



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

May 12, 2021

**VIA ELECTRONIC MAIL ONLY**

klma@factdc.org

Kendra Arnold  
Foundation for Accountability and Civic Trust  
1717 K Street NW  
Suite 900  
Washington, DC 20006

RE: MUR 7168

Dear Ms. Arnold:

On May 6, 2021, we sent you a closing letter in this matter to which we attached an incorrect Factual and Legal Analysis. Please find attached the correct Factual and Legal Analysis. We apologize for the error.

If you have any questions, please contact me at (202) 694-1588 or mallen@fec.gov.

Sincerely,

*Mark Allen*

Mark Allen  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

## FEDERAL ELECTION COMMISSION

## FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Catherine Cortez Masto  
Catherine Cortez Masto for Senate  
and Kim R. Wallin in her official capacity  
as treasurer  
Senate Majority PAC and Rebecca Lambe in  
her official capacity as treasurer

MUR 7168

## I. INTRODUCTION

11 Complainant alleges that the principal campaign committee of U.S. Senate candidate  
12 Catherine Cortez Masto, Catherine Cortez Masto for Senate (“Committee”), coordinated  
13 advertisements with Senate Majority PAC, an independent-expenditure-only political committee  
14 (“Super PAC”), resulting in excessive and prohibited in-kind contributions. The Commission  
15 finds no reason to believe that the Respondents violated 52 U.S.C. §§ 30116(f) or 30118(a), and  
16 closes the file.

## 17 II. FACTUAL BACKGROUND

18 Complainant alleges that the Committee placed information on the “media” page of its  
19 publicly available campaign website (“Website”) to direct the Super PAC to purchase  
20 advertisements in specific markets and with specific messages.

21 According to the Complaint, in “September 2016,”<sup>1</sup> the Committee posted to its website  
22 the following information about Cortez Masto’s general election opponent, Joe Heck:

23 Attention! On the issues that matter to Nevada Hispanics, there's no  
24 difference between Joe Heck and Donald Trump. Heck continues to  
25 support Trump for President, and he voted 4 TIMES to end DACA  
26 and put thousands of DREAMers at risk of deportation. Heck voted

<sup>1</sup> Compl. Ex. B (Oct. 31, 2016). The Complaint does not identify the exact day in September of the printout of the Website.

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1 to cut Pell Grants, and the two of them — Heck and Trump — would  
 2 make it harder for Nevada students to pay for college.<sup>2</sup>  
 3

4 The Super PAC allegedly “responded” with the following ad, translated and transcribed as

5 follows:

6 NARRATOR: “Is there any difference between Joe Heck and  
 7 Donald Trump? On immigration, Heck voted four times against  
 8 DACA and DAPA, putting thousands of DREAMers at risk of being  
 9 deported.” TRUMP: “We’re going to have a deportation force.”  
 10 NARRATOR: “Heck says he cares about education, but he voted to  
 11 cut Pell grants.” TRUMP: “We’re going to cut the Department of  
 12 Education.” NARRATOR: “On the issues that are most important  
 13 to us, there is no difference between Joe Heck and Donald Trump.”<sup>3</sup>  
 14

15 Following the Super PAC’s publication of the ad “that copied language from Cortez

16 Masto’s web page,” Complainant alleges that “Cortez Masto apparently approved and changed  
 17 the ‘media’ page.”<sup>4</sup>

18 The Complaint also attaches an “October 2016” printout of the Website that contains the  
 19 phrases “voters need to know” or “voters should hear” certain information regarding Joe Heck,  
 20 which allegedly was a code to alert Senate Majority PAC to run ads in specific markets.<sup>5</sup> For  
 21 example, “[a]t all points between now and Election Day voters should hear how in Washington,  
 22 Joe Heck has voted ten times to defund Planned Parenthood and Heck even threatened to shut

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<sup>2</sup> *Id.* The Website also provides a Spanish translation of this paragraph.

