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FOUNDATION FOR
ACCOUNTABILITY
AND CIVIC TRUSTOFFICE OF GENERAL
COUNSEL

MUR # 7168

October 21, 2016

Federal Election Commission
Office of General Counsel
999 E Street, NW
Washington, D.C. 20463

**Re: Complaint against Catherine Cortez Masto & Catherine Cortez Masto for
Senate**

Dear Counsel,

The Foundation for Accountability and Civic Trust (FACT) is a nonprofit organization dedicated to promoting accountability, ethics, and transparency in government and civic arenas. We achieve this mission by hanging a lantern over public officials who put their own interests over the interests of the public good. This complaint is submitted, upon information and belief, to urge the Federal Election Commission (FEC) to investigate and take appropriate enforcement actions to address apparent and obvious violations of the Federal Election Campaign Act, as amended (FECA), and FEC regulations by Catherine Cortez Masto and her campaign committee, Catherine Cortez Masto for Senate (FEC ID # C00575548).

Senate candidate Catherine Cortez Masto is using her campaign website to illegally coordinate with a super PAC that supports her candidacy.¹ Evidence indicates Cortez Masto's campaign and a super PAC established a system to transmit information between the two organizations that are legally barred from coordinating. Through a "media" page on her web site, Cortez Masto is instructing super PACs to run advertisements that she views as vital for her campaign.² Cortez Masto's page speaks for itself—it is not general

¹ See, e.g., Maggie Severns, *Democratic Candidates Writing Instructions to Super PACs on Their Websites*, Politico, July 15, 2016 (Attached as Exhibit A).

² Id.; Catherine Cortez Masto for Senate, <http://catherinecortezmasto.com/media>, last accessed Oct. 18, 2016 (attached as exhibit B (Sept. 2016) and attached as exhibit C (Oct. 2016)).

campaign information provided to the general public, but is a direct and extremely detailed request to a super PAC that is based on the campaign’s internal polling information and media needs.³ The request includes the content and phrasing for the ads, whether those ads should be digital, television, or radio, and the media markets in which the ads should run.⁴ The detail of the request extends to asking for specific ads targeting “[d]igital users, especially younger voters, Latinos, and women.”⁵ Also provided are links to citation for the information and photographs that can be downloaded for the ads.⁶

The only reasonable view of Cortez Masto’s page is that it not only requests the ads be run, but provides the content and material to do it. Moreover, Cortez Masto’s request has been successful—the Senate Majority PAC ran an ad with language identical to her request. This violates federal law that prohibits candidates from coordinating with super PACs, and the fact that the coordination is done somewhat publicly is irrelevant and does not excuse illegal behavior. There is no requirement that the commission of a crime be covered up. Cortez Masto’s obvious coordination with a super PAC is offensive to citizens who expect that a candidate running for an office in which she will make laws that all citizens are expected to follow, will actually follow the law herself. There is no question that it is illegal for a candidate to request a super PAC run an ad on the candidate’s behalf, yet there is no doubt that the extremely detailed request directed to a specific super PAC does exactly this. To ignore this type of blatant coordination would make a mockery of the law and render it meaningless. The Commission must immediately investigate and enforce the law.⁷

I. FACTS

Multiple Senate candidates have used their campaign websites to post “thinly veiled notes . . . with hints, tips and flat-out instructions for” super PACs and other organizations.⁸ The websites use obscure pages to instruct outside groups on ads to run, including the

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See 52 U.S.C. § 30109(a)(2); 11 C.F.R. § 111.4(a).

⁸ Maggie Severns, *Democratic Candidates Writing Instructions to Super PACs on Their Websites*, Politico, July 15, 2016 (Attached as Exhibit A).

specific message to convey in ads, and may also include whether the ad should be run state-wide or in a smaller media market or provide photographs and video of the candidate to be used in the ads.⁹ The pages all use specific language to convey the ad message, such as voters “need to know” or “should know,” and also indicates “which media markets in the states would make the best targets for those messages.”¹⁰ Further, it appears that all the candidates’ requests are primarily directed to the same super PAC, Senate Majority PAC, along with other outside organizations.¹¹ The candidates’ method is nearly identical, and their purpose and effect is clear—to illegally coordinate with super PACs. Moreover, the number of candidates using the same method to make the request and the same super PAC responding demonstrates that this is a conspiracy to illegally coordinate.

