



COMMISSIONER ELLEN L. WEINTRAUB
FEDERAL ELECTION COMMISSION
 WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of)	
)	
National Rifle Association of America)	MURs 7427, 7497, 7524, 7553, 7558,
Political Victory Fund and Robert Owens,)	7560, 7621, 7654, and 7660
in his official capacity as treasurer;)	
National Rifle Association of America)	
Institute for Legislative Action and Robert)	
Owens, in his official capacity as)	
treasurer; OnMessage, Inc.; Starboard)	
Strategic, Inc.; Thom Tillis Committee)	
and Collin McMichael in his official)	
capacity as treasurer; Cotton for Senate)	
and Theodore V. Koch in his official)	
capacity as treasurer; Cory Gardner for)	
Senate and Lisa Lisker in her official)	
capacity as treasurer; Ron Johnson for)	
Senate, Inc. and James J. Malczewski in)	
his official capacity as treasurer; Matt)	
Rosendale for Montana and Errol Galt in)	
his official capacity as treasurer; Josh)	
Hawley for Senate and Salvatore Purpura)	
in his official capacity as treasurer;)	
National Media Research and Placement,)	
LLC; Red Eagle Media Group; American)	
Media & Advocacy Group, LLC; Donald)	
J. Trump for President, Inc. and Bradley)	
T. Crate in his official capacity as)	
treasurer; Donald J. Trump; Richard Burr;)	
The Richard Burr Committee and Timothy)	
W. Gupton, in his official capacity as)	
treasurer; Joshua David Hawley; Matt)	
Rosendale; America First Action, Inc. and)	
Jon Proch in his official capacity as)	
treasurer; Pete Sessions for Congress and)	
Steve Hargrove in his official capacity as)	
treasurer; Cory Gardner; National Media)	
Research Planning and Placement, LLC)	

STATEMENT OF REASONS OF COMMISSIONER ELLEN L. WEINTRAUB

The Complaints in these matters concern coordination. Specifically, they allege that the National Rifle Association of America Political Victory Fund (“NRA-PVF”), a separate segregated fund connected to the National Rifle Association; the National Rifle Association Institute for Legislative Action (“NRA-ILA”), a 501(c)(4) social welfare organization; and the super PAC America First Action, Inc. (“AFA”) made millions of dollars in excessive, prohibited, and unreported in-kind contributions to presidential, Senate, and House candidate committees in the form of coordinated communications through common vendors.¹

Our nonpartisan Office of General Counsel (“OGC”) recommended that the Commission find reason to believe that NRA-PVF, NRA-ILA, and America First Action, Inc. made and failed to report excessive and prohibited in-kind contributions. The alleged recipients of this largesse were Donald J. Trump for President, Inc., Cory Gardner for Senate, Cotton for Senate, Josh Hawley for Senate, Pete Sessions for Congress, Matt Rosendale for Montana, The Richard Burr Committee, Ron Johnson for Senate, Inc., and Thom Tillis Committee. OGC recommended taking no action at this time as to the candidate committees, but OGC did not recommend dismissal.² I voted to approve the Office of General Counsel’s reason to believe recommendations and the proposed Factual and Legal Analyses, subject to minor edits.³ I attach here those proposed Factual and Legal Analyses that I supported, which provide explanations for my votes.⁴

There is no question that common vendors were used and that certain employees of those vendors were on both sides of the asserted “firewalls.”⁵ As discussed in more detail in the attached Proposed Factual and Legal Analyses, this justified an investigation. I further viewed the information

¹ See Compl. (Nov. 16, 2019), MUR 7660; Compl. at 2 (Oct. 25, 2019), MUR 7654; Compl. at 1-2, MUR 7558 (Jan. 28, 2019); Compl. at 1-2, MUR 7560 (Jan. 28, 2019); Compl. at 1-2, MUR 7621 (July 10, 2019); Compl. ¶¶ 1-3, 18-22, 42, MUR 7427 (Aug. 16, 2018); Compl. ¶¶ 1-3, 51, MUR 7497 (Sept. 17, 2018); Compl. ¶¶ 1-3, 58, MUR 7524 (Oct. 22, 2018); Compl. ¶¶ 1-3, 57, MUR 7553 (Dec. 7, 2018).

² First Gen. Counsel’s Rep, at 40-41 (May. 10, 2019).

³ Certification, MURs 7427, 7497, 7524, and 7553 (National Rifle Association of America Political Victory, Fund, *et al.*) (Apr. 12, 2021); Certification, MURs 7558, 7560 and 7621 (Donald J, Trump) (Apr. 12, 2021); Certification, MURs 7654 and 7660 (America First Action, Inc.) (Apr. 12, 2021).

⁴ See Attachment A (Proposed Factual and Legal Analysis for National Rifle Association Political Victory Fund, *et al.*); Attachment B (Proposed Factual and Legal Analysis for National Rifle Association Political Victory Fund, *et al.*); Attachment C (Proposed Factual and Legal Analysis for America First Action, Inc. and Jon Proch in his official capacity as treasurer). As noted, these versions were not adopted by the Commission. Because “reason to believe” is a threshold determination that by itself does not establish that the law has been violated, and based on the compelling record before the Commission involving other candidate committees, I also voted to make additional reason to believe findings.