<sup>3</sup> Compl. at 4. The original ad was in Spanish and is transcribed as follows: NARRATOR: “¿Hay alguna diferencia entre Joe Heck y Donald Trump? Sobre la inmigración, Heck votó cuatro veces en contra de DACA y DAPA, poniendo a miles de DREAMers en riesgo de ser deportados.” TRUMP: “We are going to have a deportation force.” NARRATOR: “Heck dice que le preocupa la educación, pero votó por cortar las becas Pell.” TRUMP: “We are going to cut the Department of Education.” NARRATOR: “En los temas que más nos importan, no hay diferencia entre Joe Heck y Donald Trump.” “Ninguna Diferencia,” <https://www.youtube.com/watch?v=aFZ2trOtvW0> (published Sept. 7, 2016) (last accessed May 8, 2017).

<sup>4</sup> Compl. at 4.

<sup>5</sup> *Id.*

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1 down the federal government in order to eliminate funding for Planned Parenthood.”<sup>6</sup> The  
 2 “October 2016” version of the Website also identified messages for specific markets: “Radio  
 3 listeners across Nevada should hear the attacks for Joe Heck have been called ‘bogus,’ ‘highly  
 4 misleading’ and ‘false.’ The truth is Catherine Cortez Masto has been a leader in cracking down  
 5 on sex trafficking and sexual assault.”<sup>7</sup>

6 However, the Complaint does not identify a Super PAC ad that was published after the  
 7 “October 2016” iteration of the Website.<sup>8</sup>

8 Complainant argues that the specificity of the Committee’s Website regarding the  
 9 message and the desired media markets – *e.g.*, “radio listeners” or “digital users, especially  
 10 younger voters, Latinos and women” – indicates that the Committee used the Website to  
 11 coordinate with the Super PAC. Therefore, the Super PAC allegedly made, and the Committee  
 12 accepted, prohibited and excessive contributions in violation of the Act.<sup>9</sup>

13 Both the Candidate and the Super PAC responded similarly by arguing that information  
 14 posted on the Committee’s publicly available Website cannot satisfy the coordinated  
 15 communications test as a matter of law.<sup>10</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* The Complaint alleges that the Committee’s Website provided photographs to be placed in the ads. *Id.* at 2.

<sup>8</sup> Senate Majority PAC published at least three other ads critical of Joe Heck, but they all pre-date the “September 2016” printout of the Website. *See* “Investment,” <https://www.youtube.com/watch?v=g9MtQ8YDz1w> (published July 1, 2016) (last accessed May 8, 2017); “Side,” <https://www.youtube.com/watch?v=OgleQXrrXjM> (published Aug. 16, 2016) (last accessed May 8, 2017); “23 Times,” <https://www.youtube.com/watch?v=Rd7AzLOFrnA> (published Aug. 24, 2016) (last accessed May 8, 2017).

<sup>9</sup> Compl. at 5-7.

<sup>10</sup> The Committee did not submit a response.

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### 1 III. LEGAL ANALYSIS

2 The Act provides that an expenditure made by any person “in cooperation, consultation,  
 3 or concert, with, or at the request or suggestion of, a candidate, his authorized political  
 4 committees or their agents” constitutes an in-kind contribution.<sup>11</sup> Super PACs are prohibited  
 5 from making contributions to candidates and their authorized committees.<sup>12</sup> It is unlawful for  
 6 candidates and political committees to knowingly accept a prohibited or excessive contribution.<sup>13</sup>

7 The Commission’s regulations provide a three-part test for determining when a  
 8 communication is a coordinated expenditure, which is treated as an in-kind contribution.<sup>14</sup> The  
 9 communication must: (1) be paid for by a third party; (2) satisfy one of five “content” standards  
 10 listed in 11 C.F.R. § 109.21(c); and (3) satisfy one of six “conduct” standards listed in 11 C.F.R.  
 11 § 109.21(d).<sup>15</sup> The Respondents have not disputed that the ads satisfy the “payment” and  
 12 “content” requirements. We therefore focus our analysis on the “conduct” standards.

