



BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
Matt Rosendale;)	
Matt Rosendale for Montana;)	MUR 7497
Cabell Hobbs,)	
in his official capacity as Assistant)	
Treasurer.)	

RESPONSE

Through counsel, Matt Rosendale, Matt Rosendale for Montana, and Cabell Hobbs, in his official capacity as Assistant Treasurer, (collectively, “Respondents”) provide the following response to the complaint filed with the Federal Election Commission (“FEC” or “Commission”) by Brendan M. Fischer, on behalf of the Campaign Legal Center, together with Alison Damaskos, on behalf of Giffords (collectively, “Complainants”), and designated by the Commission as MUR 7497.

The facts detailed in this response confirm the Respondents conformed their conduct to the prescriptions and prohibitions of the Federal Election Campaign Act of 1971, as amended (“FECA” or “the Act”), as well as the Commission’s supplementary regulations, Commission guidance, and legal precedents. Despite the Complainants’ attempt to stretch the applicable legal standards beyond their established boundaries, the Respondents trust the Commission to look past the Complainants’ unsubstantiated allegations and irrelevant information related to nonparties to determine that the facts do not support a “Reason to Believe” finding.

BACKGROUND

Matt Rosendale was a 2018 U.S. Senate candidate from Montana, and Matt Rosendale for Montana is his authorized candidate committee. Mr. Rosendale won Montana’s 2018 primary election for U.S. Senate on June 5, 2018, thereby advancing to the 2018 general election that was held on November 6, 2018.

According to the documentation provided by the Complainants, the National Rifle Association Institute for Legislative Action (“NRA-ILA”) is a tax-exempt organization that engages in political activity and lobbying consistent with the policies of the National Rifle Association (“NRA”). The Executive Director of the NRA-ILA is Chris Cox. To the best of Mr. Rosendale’s knowledge and recollection, he has only spoken to Mr. Cox on one occasion, and

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that was during a meeting on or about June 13, 2018, shortly after Mr. Rosendale secured his party's nomination in a highly contentious primary against three opponents.¹ The purpose of the meeting, at least from Mr. Rosendale's perspective, was to shore up support and seek the NRA's highly coveted endorsement given Montana's demographics and high rates of gun ownership.

During the June meeting, neither Mr. Cox nor anyone else present committed to endorsing Mr. Rosendale in his candidacy for U.S. Senate, much less did the attendees discuss the timing or content of communications supporting Mr. Rosendale or opposing Senator Tester. Mr. Rosendale and Mr. Cox did, however, discuss the NRA's dissatisfaction with Senator Tester's vote against Neil Gorsuch's confirmation to the U.S. Supreme Court, and it was clear to Mr. Rosendale that U.S. Supreme Court nominations are an extremely important issue to the NRA. Notwithstanding these discussions, given the previous legal battles involving the 2nd Amendment, the likelihood of future legal battles involving the 2nd Amendment, and the previous spending by NRA-affiliated entities during previous U.S. Supreme Court confirmation battles, the fact that U.S. Supreme Court nominations are an extremely important issue to the NRA should be obvious to anyone other than a political neophyte.

To the best of Mr. Rosendale's knowledge and recollection, he has not spoken to Mr. Cox or any other NRA-ILA employees or agents since Justice Kennedy announced his retirement from the U.S. Supreme Court and Brett Kavanaugh was nominated to fill the vacancy on July 9, 2018. Of course, neither Mr. Rosendale nor anyone else with a grasp of political campaigns required "inside information" from the NRA to predict they would make expenditures to ensure Kavanaugh was confirmed. True to form, the NRA-ILA expended \$404,496.35 opposing Senator Tester on September 6, 2018, the same day Kavanaugh's public questioning before the Senate Judiciary Committee was concluding.

The Respondents acknowledge that, during a July 2018 campaign event, Mr. Rosendale was asked about the activity of "outside groups" then participating in the 2018 Montana general election. In response to the question, Mr. Rosendale responded:

Outside groups have already started to come in. I fully expect that the U.S. Chamber is going to come in, and I fully expect the NRA is going to come in. I think both of them are coming in, probably right here in August, sometime . . .

The questioner then stated, "This is a big race for the NRA", and Mr. Rosendale replied:

¹ In the primary election, Mr. Rosendale earned the Republican nomination with 33.8% of the vote, with his opponents collectively receiving 66.2% of the vote.

Supreme Court confirmations are big – that’s what sent the NRA over the line. Because in ’12, with Denny [Rehberg, a Montana Senate candidate] they stayed out. Chris Cox told me – he was like ‘well, we’re going to be in this race.’