One of the most blatant and egregious examples of this behavior is Senate candidate Catherine Cortez Masto. On the “media” page on her web site, Cortez Masto overtly requests super PACs run digital, radio, and television ads in specific media markets.¹² The phrases “voters need to hear” and “voters should know” are used to identify the information she wants conveyed in the ads with links to citation and photographs to be used in the ads.¹³ The requests are extremely specific. For example, Cortez Masto not only requests specific and distinct television ads to be run in Las Vegas and state-wide, but also specific and distinct ads for “[r]adio listeners across Nevada” and “[d]igital users, especially younger voters, Latinos and women.”¹⁴

Cortez Masto’s requests has been successful. For instance, in September 2016, Cortez Masto’s “media” page stated,

Attention! On the issues that matter to Nevada Hispanics, there’s no difference between Joe Heck and Donald Trump. Heck continues to support Trump for President, and he voted 4 TIMES to end DACA and put thousands of DREAMers at risk of deportation. Heck voted to cut Pell Grants, and the two of them—Heck and Trump—would make it harder for Nevada students to pay for college.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Catherine Cortez Masto for Senate, <http://catherinecortezmasto.com/media> (attached as Exhibits B and C).

¹⁴ *Id.*

¡OJO! Cuando se toca de los asuntos que importan mas a los Hispanos de Nevada, no hay diferencia entre Joe Heck y Donald Trump. Heck sigue al lado de Donald Trump en su campana para presidente, y voto 4 VECES para detener el programa DACA y poner a miles de DREAMers en riesgo de ser deportados. Heck voto para cortar las becas Pell, y los dos—Heck y Trump—harian mas dificil que miles de estudiantes de Nevada puedan pagar por la universidad.¹⁵

Senate Majority PAC responded with the following ad:

NARRATOR: “¿Hay alguna diferencia entre Joe Heck y Donald Trump? Sobre la inmigracion, Heck votó cuatro veces en contra de DACA y DAPA, poniendo a miles de DREAMers en riesgo de ser deportatdos.” TRUMP: “Vamos a tener una fuerza de deportación.” NARRATOR: “Heck dice que le preocupa le educación, pero votó por cortar las becas Pell.” TRUMP: “Vamos a eliminar el Departamento de Educación. NARRATOR: “En los temas que más nos importan, no hay diferencia entre Joe Heck y Donald Trump.”¹⁶

This Senate Majority PAC ad is translated below:

NARRATOR: “Is there any difference between Joe Heck and Donald Trump? On immigration, Heck voted four times against DACA and DAPA, putting thousands of DREAMers at risk of being deported.” TRUMP: “We’re going to have a deportation force.” NARRATOR: “Heck says he cares about education, but he voted to cut Pell grants.” TRUMP: “We’re going to cut the Department of Education.” NARRATOR: “On the issues that are most important to us, there is no difference between Joe Heck and Donald Trump.”

Once Senate Majority PAC published this ad that copied language from Cortez Masto’s web page, Cortez Masto apparently approved and changed the “media” page.¹⁷

II. Law

Under the FECA, candidates for federal office are subject to regulations that limit or prohibit contributions from and interactions with individuals, groups, and organizations. Among these regulations, federal candidates are prohibited from accepting contributions from an individual or a non-multicandidate PAC in excess of \$2,700, from a multicandidate

¹⁵ *Id.*

¹⁶ Senate Majority PAC, available at <https://www.youtube.com/watch?v=aFZ2trOtvW0>, last accessed Oct. 18, 2016.

¹⁷ Catherine Cortez Masto for Senate, <http://catherinecortezmasto.com/media> (attached as Exhibits B and C).