⁵ See First General Counsel’s Report at 15-21, MURs 7427, 7497, 7524, 7553. (National Rifle Association of America Political Victory Fund, *et al.*); First General Counsel’s Report at 12-13, MURs 7558, 7560, & 7621 (National Rifle Association of America Political Victory Fund, *et al.*); First General Counsel’s Report at 9-18, MURs 7654 & 7660 (America First Action, Inc., *et al.*).

in the complaints as sufficient to support reason to believe findings against the candidate committees, under the threshold established in Commission policy.⁶


I am deeply disappointed that the Commission has, once again, been blocked from doing its duty to pursue this complaint and, instead, dismissed this matter. But Congress created other paths to get the law enforced: the lawsuits complainants can file pursuant to 52 U.S.C. § 30109(a)(8). A complainant in these matters already won one such suit against the Commission, successfully alleging a failure to act.⁷ That suit's conclusion gave rise to the third-party lawsuit that complainant has filed against several of the respondents.⁸

This third-party suit should not be affected by the Commission's dismissal of this matter. The complainant's cause of action against the respondent arose on Oct. 30, 2021, after a thirty-day period during which the Commission did not conform with a district court's Sept. 30, 2021 declaration that the Commission's failure to act on the complainant's complaint was contrary to law.⁹ The Commission's dismissal of this matter did nothing to cure the informational injury that provided the complainant with the Article III standing it needed to maintain its 52 U.S.C. § 30109(a)(8)(A) lawsuit against the Commission and its 52 U.S.C. § 30109(a)(8)(C) lawsuit against respondents.

• • •

The Commission's coordination regulations are twenty years old. They predate *Citizens United*¹⁰ and were not designed for the world of super PACs that opinion unleashed. Though frequently invoked in complaints, coordination allegations have rarely managed to garner the four votes necessary to launch an investigation. Over the past two decades, the coordination regulations have become riddled with loopholes and are in dire need of an overhaul. Today, one more notch has been carved – this time, in the common vendor standard.

Sept. 30, 2022


 Ellen L. Weintraub
 Commissioner

⁶ Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007).

⁷ *Giffords v. FEC*, No. 19-1192 (D.D.C.).

⁸ *Giffords v. National Rifle Association of America Political Victory Fund, National Rifle Association of America Institute for Legislative Action, Matt Rosendale for Montana, and Josh Hawley for Senate*, No. 21-2887 (D.D.C.).

⁹ Order, *Giffords v. FEC*, No. 19-1192 (D.D.C.), Sept. 30, 2021.

¹⁰ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

Attachment A

PROPOSED FACTUAL AND LEGAL ANALYSIS**FEDERAL ELECTION COMMISSION****FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: National Rifle Association of America MURs 7553 and 7524
 Political Victory Fund and Robert Owens,
 in his official capacity as treasurer
 National Rifle Association of America Institute
 for Legislative Action and Robert Owens,
 in his official capacity as treasurer

I. INTRODUCTION

These matters were generated by two complaints filed with the Federal Election Commission (the “Commission”). *See* 52 U.S.C. § 30109(a)(1). These complaints allege that the National Rifle Association of America Political Victory Fund (the “NRA-PVF”) and the National Rifle Association Institute for Legislative Action (the “NRA-ILA”) (collectively the “NRA Respondents”) violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by making excessive, prohibited, and unreported in-kind contributions to Donald J. Trump for President, Inc. (the “Trump Committee”) and Josh Hawley for Senate (the “Hawley Committee”) in the form of coordinated communications using “common vendors” National Media Planning and Placement LLC (“National Media”), Red Eagle Media Group (“Red Eagle”), and American Media & Advocacy Group (“AMAG”).¹ For the reasons that follow, the Commission finds reason to believe that: (1) the NRA-PVF and the NRA-ILA violated 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a), by making and failing to report excessive and prohibited in-kind contributions to Donald J. Trump for President, Inc. and Bradley T. Crate; and (2) the NRA-PVF violated U.S.C. §§ 30104(b), 30116(a), and 30118(a), by making and failing

¹ *See* Compl. ¶¶ 2-3, 57-68, MUR 7553; Compl. ¶¶ 1-3, 58, MUR 7524 (Oct. 22, 2018).

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to report excessive and prohibited in-kind contributions to Josh Hawley for Senate and Salvatore Purpura in his official capacity as treasurer.

II. FACTUAL BACKGROUND

The NRA-PVF is registered with the Commission as a separate segregated fund connected to the National Rifle Association of America (“NRA”).² It makes contributions to candidates and political committees and makes independent expenditures through a separate account.³ The NRA-ILA is a tax-exempt organization under Section 501(c)(4) of the Internal Revenue Code that, according to the Complaints, describes itself as “the principal lobbying arm of the NRA.”⁴

In the 2016 general election, Donald J. Trump was the Republican nominee for President.⁵ In the 2018 election cycle, Josh Hawley was a candidate for U.S. Senate in Missouri.⁶ National Media is a Virginia company that organized in 2006 and provides political consulting services.⁷ According to public state records, “Red Eagle Media Group” and

² The NRA-PVF’s Amended Statement of Organization also notes that it is a Lobbyist/Registrant PAC. *See* NRA-PVF, Amended Statement of Organization (Mar. 16, 2019).

³ *Id.*

⁴ *See, e.g.*, Compl.¶ 8, MUR 7553.

⁵ *See* Donald J. Trump, Statement of Candidacy (July 29, 2016); Ron Johnson, Statement of Candidacy (Apr. 30, 2015).

⁶ Josh Hawley, Statement of Candidacy (Oct. 10, 2017).

⁷ *See* National Media, Commonwealth of Virginia State Corporation Commission, <https://sccefile.scc.virginia.gov/Business/S207052>. It is registered at 815 Slaters Lane, Alexandria, VA 22314.