While Mr. Rosendale’s remarks admittedly may have given the Complainants the wrong impression that he had discussed independent expenditures with the NRA-ILA, it is important to understand that his remarks were made in the following backdrop:

- A pending confirmation battle for a critical seat on the U.S. Supreme Court, with Republican leadership stating immediately that they intended to confirm Kavanaugh before the Supreme Court’s fall session (meaning confirmation hearings would have to begin in August or early September).
- Mr. Rosendale understood that U.S. Supreme Court nominations are an extremely important issue to the NRA; and
- Mr. Rosendale’s understanding of previous spending by NRA-affiliated entities during previous U.S. Supreme Court confirmation battles.

Given this backdrop and the fact that Mr. Rosendale was doing everything he could to generate momentum, raise money, and consolidate support in a race where the polls showed he was trailing Senator Tester, Mr. Rosendale’s comments were based on deduction mixed with aspiration and some political bluster. Ultimately, Mr. Rosendale’s prediction that the NRA would “come in” in August was incorrect, as the NRA-ILA did not make any independent expenditures until September.

Since the independent expenditures reported by NRA-ILA included \$383,196 in payments to Starboard Strategic, Inc., the Complainants have also alleged coordination because of a “common vendor” relationship between Starboard Strategic and OnMessage, Inc. While the Respondents are in no position to make detailed assertions about all the conduct of vendors, the Respondents can attest that their first encounter with Starboard Strategic was their review of this complaint. Not only have the Respondents never negotiated any engagements with Starboard Strategic, they are generally unfamiliar with the business operations of Starboard Strategic. To the best of the Respondents’ knowledge and belief, they have conducted their campaign activities entirely independent of Starboard Strategic.

During this period, Matt Rosendale for Montana engaged the services of OnMessage for media and political consulting services. To the best of the Respondents’ knowledge, OnMessage established and implemented the type of firewall policy, as detailed in 11 C.F.R. § 109.21(g), that prohibits the flow of information between certain client projects. Importantly, the Respondents have no reason to believe that OnMessage did not adhere to the terms of its firewall policy.

LEGAL DISCUSSION AND ANALYSIS

To avoid unintended candidate contributions that exceed the contribution limits, so-called “Super PACs” and other outside groups such as NRA-ILA are strictly prohibited from coordinating their activities with the candidate(s) they are supporting. As a practical matter, questions often arise as to what constitutes “coordination.” At the most basic level, coordination means the creation of an advertisement at the request or suggestion of a candidate or campaign, or with the approval of the candidate or campaign. From a more nuanced perspective, the Commission’s regulation has three elements—payment, content and conduct—all of which must be satisfied in order to constitute coordination.

The “Conduct Prong” examines the interactions between the person paying for the communication and the candidate, authorized committee or political party committee, or their agents. A communication satisfies this part of the test if it meets *any one* of the following five standards:

1. If the communication is created, produced or distributed at the **request or suggestion** of the candidate, candidate’s committee, a party committee or agents of the above; or the communication is created, produced or distributed at the suggestion of the person paying for the communication and the candidate, authorized committee, political party committee or agent of any of the foregoing **assents** to the suggestion.²
2. If the candidate, the candidate’s authorized committee or party committee is **materially involved** in decisions regarding the content, intended audience, means or mode of the communication, specific media outlet used, the timing or frequency or size or prominence of a communication.³
3. If the communication is created, produced or distributed after one or more **substantial discussions** about the communication between the person paying for the communication or the employees or agents of that person and the candidate, the candidate’s committee, the candidate’s opponent or opponent’s committee, a political party committee or agents of the above. A discussion is “substantial” if information about the candidate’s or political party committee’s campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.⁴

² 11 C.F.R. § 109.21(d)(1).

³ 11 C.F.R. § 109.21(d)(2).

⁴ 11 C.F.R. § 109.21(d)(3).