PAC in excess of \$5000, or from any corporation or labor organization in any amount.¹⁸ Federal candidates are also prohibited from accepting contributions or coordinating with independent expenditure only committees, *i.e.* super PACs.¹⁹

Contributions are broadly defined to include cash donations, but also “anything of value . . . for the purpose of influencing any election for Federal office.”²⁰ Federal law specifically provides that certain expenditures are contributions, including: (i) “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents.”²¹

In order to determine whether an expenditure was made in cooperation with a candidate under subsection (i), FEC regulations provide a three-part test: (1) the communication is paid for by a third-party; (2) the communication satisfied a “content” standard of 11 C.F.R. § 109.21(c); and (3) the communication satisfies one of the “conduct” standards of 11 C.F.R. § 109.21(d).²²

II. Analysis

Catherine Cortez Masto’s actions are not only a clear attempt to violate the law, but a successful one. This is not a case where a super PAC has lifted information that was posted for and available to the general public from a candidate’s web page. Rather, this is a case where the candidate and super PAC designated a system to communicate, and the candidate made a web page simply to directly communicate with that super PAC and request specific ads be run. There are numerous facts that evidence coordination: The “media” page itself has a different appearance than the other pages of the web site, which indicates it was published for a different purpose than the general web site and not intended for the general public. The requests uses identical or similar language as other candidates—“voters need to know”—to indicate that it is the request. The campaign, which has knowledge from polling and its own media buys, is stating what ad content would be helpful to the campaign and in what specific media markets those ads should air—state wide or specific cities. Further, the requests are extremely detailed with target

¹⁸ 52 U.S.C. §§ 30116, 30118.

¹⁹ 52 U.S.C. §§ 30101, 30118.

²⁰ 52 U.S.C. § 30101(8)(A).

²¹ 52 U.S.C. § 30116(a)(7)(B)(i).

²² 11 C.F.R. § 109.21.

voter biographical information, types of ads, and media markets. The timeline of a website post, followed by the requested ad, and then the change of the web page after the ad airs shows that a request is being made and acted upon. These facts make it clear that Cortez Masto is using her “media” page to communicate with super PACs.

In addition to these facts clearly demonstrating coordination, they also meet the FEC’s three-prong test. First, the communications were paid for by other groups—the super PAC, Senate Majority PAC.

Second, the ads meet the content prongs under 11. C.F.R. § 109.21(c). Under subsection (5), the ads are the “functional equivalent of express advocacy” because they are “susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.”²³ The ads are intended to urge voters to vote for Cortez Masto over her opponent, who is characterized in a negative manner—this is information that Cortez Masto has explicitly stated voters need to know before voting.²⁴

Finally, the ads meet the conduct prong under 11 C.F.R. § 109.21(d). Under subsection (1), the ads were clearly created and distributed at the request of the candidate and her committee. In addition to the numerous facts discussed above that demonstrate coordination, the super PACs response also demonstrates the candidate and campaign made a request. Although the request was made through a public web page, this does not excuse the fact that the request was made.²⁵ Unlike other conduct prongs, subsection (1) **does not state** that it does not apply if the “material was obtained from a publicly available source.” Rather, any interpretation of subsection (1) that would permit this would result in permissible coordination by request so long as the request was made publicly—this is unreasonable and contrary to the regulations and statute.²⁶ Moreover, this is not a case

²³ 11 C.F.R. § 109.21(c)(5)

²⁴ Catherine Cortez Masto for Senate, <http://catherinecortezmasto.com/media> (attached as Exhibits B and C).

²⁵ Compare 11 C.F.R. § 109.21(d)(1)(i) (“The communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee.”), with 11 C.F.R. § 109.21(d)(2) (“This paragraph . . . is not satisfied if the information material to the creation, or distribution of the communication was obtained from a publicly available source.”)