13 Complainant alleges that the ad satisfies the “request or suggestion” conduct standard,  
 14 which requires that the communication be “created, produced, or distributed at the request or  
 15 suggestion of a candidate [or] authorized committee.”<sup>16</sup> The Commission has explained that the  
 16 “request or suggestion” standard refers to requests or suggestions “made to a select audience, but

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<sup>11</sup> 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20; *see also* 52 U.S.C. § 30104(b) (requiring political committees to disclose to the Commission contributions received from other political committees and persons).

<sup>12</sup> *See* 52 U.S.C. §§ 30116(a), 30118(a); Advisory Op. 2010-11 (Commonsense Ten) at 2-3.

<sup>13</sup> *See, e.g.*, 52 U.S.C. §§ 30116(f), 30118(a).

<sup>14</sup> 11 C.F.R. § 109.21(a)-(b).

<sup>15</sup> *Id.* § 109.21(a).

<sup>16</sup> *Id.* § 109.21(d)(1).

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1 not those offered to the public generally.”<sup>17</sup> As an example of the distinction between  
 2 generalized and targeted requests, the Commission provided that “a request that is posted on a  
 3 web page that is available to the general public is a request to the general public and does not  
 4 trigger the [request or suggestion] conduct standard,” whereas a request sent through an intranet  
 5 service or by email to a discrete group of recipients would satisfy the standard.<sup>18</sup>

6       In MUR 6821 (Shaheen for Senate), the Commission found that the use of publicly  
 7 available information, including the use of information contained on a candidate’s website, was  
 8 not sufficient to satisfy the “conduct” standards.<sup>19</sup> In that case, the Complaint alleged that  
 9 Shaheen’s principal campaign committee and the Democratic Senatorial Campaign Committee  
 10 coordinated with a Super PAC when they posted information about Shaheen’s opponent on  
 11 Shaheen’s campaign website and on Twitter. The Super PAC allegedly responded to the posts  
 12 within two days, circulating a television commercial criticizing Shaheen’s opponent on the same  
 13 grounds as discussed in the posts.<sup>20</sup>

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<sup>17</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (explanation and justification) (“2003 E&J”). The Complaint argues that in 2006 the Commission added a safe harbor to the regulations for publicly available information to each conduct standard except the request or suggestion conduct standard, which evidences the Commission’s intent to exclude the request or suggestion conduct standard from the safe harbor. *See* Coordinated Communications, 71 Fed. Reg. 33190, 33204-05 (June 8, 2006) (explanation and justification) (“2006 E&J”). The 2006 E&J, however, explicitly notes that the safe harbor was not added to the request or suggestion conduct standard to avoid protecting alleged coordination that was both available on a public source and was privately conveyed. *Id.* There is no allegation here that the Committee privately requested or suggested that the Super PAC run any ads.

<sup>18</sup> *See* 2003 E&J at 432.

<sup>19</sup> Factual & Legal Analysis at 7-8, MUR 6821 (Shaheen for Senate).

<sup>20</sup> *Id.* at 1-3; *see also* Factual and Legal Analysis, MUR 7124 (McGinty for Senate); *id.*, Certification (Apr. 28, 2017) (Commission found no reason to believe there was coordination where the alleged request was on the candidate’s publicly available website).

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1        In both MUR 6821 and this matter, the alleged request for advertising appeared on the  
2 candidate's publicly available campaign website. The Complaint does not allege any private  
3 communication between the Committee and the Super PAC. Moreover, the only Super PAC ad  
4 identified in the Complaint preceded the "October 2016" iteration of the Website, and the  
5 "September 2016" version of the Website does not contain the phrases "voters need to know" or  
6 "voters should hear," which the Complaint alleges were coded messages to the Super PAC.<sup>21</sup>

7        Therefore, the communication at issue does not appear to satisfy the conduct standard.

8        Because the available record does not support a reasonable inference that the Committee  
9 coordinated with the Super PAC, the Commission finds no reason to believe that Respondents  
10 violated 52 U.S.C. §§ 30116(f) or 30118(a), and closes the file.

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<sup>21</sup>        See Compl. at 4 & Ex. B.