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“American Media & Advocacy” are fictitious names used by National Media.⁸ In fact, Respondents acknowledge that National Media, Red Eagle, and AMAG are the same company.⁹ National Media holds itself out as “a leader in media research, planning, and placement for issue advocacy, corporate, and political campaigns.”¹⁰

In the 2016 presidential election, the NRA-ILA made over \$21 million in independent expenditures in support of Trump or in opposition to Hillary Clinton, and the NRA-PVF made close to \$9.3 million in such expenditures.¹¹ Of that approximately \$30 million, the NRA Respondents paid Starboard Strategic, Inc. (“Starboard”) nearly \$26 million for advertising expenses.¹² Starboard, in turn, retained National Media personnel to place the NRA Respondents’ ads, which they did under National Media’s fictitious name, “Red Eagle.”¹³

⁸ See, e.g., National Media, Certificate of Assumed or Fictitious Name “Red Eagle Media Group,” Commonwealth of Virginia State Corporation Commission (Mar. 27, 2014); National Media, Certificate of Assumed or Fictitious Name “American Media & Advocacy Group,” Commonwealth of Virginia State Corporation Commission (Dec. 12, 2018). Respondents argue that the Complaint in MUR 7553’s reference to “American Media & Advocacy Group, LLC . . . at Paragraph 46” is a separate legal entity from AMAG “that was created by National Media’s principals but has never had any operations.” NRA Resp. at 5 n.16, MUR 7553 (Jan. 29, 2019) (on behalf of NRA-ILA, NRA-PVF, and National Media). Respondents also contend that the “Complaint’s reference to ‘AMAG’ at Paragraph 47 is a reference to the fictitious name used by National Media.” *Id.* Paragraphs 46 and 47 of the MUR 7553 Complaint do not contain a reference to either of these entities. Further, while the relationship between these ostensibly related entities is unclear on this record, we note that, like National Media, AMAG, and Red Eagle, the company “American Media & Advocacy Group, LLC” is also registered at 815 Slaters Lane, Alexandria, VA 22314. See American Media & Advocacy Group, LLC, <https://sccefile.scc.virginia.gov/Business/S416256>.

⁹ NRA Resp. at 5, MUR 7553.

¹⁰ National Media, <http://www.natmedia.com/> (last visited May 9, 2019).

¹¹ See NRA-PVF and NRA-ILA, Disbursements to Starboard for IEs supporting/opposing Trump or Clinton, 2015-2016 (regularly scheduled reports).

¹² See Compl. ¶¶ 15-16, MUR 7553; see also NRA-PVF and NRA-ILA, Disbursements to Starboard for IEs supporting/opposing Trump or Clinton, 2015-2016 (regularly scheduled reports).

¹³ See NRA Resp. at 6, MUR 7553; Compl. ¶¶ 15, MUR 7553.

1 Reports filed with the Commission show that the Trump Committee paid nearly \$74 million for
 2 “placed media” under National Media’s other fictitious name, “AMAG.”¹⁴

3 In the 2018 U.S. Senate race in Missouri, the NRA-PVF disclosed nearly \$1.3 million in
 4 independent expenditures supporting Hawley or opposing his opponent, Claire McCaskill, which
 5 included expenditures for ads.¹⁵ As in the 2016 presidential election, National Media officials
 6 distributed the NRA-PVF’s ads supporting Hawley or attacking McCaskill under the “Red
 7 Eagle” fictitious name, and placed ads by the Hawley Committee under the “AMAG” fictitious
 8 name.¹⁶

9 **III. LEGAL ANALYSIS**

10 The Federal Election Campaign Act of 1971, as amended (the “Act”), defines the terms
 11 “contribution” and “expenditure” to include “anything of value” made by any person for the
 12 purpose of influencing an election.¹⁷ The term “anything of value” includes in-kind
 13 contributions.¹⁸ In-kind contributions result when goods or services are provided without charge
 14 or at less than the usual and normal charge,¹⁹ and when a person makes an expenditure in

¹⁴ See Trump Committee, Disbursements to AMAG, 2017-2018 (regularly scheduled reports); *see also* NRA Resp. at 6, MUR 7553; Compl. ¶ 17, MUR 7553.

¹⁵ See NRA-PVF, Disbursements to Starboard for IEs supporting/opposing Hawley or McCaskill, 2017-2018 (regularly scheduled reports).

¹⁶ See Compl. ¶¶ 40-47, MUR 7524; NRA Resp. at 4-5, MUR 7524 (Dec. 17, 2018) (on behalf of NRA-PVF, NRA-ILA, OnMessage, Starboard, and National Media).

¹⁷ 52 U.S.C §§ 30101(8)(A)(i), 30101(9)(A)(i).

¹⁸ 11 C.F.R. § 100.52(d).

¹⁹ *Id.*

1 cooperation, consultation or in concert with, or at the request or suggestion of a candidate or the
 2 candidate's authorized committee or their agents.²⁰

3 Under Commission regulations, expenditures for "coordinated communications" are
 4 addressed under a three-prong test at 11 C.F.R. § 109.21 and other coordinated expenditures are
 5 addressed under 11 C.F.R. § 109.20(b). The Commission has explained that section 109.20(b)
 6 applies to "expenditures that are not made for communications but that are coordinated with a
 7 candidate, authorized committee, or political party committee."²¹ Under the three-prong test for
 8 coordinated communications, a communication is coordinated and treated as an in-kind
 9 contribution when it is paid for by someone other than a candidate, a candidate's authorized
 10 committee, a political party committee, or the authorized agents of either (the "payment prong");
 11 satisfies one of five content standards (the "content prong"); and satisfies one of five conduct
 12 standards (the "conduct prong").²² A communication must satisfy all three prongs to be a
 13 "coordinated communication" under Commission regulations.