4. If the person paying for the communication **employs a common vendor** to create, produce or distribute the communication, and that vendor:
 - a. Is currently providing services *or* provided services within the previous 120 days with the candidate or party committee that puts the vendor in a position to acquire information about the campaign plans, projects, activities or needs of the candidate or political party committee; and
 - b. Uses or conveys information about the plans or needs of the candidate or political party, or information previously used by the vendor in serving the candidate or party, and that information is material to the creation, production or distribution of the communication.⁵
5. If a person who has previously been an **employee or independent contractor** of a candidate's campaign committee or a party committee during the previous 120 days uses or conveys information about the plans or needs of the candidate or political party committee to the person paying for the communication, and that information is material to the creation, production or distribution of the communication.⁶

With respect to the allegation against the Respondents, the Complainants allege that the Respondents—together with NRA-ILA and OnMessage—have illegally coordinated NRA-ILA's public communications, which necessarily means that the Respondents would have needed to satisfy the Conduct Prong of the Commission's three-pronged test for coordination. In making this allegation, the Complainants clearly rely on an incomplete understanding of the Act and Commission precedents to stretch Mr. Rosendale's remarks beyond any reasonable and rational interpretation of their meaning.

I. The Respondents did not engage in any direct discussion with NRA-ILA sufficient to satisfy the Conduct Prong.

A. There were no discussions about the timing or content of public communications.

As stated above, neither Mr. Cox nor anyone else attending the June meeting committed to endorsing Mr. Rosendale in his candidacy for U.S. Senate, much less discuss the timing or content of communications supporting Mr. Rosendale or opposing Senator Tester. To the best of Mr. Rosendale's recollection, he has not spoken to Mr. Cox or any other NRA-ILA employees or agents since Justice Kennedy announced his retirement from the U.S.

⁵ 11 C.F.R. § 109.21(d)(4).

⁶ 11 C.F.R. § 109.21(d)(5).

Supreme Court and Kavanaugh was nominated to fill the vacancy on July 9, 2018. While Mr. Rosendale's remarks during the July campaign event could have given the Complainants the false impression that the Respondents had discussed independent expenditures with the NRA-ILA, his remarks were a reflection of the fact he was doing everything he could to generate momentum, raise money, and consolidate support in his race with the backdrop of a contentious U.S. Supreme Court confirmation battle.

Prior to Justice Kennedy's retirement, Mr. Rosendale and Mr. Cox discussed the NRA's dissatisfaction with Senator Tester's vote against Neil Gorsuch's confirmation to the U.S. Supreme Court, and it was clear to Mr. Rosendale that U.S. Supreme Court nominations are an extremely important issue to the NRA. These discussions, however, do not meet **any** of the five standards necessary to satisfy the Conduct Prong of the Commission's three-pronged test for coordination.

B. Candidates are not outright prohibited from interacting with persons that make independent expenditures.

Federal courts have acknowledged the heightened potential for *quid pro quo* corruption when a candidate requests, suggests, or even merely assents to certain political speech from third parties because that request or suggestion indicates the value placed on that speech by a candidate.⁷ For this reason, courts have accepted the Commission's rule that communications of third parties that originate with the request or suggestion of a federal candidate satisfy the Conduct Prong.⁸ The result is different, however, if a communication does not originate with the candidate because the absence of prearrangement with, or assent of, the candidate undermines the value of the communication and the likelihood that the communication is part of a *quid pro quo* corrupt transaction.⁹ Indeed, as the Supreme Court has noted, without this prearranged relationship, independent expenditures are often of little value to a candidate because they can be duplicative and even counter-productive to the aims of the candidate and their campaign.¹⁰

This distinction is explained by the Supreme Court's strong deference to the principle that more speech, rather than less, is the governing principle that should guide the regulation of political activity.¹¹ For this reason, courts have consistently struck down restrictions that

⁷ *Shays v. F.E.C.*, 337 F. Supp. 2d 28, 63 (D.D.C. 2004), *aff'd sub nom. Shays v. Fed. Election Comm'n*, 414 F.3d 76 (D.C. Cir. 2005).

⁸ 11 C.F.R. § 109.21(d)(1).

⁹ *Buckley v. Valeo*, 424 U.S. 1, 47-48 (1976).

¹⁰ *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 220-22 (2003).

¹¹ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 360-61 (2010).

amount to a blanket prohibition against any candidate interaction with outside groups.¹² While the Act generally prohibits candidates from raising funds outside of the Act's contribution limits and source prohibitions (i.e., "soft money"), the Act nevertheless permits great latitude for candidates to interact with entities that raise and spend soft money.¹³

The Commission's regulations not only recognize this principle, but they support it by permitting a candidate to solicit "hard dollar" funds for so-called "Super PACs" that make independent expenditures on behalf of that candidate. Additionally, federal candidates may "attend, speak at, or be a featured guest at a non-Federal fundraising event."¹⁴ The Commission has further elaborated that candidates may attend a non-Federal fundraising event, regardless of the number of attendees, as long as the requirements of 11 C.F.R. § 300.64 are met.¹⁵ Such activity does not fall within the coordination principles because access alone is not corruption, and courts doubt whether independent expenditures truly create any real value for candidates sufficient to even ingratiate the payor to the candidate.¹⁶

C. Interaction between federal candidates and entities, within the meaning of 11 C.F.R. § 109.21(d)(1), is only coordinated when evidence exists that the candidate took active steps to partner with the entity.