²⁶ The commission has previously stated “that a communication resulting from a general request to the public or the use of publicly available information, including information contained on a candidate’s campaign website, does not satisfy the content standards.”

where the communication contained generally publicly available information—a request was made based upon internal campaign information to a super PAC, and the fact it was made on a webpage is irrelevant. Any interpretation of the Commission’s regulations that would permit illegal acts to be committed publically is plainly erroneous and inconsistent with the statute. Finally, it is clear to the public that Cortez Masto is using this webpage to request super PACs run specific ads.²⁷

III. Conclusion

There should be no doubt Catherine Cortez Masto communicated with a super PAC and then used the media page on her website to request the super PAC run specified ads, and that this coordination has resulted in ads that are illegal in-kind donations to Cortez Masto’s campaign. This is an extreme violation because unlike candidates, super PACs can accept unlimited contributions and any permitted cooperation with a federal candidate would simply eviscerate the FECA. It is not a defense that Cortez Masto is using a public venue to illegally coordinate with a super PAC—there is no requirement that a crime be committed in secret. Moreover, the number of candidates using the same method to coordinate with the same super PAC indicates this is a conspiracy to coordinate that demands the Commission act. If the Commission does not act and punish such a clear violation, then the laws are without purpose. FACT respectfully requests the Commission immediately investigate and hold the Respondents accountable.

FEC, Factual & Legal Analysis, Shaheen for Senate, MUR 6821 (Dec. 2, 2015). However, this analysis should only apply to the conduct alternatives that explicitly state this in its description. *See, e.g.*, 11 C.F.R. § 109.21(d)(2) and (3). Any other interpretation would be contrary to the plain language of the Commission’s regulations.

²⁷ *See* Maggie Severns, *Democratic Candidates Writing Instructions to Super PACs on Their Websites*, Politico, July 15, 2016 (Attached as Exhibit A).

Respectfully submitted,



Matthew G. Whitaker, Executive Director
Foundation for Accountability & Civic Trust
1717 K Street NW, Suite 900
Washington, D.C. 20006

Subscribed and sworn to before me on October 19, 2016.


Zachary S. Goodrich Notary Public



Federal law prohibits candidates from explicitly coordinating with outside groups, but public communications that outside groups pick up on are fair game, with few limitations, and campaigns' experiments with such missives are growing bolder over time. | AP Photo/J Pat Carter

Democratic candidates writing instructions to super PACs on their websites

By MAGGIE SEVERNS | 07/15/16 05:02 AM EDT

You don't have to look hard to find out how Democratic Senate candidates want their outside allies to spend money this year.

The party's candidates in Florida, Ohio, Pennsylvania and elsewhere are posting thinly veiled notes on their websites with hints, tips and flat-out instructions for supportive outside groups about how best they can help. The pages include not only messaging information but suggestions about which media markets in the states would make the best targets for those messages.

In a small, yellow box on her campaign site, Katie McGinty regularly publishes notes on what issues Pennsylvania voters, particularly women, should be hearing about. Ted Strickland has a public page, "Ohio Needs to Know," with issue briefs on GOP Sen. Rob Portman's vote record and b-roll of a smiling Strickland talking to voters. And Democratic outside groups have already lifted the messages on both pages for use in expensive TV ads that the Senate campaigns themselves may not have been able to afford at the time.

Federal law prohibits candidates from explicitly coordinating with outside groups, but there's a loophole as wide as the internet itself. Public communications that outside groups pick up on are fair game, with few limitations, and campaigns' experiments with such missives are growing bolder over time.

"It used to be you sent out smoke signals. But there's no need to be elliptical about the smoke signals anymore," said Kenneth Gross, a campaign finance expert and partner at Skadden, Arps, Slate, Meagher & Flom.

At least five Democratic Senate candidates have posted such messages recently, a review by POLITICO found, which experts said are notable for their level of specificity. Some verge on instructing super PACs on what to do, which is prohibited, but campaign finance experts said they would most likely clear the current bars enforced by the Federal Election Commission.

In Florida, Rep. Patrick Murphy's campaign has a clear message for supportive outside groups, potentially including the DSCC and a super PAC funded by his family. "Florida Democrats, especially those from Tampa to Orlando, deserve to know that President [Barack] Obama endorsed Patrick Murphy," Murphy's website reads.

Murphy's own campaign is preparing to spend over a million dollars on TV ads ahead of Florida's Aug. 30 primary, but Orlando is missing from the early ad reservations, according to a source tracking Murphy's media buys. And Murphy's buy in Tampa is far below saturation levels.