14 The "conduct prong" is satisfied by: (1) communications made at the "request or
 15 suggestion" of the relevant candidate or committee; (2) communications made with the "material
 16 involvement" of the relevant candidate or committee; (3) communications made after a
 17 "substantial discussion" with the relevant candidate or committee; (4) specific actions of a
 18 "common vendor;" (5) specific actions of a "former employee or independent contractor;" and

²⁰ 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.20. *See also Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976).

²¹ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003); *see also* Advisory Opinion 2011-14 (Utah Bankers Association).

²² 11 C.F.R. § 109.21(a); *see also id.* § 109.21(b) (describing in-kind treatment and reporting of coordinated communications); *id.* §§ 109.21(c), (d) (describing content and conduct standards, respectively). A sixth conduct standard describes how the other conduct standards apply when a communication republishes campaign materials. *See id.* § 109.21(d)(6).

(6) specific actions relating to the dissemination of campaign material.²³

The “common vendor” standard of the conduct prong has three elements: (i) the person paying for the communication, or an agent of such person, uses a “commercial vendor”²⁴ to create, produce, or distribute the communication; (ii) the vendor previously provided certain enumerated services to the candidate identified in the communication during the previous 120 days; and (iii) the commercial vendor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate’s opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.²⁵

Commission regulations state that a candidate or authorized committee “does not receive or accept an in-kind contribution” resulting from coordination through a common vendor unless the communication was made at the request or suggestion of, with the material involvement of, or after substantial discussions with, the candidate or authorized committee.²⁶ Further, the

²³ *Id.* § 109.21(d).

²⁴ A commercial vendor includes “any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services.” 11 C.F.R. § 116.1(c). A “commercial vendor” also includes “any owner, officer, or employee of the commercial vendor.” *Id.* § 109.21(d).

²⁵ 11 C.F.R. § 109.21(d)(4); *see id.* § 116.1(c) (defining commercial vendor as “any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services”).

²⁶ 11 C.F.R. § 109.21(b)(2); *see id.* § 109.21(d)(1)-(3).

Commission has crafted a safe harbor provision for commercial vendors that have established and implemented a written firewall policy that meets certain requirements.²⁷

A firewall policy satisfies the “safe harbor” if it: (1) is “designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate” who is identified in the communication, or “the candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee, or a political party committee;” and (2) “described in a written policy that is distributed to all relevant employees, consultants, and clients affected by the policy.”²⁸ The safe harbor, however, “does not apply if specific information indicates that, despite the firewall, information about the candidate’s . . . campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication.”²⁹

A. There is Reason to Believe that the NRA Respondents Coordinated with the Trump Committee Through National Media

The Complaint in MUR 7553 alleges that the NRA Respondents coordinated with the Trump Committee through National Media. As an initial matter, there is no dispute that the payment and content prongs of the coordinated communications test are satisfied.³⁰ Nor is there

²⁷ *Id.* § 109.21(h).

²⁸ *Id.* § 109.21(h)(1)-(2).

²⁹ *Id.* § 109.21(h).

³⁰ *See* NRA Resp. at 25, MUR 7553 (noting that the Commission should reject the Complaint’s “invitation to find reason to believe solely on the basis that the ‘payor’ and ‘content’ standards are satisfied”); *see also supra* notes 23-24.

any dispute regarding the first two common vendor elements.³¹ Only the third element of the common vendor conduct prong is in dispute.

According to this Complaint, high-ranking National Media officials repeatedly placed ads for both the NRA Respondents and the Trump Committee.³² These officials, the Complaint contends, used “their knowledge about the ‘plans, projects, activities or needs’ of the Trump campaign to most effectively place the [NRA Respondents’] ads supporting Trump.”³³ Attached as exhibits to the Complaint are a number of documents containing advertising information obtained from the Federal Communication Commission’s (“FCC”) public database.³⁴

A review of these and other public FCC filings provides reason to believe that National Media officials used or conveyed non-public information to the NRA Respondents about the Trump Committee’s “plans, projects, activities or needs” that was material to the placement of

³¹ See NRA Resp. at 6, 25, MUR 7553 (acknowledging that National Media is a common vendor because the first two parts of the test are satisfied but contending that there must be some evidence that the third part of the test is satisfied before finding reason to believe). National Media and its officials qualify as “commercial vendors,” see 11 C.F.R. § 116.1(c), and distributed, from June through November 2016, the NRA Respondents’ communications supporting Trump or opposing Clinton, see Compl., Exs. F-I, K-L, P, Q, MUR 7553. In addition, on or about September 16, 2016, through November 2016, National Media selected and purchased advertising — an enumerated service — for the Trump Committee, overlapping with the time period National Media provided services to the NRA Respondents. See Compl., Exs. J, M, R, MUR 7553; see also NRA Resp. at 17, MUR 7553; Trump Committee, Disbursements to AMAG, 2017-2018 (regularly scheduled report) (disclosing \$74 million to AMAG for “placed media” between September 19, 2016 and November 2016).

³² Compl. ¶¶ 63-64, MUR 7553.

³³ *Id.* ¶ 64.