Despite the Complainants' attempts to stretch the bounds of what constitutes impermissible coordination, the preceding analysis makes clear that candidates can, and often do, interact with persons that support or oppose candidates with independent expenditures. Following this lead, federal courts have clarified that where a candidate interacts with an independent expenditure entity, coordination is only found where the candidate becomes a partner to the speech, similar to a joint venture between the parties. In *Fed. Election Comm'n v. Christian Coal.*, 52 F. Supp. 2d 45, 97 (D.D.C. 1999), the court concluded that the critical inquiry was the action of the candidate and their committee, regardless of the independent expenditure entity's attempts to interact with the candidate. Even where the candidate and the candidate's campaign were "armed with the foreknowledge" of the entity's plans, no coordination existed where the candidate's campaign did not respond to any attempts to develop those plans.¹⁷ Without more, the

¹² *Clifton v. Fed. Election Comm'n*, 927 F. Supp. 493, 500 (D. Me. 1996), judgment modified and remanded, 114 F.3d 1309 (1st Cir. 1997) ("[T]he FEC cannot use the mere act of communication between a corporation and a candidate to turn a protected expenditure for issue advocacy into an unprotected contribution to the candidate.")

¹³ 52 U.S.C. § 30125(e).

¹⁴ 11 C.F.R. § 300.64(b)(1).

¹⁵ Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC).

¹⁶ *See supra* Note 10 at 360-61.

¹⁷ *Id.* at 93.

candidate cannot be shown to have the necessary interest in the activities to demonstrate the significant inherent value of the expenditures warranting a finding of an in-kind contribution.¹⁸

In crafting and proposing 11 C.F.R. §109.21, the Commission took heed of the *Christian Coal* court's warning to tread lightly in the arena of political speech. When proposing this rule, the Commission explained that the prohibitions of 11 C.F.R. § 109.21 are only satisfied by the "most direct" coordination between a candidate and entity when creating a communication. The Commission further explained that this provision is only satisfied when "the candidate . . . communicates desires to another person who effectuates them."¹⁹ The need for this direct relationship is consistent with the *quid pro quo* principles the courts have enshrined as the basis for political speech regulation, and no such relationship exists in the instant matter.

D. The Complainants have not offered any evidence that the Respondents requested or suggested NRA-ILA independent expenditures.

Since the law favors speech, courts that have considered the interaction between candidates and persons making independent expenditures have instructed the Commission to tread carefully in regulating political activity. The Commission has appropriately taken this queue in the past, agreeing that only the most direct conduct between a candidate and these persons will amount to coordination. In the instant matter, the Respondents' conduct has stayed within the bounds of permissible interaction.

The Complainant has only offered evidence of Mr. Rosendale's public comments about the anticipate participation of outside groups in the general election. Mr. Rosendale, on the other hand, will submit an affidavit²⁰ attesting to several critical facts:

- To the best of Mr. Rosendale's knowledge and recollection, he has only spoken to Mr. Cox on one occasion, and this was during a meeting on or about June 13, 2018, in which Mr. Rosendale was seeking the NRA's endorsement of his candidacy.
- To the best of Mr. Rosendale's knowledge and recollection, during the meeting on or about June 13, 2018, neither Mr. Cox nor anyone else attending the meeting discussed the timing or content of communications supporting Mr. Rosendale or opposing Senator Tester.

¹⁸ *Id.* at 92.

¹⁹ *Coordinated and Independent Expenditures*, 68 Fed. Reg. at 432.

²⁰ Mr. Rosendale's affidavit will be transmitted to the Commission under separate cover.

- To the best of Mr. Rosendale’s knowledge and recollection, he has not spoken to Mr. Cox or any other NRA-ILA employees or agents since Justice Kennedy announced his retirement from the U.S. Supreme Court and Brett Kavanaugh was nominated to fill the vacancy on July 9, 2018.

