents. Whether one looks at a dictionary or at the Commission's own regulations – which, at 11 C.F.R. § 110.6(b), define the term "intermediary" to *exclude* individuals and vendors that are authorized by a political committee to raise funds on its behalf (e.g. its fundraising agents) – an agent includes persons who work on behalf of *one* party and an intermediary includes persons who have pre-existing relationships with *both* parties.[16] All the aforementioned categories of "general public political advertising communications rely on an *intermediary* to disseminate the message" – television advertising, radio advertising, digital advertising, mail, telephone banks, billboards, etc.[17] Paid canvassing communications, such as the Script and Canvassing Literature, rely on *agents* to disseminate the message.

Draft A's attempt to shoehorn the paid canvassers into the category of "intermediary" is unpersuasive.[18] Yes, the paid canvassers communicate TMP's message to voters and record information that is transmitted back to TMP. But they do so as agents on behalf of TMP. They are no different than, say, a paid fundraiser for a federal candidate who solicits a donor as a fundraising agent for the candidate, and then reports back to the candidate on what the donor

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[13] *See* First General Counsel Report, MUR 6657 (May 16, 2013) (Akin) at 6-7.
[14] Draft A at 8 (emphasis added).
[15] Draft B at 8.
[16] *See* Adv. Op. Req. 2024-1 (Texas Majority PAC) at 5-6.
[17] Statement of Comm'rs Shana M. Broussard and Ellen L. Weintraub Regarding Advisory Opinion 2022-20 (Maggie for NH) at 2 (allocated).
[18] Draft A at 8-9, n. 35.

said. Nobody would call that person an "intermediary" – in fact, the soft money regulations would be undermined if they did, *see* 11 C.F.R. § 300.2 – and the same is true with paid canvassers. Under Draft A's theory, *every* communication distributed via a vendor or consultant would be deemed "general public political advertising"; even the proverbial speech "made from a soapbox in the public square" if a committee paid a local actor to deliver it.[19] That simply is not the law. The Commission has never even hinted, let alone held, that a communication's status as "general public political advertising" turns on whether the sponsor uses in-house employees or a vendor to disseminate it, and such an approach finds no basis in the Commission's regulations.

Draft A then incorrectly asserts that TMP's proposed communications are "functionally similar to forms of media that are listed in the statutory definition of 'public communication.'"[20] But as Draft B correctly observes, "door-to-door canvassing is a traditional grassroots activity fundamentally different from the types of mass media enumerated in the statutory definition of 'public communication.'"[21] Unlike newer technologies that were unknown (or barely known) to Congress at the time it defined the term "public communication," Congress was keenly aware of this form of political speech when it enacted the statute. In fact, of all the widely used forms political speech in use at the time Congress defined "public communication," canvassing appears to be the one category that Congress failed to enumerate in the statute. That, in and of itself, is powerful evidence of congressional intent. And it suggests that the Commission was correct in 2006 when it drew a bright line between forms of communication that require payment to a third-party platform to access the platform's audience and those that do not.

Finally, Draft A's reliance on two enforcement actions is unpersuasive. Neither matter involved the question presented here: whether paid canvassing is a "public communication." One matter (Bono) pre-dated the Commission's 2006 E&J, where the Commission clearly articulated a bright line between communications that qualify as "general public political advertising" and those that do not. The other matter (Hale) resulted in a dismissal that elided any need for commissioners to grapple with the question now before it. Notably, when commissioners *have* been asked to answer this question, they have overwhelmingly concluded that paid canvassing is not a "public communication."[22]

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[19] Internet Communications, 71 Fed. Reg. at 18,594.
[20] Draft A at 9.
[21] Draft B at 9.
[22] *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 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); Statement of Reasons of Chairman Michael E. Toner &

Congress is free to pass laws regulating paid canvassing in the way it regulates television ads. The Commission may open a rulemaking to determine whether it should revisit the bright line it drew in 2006. But "regulated parties should know what is required of them so they may act accordingly" and "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way; when speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."[23] Only Draft B follows the Commission's clear precedents; Draft A does not. Draft B should be adopted.

Yours truly,

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

Comm'rs David M. Mason & Hans A. von Spakovsky at 5, MUR 5604 (Friends of William D. Mason) (Dec. 11, 2006); 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.

[23] *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54, 132 S. Ct. 2307, 2317, 183 L. Ed. 2d 234 (2012).