³⁴ A broadcast, cable, or satellite licensee must place information on political advertising “immediately” in its “political file,” which is available in the FCC’s online public database. 47 C.F.R. § 73.1943; see About Public Inspection Files, <https://publicfiles.fcc.gov/about-station-profiles/>. The political file must contain requests to purchase broadcast time made by candidates or communicates a message relating “to any political matter of national importance.” 47 U.S.C. § 315(e)(1). The file must include: (1) whether the request is accepted or rejected; (2) the rate charged; (3) the date and time the communication is to air; (4) the name of the candidate and the office and election referenced, or the issue referenced, if applicable; and (5) in the case of a request made by the candidate, the name of the candidate, candidate’s authorized committee, and treasurer; or in the case of any other request, the name of the person purchasing the time, the name, address, and phone number of a contact person for such person. *Id.* § 315(e)(2).

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1 the NRA Respondents' communications. These filings show the same National Media officials
2 were involved in the placement of ads for both the NRA Respondents and the Trump Committee,
3 and they placed ads for both of them on the same television station, within days of each other, to
4 run during the same time period. For example, the name of Jon Ferrell, National Media's
5 Director of Accounting, appears on a NRA-PVF "Agreement Form for Non-Candidate/Issue
6 Advertisements" dated October 19, 2016, for "Pro Trump" "Anti Clinton" ads scheduled to run
7 from October 25 to October 31, 2016, on a Norfolk, Virginia, television station.³⁵ Five days
8 later, Ferrell's name appears on an October 24, 2016, "Agreement Form for Political Candidate
9 Advertisements" on behalf of the Trump Committee for "Pro Trump" "Anti Clinton" ads
10 scheduled to run on the same Norfolk station during the same week.³⁶

11 National Media also placed ads for the Trump Committee and the NRA Respondents to
12 be aired during several of the same ACC football games being broadcast by Raycom Sports
13 Network ("Raycom Sports"), and it made those placements within days of each other. Ferrell
14 signed an "Agreement Form for Non-Candidate/Issue Advertisements" dated September 15,
15 2016, to place \$101,200 worth of NRA-ILA ads supporting Trump or opposing Clinton that ran
16 during seven ACC football games between September and November 2016.³⁷ Five days later,

³⁵ See Compl., Ex. Q, MUR 7553.

³⁶ See *id.*, Ex. R.

³⁷ See Compl., Ex. L, MUR 7553. It appears that Raycom Sports provided the television stations with the signed agreement forms. See, e.g., WCJB-TV, Political Files, <https://publicfiles.fcc.gov/tv-profile/wcjb-tv/political-files/2016/non-candidate-issue-ads/9d5850ce-2662-dd72-2d86-9ad974e9fa3e/> (showing file labeled "NRA-ACC Games-Raycom" for five ACC football games that was uploaded on Sept. 16, 2016); WGNT, Political Files, <https://publicfiles.fcc.gov/tv-profile/wgnt/political-files/2016/non-candidate-issue-ads/nra/fce64b20-054b-8247-1260-f8e29776fb26/> (showing file labeled "Raycom Sports Network – ACC Football Sept-Oct 2016" for five football games uploaded on Sept. 16, 2016).

1 National Media submitted another “Agreement Form for Political Candidate Advertisements”³⁸
 2 for the placement of \$35,700 in Trump Committee ads that ran during five of the same games.³⁹
 3 The Complaint cites an article by *Mother Jones/The Trace*, which states:

4 The purchases were mirror images of each other. In five of the games, both
 5 the NRA and Trump bought ads. When the NRA ran two spots either
 6 attacking Clinton or promoting Trump, the Trump campaign ran just one.
 7 And when the Trump campaign ran two spots, the NRA ran one. The
 8 pattern even persisted when there was no direct overlap: In the two games
 9 the Trump campaign sat out, the NRA ran two ads. And in the one game
 10 during which the NRA didn’t buy time, Trump bought two slots. Side by
 11 side, the spots aired across the country on as many as 120 stations, according
 12 to data provided by Raycom.⁴⁰
 13

14 In addition, other National Media employees appear on public filings for both the Trump
 15 Committee and the NRA Respondents. For instance, Kristy Kovatch, a senior media buyer at
 16 National Media,⁴¹ appears as the contact on behalf of the Trump Committee on an NBC
 17 “Political Inquiry Record” dated September 16, 2016, regarding a request for advertising rates,⁴²
 18 and also the contact for the NRA-ILA on a station request sheet dated September 19, 2016, for

³⁸ The agreement form for the placement of these ads was not signed by Jon Ferrell. Compl., Ex. M, MUR 7553.

³⁹ See *id.*, Ex., M, MUR 7553. An invoice from Raycom Sports for the Trump Committee ads is addressed to Ben Angle, senior media buyer at National Media. See *id.* Further, like with the placement of the NRA-ILA’s ads during these games, Raycom Sports appears to have provided the stations with the signed agreement forms. See, e.g., WLWC, Political Files, <https://publicfiles.fcc.gov/tv-profile/wlwc/political-files/2016/federal/president/acc-presidential-advertisement/1783250b-5d2d-5439-33a0-207ed32aa122/> (showing three files labeled “Note-Sold by Raycom” for five games that were uploaded on Oct. 31, 2016); WCJB-TV, Political Files, <https://publicfiles.fcc.gov/tv-profile/wcjb-tv/political-files/2016/federal/president/61c8c79f-5717-f10c-ce17-fdd1db2111d5/> (showing files labeled “Trump 9-24 via Raycom Sports” and “Trump 10-29 via Raycom Sports” that were uploaded Sept. 22 and Oct. 31, 2016 for two ACC football games).