The McGinty, Murphy and Strickland campaigns declined to comment for this story, as did two outside groups: Senate Majority PAC and EMILY's List.

Strickland's campaign recently hinted that it would appreciate certain ads in certain media markets, according to transcripts provided to POLITICO of text that appeared on Strickland's website in May.

Two notices posted in early May said that "people in Columbus should know about the contrast between Portman and Strickland on retirement security," and that "people in Cleveland, Akron, Canton, Youngstown and Appalachia should see and hear about the contrast between Portman and Strickland on trade policy."

On May 24, labor groups went live with two ads in Ohio in just those media markets.

The American Federation of Teachers ran an ad only in Columbus that hit Portman on Social Security. Meanwhile, a second ad from AFSCME, which ran in Cleveland and Youngstown, criticized Portman on trade.

Strickland posted a June update about educating Ohio voters on Portman's Social Security positions that was followed by ads run by Senate Majority PAC on the issue. A new post, from July 12, notes that "Ohioans across the state will always need to know about the contrast between Ted Strickland and Senator Portman on trade."

These hints on geography "come close to being directions on how to help the campaigns," said Larry Noble, general counsel at the Campaign Legal Center, which is illegal. But currently, the FEC has interpreted law in a way that "if [campaigns] do it publicly, it's not coordination."

Other public hints to super PACs have focused just on messaging. In March, ahead of her tough primary against ex-Rep. Joe Sestak in Pennsylvania, one of McGinty's notes highlighted her biography: "As the ninth of ten children and the daughter of a police officer who walked the beat and restaurant hostess [sic], Katie McGinty is

fighting to help everyday families," the McGinty website read on March 7.

EMILY's List's super PAC began airing ads focused on just that on April 4.

"Her dad was a Philly cop, her mom worked in a restaurant. ... She'll always stand up for manufacturing, higher wages and equal pay for women so opportunity never gets out of reach," a narrator said in the first ad aired by EMILY's List.

By March 24, McGinty's site updated with negative information about her primary opponent. Voters "need to know" that Sestak supported a plan that "would have cut Social Security and Medicare benefits, raised the Social Security retirement age to 69, and forced higher out-of-pocket spending for Medicare recipients," McGinty's website read.

EMILY's List's second ad, released April 11, again reflected the text: "Joe Sestak supports a plan that the New York Times reported makes cuts to Social Security benefits, and the plan raises the retirement age. ... The plan Sestak supports means higher out-of-pocket costs for millions on Medicare."

The FEC recently ruled on a similar exchange of information in 2014, between Sen. Jeanne Shaheen and Senate Majority PAC during the 2014 election. The commission said that because the PAC didn't copy Shaheen's signals verbatim and Shaheen didn't explicitly instruct the PAC to make the ads, the public signaling was allowed.

That ruling, and others like it, have increasingly convinced campaigns and outside spenders that public messages between campaigns and super PACs are unlikely to draw punishment from the FEC — even if they appear to be against the spirit of campaign finance laws. And with Democratic campaigns like Strickland's, McGinty's and others making do with less money than their opponents, they clearly want to make sure supporters don't spend precious resources on anything but the optimal message.

McGinty's campaign has kept up its signaling into the general election. Majority Forward, a 501(c)(4) nonprofit affiliated with Senate Majority PAC, spent \$400,000 attacking Republican Sen. Pat Toomey with an ad that began airing at the end of June in Pennsylvania.

"Wall Street's given Toomey \$2.7 million in contributions, and Toomey supported privatizing Social Security in the stock market," a narrator says in the ad.

McGinty's campaign appeared thankful to see that ad on TV — but unsatisfied with the amount of money behind the message.

"Pennsylvania voters all across the state need to keep hearing a lot more about Pat Toomey and Wall Street," McGinty's website currently reads. "Wall Street's given Toomey \$2.7 million in contributions, and Toomey supported privatizing Social Security in the stock market."

Visit the Campaign Pro Race Dashboard to track the candidates and consulting firms engaged in the top House, Senate, and gubernatorial races of 2016.