In contrast to Mr. Rosendale’s attestations, the Complainants offer no evidence that he encouraged, sought, requested, or communicated at all a desire for such groups to make independent expenditures to influence his race, and certainly no evidence that would support a finding that Mr. Rosendale became a partner to NRA-ILA’s speech. Furthermore, no evidence has been offered to suggest that Mr. Rosendale’s comments were little more than his own guesses about potential activity. Even if Mr. Rosendale had been told by the NRA-ILA’s Executive Director that they were going to be involved in the race in some capacity, whether it be through an endorsement, a direct contribution, or independent expenditures, the analysis here is not changed. Even an educated guess is still a guess.

E. The Complainant’s reliance on FEC Advisory Opinion Request 2016-12 (Citizen Super PAC) is misplaced.

The Complainants argue that even if the Respondents did not request or suggest the NRA-ILA independent expenditures, the Respondents assented to those independent expenditures within the meaning of the second prong of 11 C.F.R. § 109.21(d)(1). Despite being aware of the precedent discussed herein establishing that affirmative action on the part of the candidate or candidate’s committee is a necessary element to satisfy either prong of 11 C.F.R. § 109.21(d)(1), the Complainants nonetheless ignore that precedent and instead give great weight to the Commission’s inability to agree on a final advisory opinion in the matter of Advisory Opinion Request 2016-12 (Citizen Super PAC). The Complainants’ reliance on unapproved advisory opinion drafts is misplaced.

As discussed above, regardless of whether the Commission or the courts apply the request or suggestion prong or the assent prong of 11 C.F.R. § 109.21(d)(1), some affirmative conduct by the candidate is necessary. For those concerned that this rule would create liability without any action on the part of the candidate, the Commission sought to allay those fears by explaining that it did not propose creating an in-kind contribution where the payor “merely informs” the candidate of its plans. Instead, the candidate must also take action to demonstrate its “assent to the suggestion.”²¹ The Commission was so aware of the need to demonstrate affirmative assent that it took time to clarify that it was *not* creating a rebuttable presumption of assent in its rules so as to require the candidate to demonstrate action taken to disavow an entity’s activity.²²

²¹ *Id.*

²² *Id.*

Although the Commission could not reach a consensus on all questions presented in Advisory Opinion Request 2016-12 (Citizen Super PAC), the Commission was consistent throughout the proposed advisory opinion drafts that candidate assent meant the candidate was required to take some action to affirm the conduct of an entity making independent expenditures. As noted explicitly in Draft B, an in-kind contribution would only result on the facts presented in that request if Citizen Super PAC proposed the candidate and candidate's committee take certain actions and the candidate or candidate's committee did in fact take those actions.²³ The Commission's additional drafts are consistent on this point that assent requires action, and no such action exists in the instant matter.²⁴

F. The Complainants have not offered any evidence that the Respondents assented to proposed or actual NRA-ILA independent expenditures.

The Complainants have not offered any evidence beyond Mr. Rosendale's remarks during the July campaign event. Given the assertions in Mr. Rosendale's affidavit and the facts detailed in this response, the Complainants cannot reasonably contend that Mr. Rosendale assented to any NRA-ILA activity. Not only was Mr. Rosendale not armed with any specific knowledge of the activities of NRA-ILA, but he did not assent to any expenditures of NRA-ILA on his behalf. Without more, there is no way to justify a "Reason to Believe" finding that Respondents engaged in activity that can be considered an in-kind contribution under the Conduct Prong of the Commission three-pronged coordination test.

II. The Complainants have offered no evidence to support a violation of 11 C.F.R. § 109.21(d)(4).

Since the Respondents are in no position to make detailed assertions about all the conduct of vendors, the Respondents believe that OnMessage, Starboard Strategic, and potentially the NRA are better suited to respond to this particular allegation. With that said, to the best of the Respondents' knowledge, OnMessage has implemented a firewall policy that satisfies the safe harbor requirements of 11 C.F.R. § 109.21(g), and the Respondents have no reason to believe that firewall policy was not adhered to.

CONCLUSION

The facts detailed in this response confirm the Respondents conformed their conduct to the prescriptions and prohibitions of the Act, as well as the Commission's supplementary

²³ Advisory Opinion 2016-12 (Citizen Super PAC) Draft B.

²⁴ See also Advisory Opinion 2016-12 (Citizen Super PAC) Draft A; Advisory Opinion 2016-12 (Citizen Super PAC) Draft C.

regulations, Commission guidance, and legal precedents. Therefore, the Respondents respectfully urge the Commission to dismiss this complaint with no further action.

Sincerely,



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and Cabell Hobbs, in his official capacity as Assistant Treasurer

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