⁴⁰ Mike Spies, *Documents Point to Illegal Campaign Coordination Between Trump and the NRA*, MOTHER JONES, (Dec. 6, 2018), <https://www.motherjones.com/politics/2018/12/nra-trump-2016-campaign-coordination-political-advertising/>.

⁴¹ National Media, <https://www.natmedia.com/#the-team> (last visited May 8, 2019).

⁴² Compl., Ex. J, MUR 7553.

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ads that mentioned “Hillary Clinton,” “Donald Trump,” and the “General Election, 11/8/16.”⁴³ Ben Angle, another senior media buyer at National Media, appears as the contact person on advertising request sheets dated September 23, 2016, and November 1, 2016, for the placement of Trump Committee ads on the Colorado station KMGH,⁴⁴ while a rate request form dated October 14, 2016, for the same station lists Angle as the contact for NRA-ILA ads that are “pro-Donald Trump and guns rights.”⁴⁵ In addition, Caroline Kowalski, a former media assistant at National Media, also appears on public records for NRA-PVF ad buys on August 11 and October 28, 2016, and for Trump Committee ads on September 28, November 3, and November 4, 2016.⁴⁶

In a previous matter, the Commission found reason to believe that the third element of the common vendor conduct prong was satisfied and investigated where a principal of a common vendor, “while providing consulting services, arranging media buys, and producing television ads” for the candidate committee, was also providing the same services to an organization that supported the candidate.⁴⁷ These dual roles, the Commission explained, placed the principal of the common vendor “in a position to know non-public information regarding” the candidate’s campaign and the organization’s plans for the election cycle and to use or convey that

⁴³ *Id.*, Ex. K.

⁴⁴ See KMGH, Political Files, <https://publicfiles.fcc.gov/tv-profile/kmgh-tv/political-files/2016/federal/president/trump-for-president/f2e5d6f0-1718-d38d-4c0a-7ba0560f2e0a/> (showing “Trump Rate Request 9.23.16” & “RNC-Trump President Rate Request General Election — American Media”).

⁴⁵ Compl., Ex. P, MUR 7553.

⁴⁶ See Compl. ¶ 63(d), Exs. I, N, S, U, W, MUR 7553. The referenced records are identified as “Traffic Instructions” documents, a “Station Issue Advertising Request Sheet,” and a “Political Inquiry Form.” *Id.*, Exs. I, N, S, U, W.

⁴⁷ See Factual & Legal Analysis at 3-4, 6-7, 10-11, MUR 5415 (Club for Growth).

1 information in advising and guiding both clients, including on issues related to the allocation of
2 resources.⁴⁸

3 Here, the available information similarly indicates that the same National Media
4 officials — Angle, Kovatch, Ferrell, and Kowalski — were involved in both sides of the ad
5 placements for the Trump Committee and the NRA Respondents. Their involvement in the
6 placement of the Trump Committee’s ads placed them in a position to know non-public
7 information that may have informed the placement of the NRA Respondents’ ads supporting
8 Trump and opposing Clinton.⁴⁹ And as outlined above, the parallel placement and distribution of
9 many of the ads by National Media provides additional support for the inference that non-public
10 information about the Trump Campaign’s plans, activities, and needs influenced National
11 Media’s placement of the NRA Respondents’ pro-Trump ads.

12 Respondents advance several rebuttals, none of which persuasively refutes the specific
13 information suggesting coordination.⁵⁰ National Media claims to have adopted and implemented
14 a firewall policy,⁵¹ and provides the affidavit of its president, Robin Roberts, attesting that “all
15 employees operate[d] in accordance with National Media’s then-current firewall policy.”⁵²
16 Attached to their Response is an unsigned AMAG firewall policy, dated March 26, 2016, and the

⁴⁸ *Id.* The Commission ultimately voted to take no further action, concluding that the investigation produced no evidence of common vendor coordination. *See* Commission Certification, MUR 5415 (Nov. 12, 2008) (Club for Growth); Third General Counsel’s Report at 15, MUR 5415 (Club for Growth).

⁴⁹ *See* Factual & Legal Analysis at 3-4, 6-7, 10-11, MUR 5415 (Club for Growth); *see also* Factual & Legal Analysis, MURs 5511, 5525 (finding reason to believe based on individual’s dual role in the Bush-Cheney 2004 Veteran’s National Steering Committee while appearing at the same time in a television advertisement funded by organization that shared goal of defeating Kerry).

⁵⁰ *See* NRA Resp., MUR 7553; Trump Committee Resp., MUR 7553 (Jan. 11, 2019).

⁵¹ *See* NRA Resp. at 6-8, 17-21, Attach. F, MUR 7553.

⁵² *See* NRA Resp., Robins Affidavit ¶ 3, Attach. B, MUR 7553.

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1 “Trump Firewall Policy,” which supplemented the earlier policy and is dated September 15,
2 2016.⁵³ The Trump Firewall Policy states that the same employees or consultants “cannot
3 perform work relating to more than one client on opposite sides of the firewall for the same
4 election or race.”⁵⁴ Evan Tracey is listed as the team leader for media buying for the Trump
5 Committee and Angle, Kovatch, Tracey Robinson, and Michelle Lawrence are identified as the
6 team’s media buyers.⁵⁵ A review of the policy, however, indicates that under its plain terms it
7 did not apply to management or administrative employees such as Ferrell or Kowalski,⁵⁶ and, as
8 noted above, there is information suggesting that media buyers Angle and Kovatch were working
9 on both sides of the firewall during the same time period, indicating that any such firewall was
10 ineffective.⁵⁷ Further, the firewall policy was not signed by any National Media employee, and
11 Roberts’s affidavit does not provide any details regarding when it was distributed and how it was

⁵³ See NRA Resp., Ex. F, MUR 7553.