Exhibit B

<http://catherinecortezmasto.com/media>

September 2016

Attention! On the issues that matter to Nevada Hispanics, there's no difference between Joe Heck and Donald Trump. Heck continues to support Trump for President, and he voted 4 TIMES to end DACA and put thousands of DREAMers at risk of deportation. Heck voted to cut Pell Grants, and the two of them — Heck and Trump — would make it harder for Nevada students to pay for college.

¡OJO! Cuando se toca de los asuntos que importan más a los Hispanos de Nevada, no hay diferencia entre Joe Heck y Donald Trump. Heck sigue al lado de Donald Trump en su campaña para presidente, y votó 4 VECES para detener el programa DACA y poner a miles de DREAMers en riesgo de ser deportados. Heck votó para cortar las becas Pell, y los dos — Heck y Trump — harían más difícil que miles de estudiantes de Nevada puedan pagar por la universidad.

[Click here for more information.](#)

Exhibit C

<http://catherinecortezmasto.com/media>

October 2016

Media

FACEBOOK

At all points between now and Election Day voters should hear how in Washington, Joe Heck has voted ten times to defund Planned Parenthood and Heck even threatened to shut down the federal government in order to eliminate funding for Planned Parenthood. And Heck supports overturning Roe v. Wade, which would allow states to criminalize abortion.

In Las Vegas, voters should know that Nevada has the third highest interest rates for payday loans in America, 521%. But in Washington, Joe Heck fought to protect payday lenders. Newspapers called Heck's bill, "a shameless effort by the payday-loan industry to avoid federal rules that would require more responsible behavior". No wonder Heck received more than \$19,000 from payday lenders just as he pushed the bill.

If voters are to hear about Joe Heck and Donald Trump it is important they know that Joe Heck has been a strong supporter of Donald Trump. That Heck said, quote, "I have high hopes that we will see Donald Trump become the next president". And that when Joe Heck was asked if he trusted Donald Trump with his finger on the nuclear button, Heck replied, "why wouldn't I?". Joe Heck and Donald Trump are wrong for Nevada.

Radio listeners across Nevada should hear the attacks for Joe Heck have been called "bogus," "highly misleading" and "false." The truth is Catherine Cortez Masto has been a leader in cracking down on sex trafficking and sexual assault. And on the state pardon board she voted over 95% of the time with Governor Sandoval. But we shouldn't be surprised Joe Heck's trying to distract from his record on issues important to women. In Washington, Joe Heck's voted ten

times to defund Planned Parenthood. Even though they provide cancer screenings to thousands of Nevadans. Heck even threatened to shut down the federal government to defund Planned Parenthood. In Washington, Joe Heck has not been working for you.

Digital users, especially younger voters, Latinos and women, should see that Joe Heck has been a strong supporter of Donald Trump. That even as Trump mocked a disabled reporter, called Latinos "criminals" "drug dealers" and "rapists", Joe Heck still said, quote, "I have high hopes that we will see Donald Trump become the next president". And that when Joe Heck was asked if he trusted Donald Trump with his finger on the nuclear button, Heck replied, "why wouldn't I?". Joe Heck and Donald Trump are wrong for Nevada.

[Click here for more information.](#)

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Media ()

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[Click here for more information.](http://catherinecortezmasto.com/private/150933781999/tumblr_oe31tgiW821uyonpd)

(http://catherinecortezmasto.com/private/150933781999/tumblr_oe31tgiW821uyonpd)

10/18/2016

Catherine Cortez Masto for Senate — Media

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[Click here for more information.](#)

(<http://catherinecortezmasto.com/post/149471937444/heck-endorsed-trump-heck-i-have-high-hopes>)



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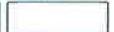
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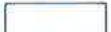
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Catherine and her husband Paul Masto. Paul is a retired Secret Service agent. They live in Las Vegas.

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My top priority as Nevada's Attorney General was to fight for all Nevadans, especially the most vulnerable. As Nevada's next U.S. Senator, I will continue fighting for our state. Thank you for your support, President Barack Obama.

ABOUT

Catherine Cortez Masto has always fought to protect Nevada's seniors, children, women, consumers, and homeowners. Now she wants to bring her fight to the U.S. Senate.

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