⁵⁴ *Id.*, Ex. F. In particular, the firewall policy states that an employee providing services to the Trump Committee is prohibited “from working for an independent expenditure client” and “from communicating with other company employees who provide services to an independent expenditure client” in connection with the presidential election regarding the substance of team member’s work for the Trump Committee, or regarding the other employees’ work for the independent expenditure client. *Id.*

⁵⁵ *Id.*

⁵⁶ Specifically, the firewall policy excludes “employees or consultants who provide exclusively administrative assistance (e.g., reception, clerical, or IT support)” or “employees who perform management functions (e.g., financial, strategic, or corporate leadership) which affect all AMAG clients” from the firewall policy. NRA Resp. at 6, Ex. F, MUR 7553.

⁵⁷ Kovatch and Angle assert that they performed work for the NRA Respondents in 2016 until September 15, 2016, and September 18, 2016, respectively. NRA Resp. at 17, 20, Angle Affidavit ¶¶ 4-9, Kovatch Affidavit ¶¶ 4-7, Attachs. E, F, MUR 7553. They state they performed work in accordance with the Trump Firewall policy and insist that the rate request documents that identify them as the contacts for ads on behalf of the NRA Respondents after those dates may not reflect current information and, in any event, they do not submit rate requests — this is done by media assistants such as Kowalski. See NRA Resp. at 14, 18-2, Ben Angle Affidavit ¶ 7, Kovatch Affidavit ¶ 7, MUR 7553. Whether these contemporaneous documents contain accurate information — as opposed to information in Kovatch’s and Angle’s *post hoc* affidavits — is a factual dispute that necessarily requires investigation. Further, Respondents state that Kowalski, as a media assistant, worked at the direction of the media buyers, such as Kovatch and Angle. See NRA Resp. at 14, MUR 7553 (noting that media assistants perform clerical and administrative support for the media buyers).

1 implemented.⁵⁸ Under these circumstances, it appears unlikely that the firewall policy
 2 effectively prevented material information about the candidate's communication strategies from
 3 being used by National Media officials or passing to the NRA Respondents. As such, the
 4 firewall safe harbor does not apply.⁵⁹

5 Respondents also argue that the NRA Respondents' ads were placed before the Trump
 6 Committee ads and thus were publicly available "immediately" through the FCC's public
 7 database.⁶⁰ They thus reason that these ads cannot be deemed coordinated, and, therefore, the
 8 safe harbor applies.⁶¹ However, Respondents' argument that the ad buys were publicly available
 9 ignores the key fact that the *same* company and personnel placed ads for both the payor and the
 10 candidate committee, undermining the contention that the relevant participants relied solely on
 11 information in the stations' public inspection files to make placement decisions. Importantly, the
 12 NRA Respondents do not argue in their responses or include statements in their affidavits that

⁵⁸ See NRA Resp., Ex. F, MUR 7553; Robins Affidavit ¶ 3, MUR 7553. The Commission has stated that a "person paying for a communication seeking to use the firewall safe harbor should be prepared to provide reliable information (e.g., affidavits) about an organization's firewall, and how and when the firewall was distributed and implemented." Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006). Notably, at the end of National Media's firewall policy is the following: "Please sign and date this policy statement acknowledging that you have read and understand the Policy Statement. *Return the signed copy to Robin.* An additional copy has been provided for your records." See NRA Resp., Attach. F (emphasis added).

⁵⁹ See 11 C.F.R. § 109.21(h).

⁶⁰ NRA Resp. at 21-26; Trump Committee Resp. at 1 n.1, MUR 7553. "To qualify for the safe harbor, the person paying for the communication bears the burden of showing that the information used in creating, producing, or distributing the communication was obtained from a publicly available source." 71 Fed. Reg. at 33,205.

⁶¹ NRA Resp. at 2-3, 21-26, MUR 7553; Trump Committee Resp. at 1 n.1, MUR 7553.

1 they relied on publicly available information to make their ad placement decisions, or even that
 2 they were aware of the information in the public inspection files.⁶²

3 Relatedly, Respondents' argument that common vendor coordination is impossible
 4 because National Media placed the NRA's ads before the Trump Committee's ads is
 5 unconvincing.⁶³ According to Respondents, the NRA's ads that ran on Raycom Sports and on
 6 the Norfolk station were placed before the Trump Committee ads, making "common vendor"
 7 coordination impossible.⁶⁴ The third element of the common vendor standard, however, does not
 8 depend entirely on the sequencing of the ads; the element focuses on whether the commercial
 9 vendor uses or conveys to the person paying for the communication information that is material
 10 to its distribution, irrespective of when that communication airs.⁶⁵ If Respondents' position were
 11 correct, candidates and third parties could completely avoid common vendor coordination
 12 findings by strategically timing the placement of a third party's fully coordinated communication
 13 just before the candidate's message. Further, Respondents acknowledge that Angle, a senior
 14 media buyer, placed the ads that ran during the ACC football games on Raycom Sports for both

⁶² See NRA Resp. at 3-5, MUR 7553. Respondents' failure to assert that their ad placement decisions were based on information in the stations' public files distinguishes this matter from MUR 5506 (EMILY's List). See Commission Certification, MUR 5506 (Aug. 12, 2005), First General Counsel's Report at 5-7 (concluding that the response rebuts allegation of coordination because the committee "states that it made its decisions about placing and pulling ads on information that television stations are required to make public").

⁶³ See NRA Resp. at 21-26, MUR 7553.

⁶⁴ *Id.*

⁶⁵ See 11 C.F.R. § 109.21(d)(4)(iii).

1 the Trump Committee and the NRA-ILA,⁶⁶ and Respondents do not deny, let alone address, the
 2 pattern described in news reports that these ads were “mirror images” of each other.⁶⁷

3 Respondents’ argument that Ferrell’s signature on the ad placement forms was merely an
 4 administrative step, and he was not involved in the creation, production, or distribution of the ads
 5 is also not persuasive.⁶⁸ Respondents assert that the “‘agreement forms’ are not contracts,” do
 6 not “authorize the airing” or placement of ads, and “have nothing whatsoever to do with the
 7 selection of audiences and time slots.”⁶⁹ Instead, Respondents argue, other documents contain
 8 the actual details of any ad buy.⁷⁰ However, according to the National Association of
 9 Broadcasters — the entity that created the ad placement forms themselves — these forms were
 10 “*designed to serve as actual contracts for the sale of political broadcast time* and to satisfy FCC
 11 record retention requirements.”⁷¹ In addition, by signing the forms, Ferrell represented that the
 12 “payment for the above described broadcast time had been furnished” and that he was

⁶⁶ NRA Resp. at 21-22, MUR 7553.

⁶⁷ See *supra* note 64. Further, it is not clear whether Angle placed the NRA Respondents’ ads on August 25, 2016, a month before the Trump Committee ads were allegedly placed on or about September 20, 2016, as the agreement form signed by Ferrell for the placement of the NRA Respondents’ ads is dated September 15, 2016. See NRA Resp., Exs. L, M. Moreover, for ACC football games on November 5, 2016, Raycom Sports sent the signed agreement form for Trump Committee ads to a station on October 21, 2016, with a notation, “Teams TBD,” and sent the agreement form for NRA ads to a station on November 1, 2016. Thus, it is unclear whether all placement decisions for the Raycom Sports football games were made in either August or September for the Trump Committee and NRA Respondents. Compare WLWC, Political Files, <https://publicfiles.fcc.gov/tv-profile/wlwc/political-files/2016/federal/president/acc-presidential-advertisement/1783250b-5d2d-5439-33a0-207ed32aa122/> (showing file labeled “Note-Sold by Raycom 10 29 and 11 5” with upload date of Oct. 31, 2016 for Trump Committee ads), with WCJB-TV, Political Files, <https://publicfiles.fcc.gov/tv-profile/wcjb-tv/political-files/2016/non-candidate-issue-ads/9d5850ce-2662-dd72-2d86-9ad974e9fa3e/> (showing file labeled “NRA-ACC Games-Raycom 11-5” with upload date of Nov. 3, 2016).

⁶⁸ NRA Resp. at 11-14, MUR 7553.

⁶⁹ *Id.* at 6, 11.

⁷⁰ *Id.* at 11.

⁷¹ National Association of Broadcasters, Political Broadcast Agreement Forms, PB-18, <https://gab.org/wp-content/uploads/2016/06/pb18-form-final-c1.pdf>.

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“authorized to announce the time as paid” by the NRA Respondents and Trump Committee.⁷²

Thus, Ferrell was in a position to know when and where the ads were being placed and the cost of the placements for both the Trump Committee and the NRA Respondents.⁷³ And Ferrell’s attempt to disclaim knowledge of the forms’ contents is undermined by his representations in them and his signatures on them.

Further, the fact that Ferrell and Kowalski may have been acting only in an “administrative” capacity does not preclude a coordination finding. As the Commission explained in the context of the “former employee” conduct standard, the “use or convey” standard “does not make any distinction between categories or ranks of employees.”⁷⁴ The Commission specifically declined to limit its application to “a specified class of employees who are likely to ‘possess material political information.’”⁷⁵ Under these circumstances, the Responses and Ferrell’s affidavit do not sufficiently refute the allegation that Ferrell or Kowalski

⁷² See, e.g., Compl., Exs. Q, R, MUR 7553. In fact, Ferrell signed the agreement form as the “agent of Donald J. Trump for President Inc.” See *id.*, Ex. R.

⁷³ Moreover, according to information on National Media’s website, Ferrell has experience “managing the financial details of campaigns,” “ensures that every penny allocated for media is spent according to election laws,” and “conducts post-election analysis of every account to substantiate and reconcile media buys.” National Media, <https://www.natmedia.com/#the-team>.

⁷⁴ See Advisory Opinion 2016-21 at 5 (Great America PAC); see also 11 C.F.R. § 109.21(d)(5).

⁷⁵ *Id.* (quoting 68 Fed. Reg. at 437).

were in positions to have access to information that may have been material to the placement of the ads, even if they did not make the actual placement decisions.⁷⁶

Accordingly, the Commission finds reason to believe that the NRA-PVF and the NRA-ILA violated 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a)⁷⁷ by making and failing to report excessive and prohibited in-kind contributions to the Trump Committee in the form of coordinated communications.⁷⁸

B. There is Reason to Believe that NRA-PVF Coordinated with the Hawley Committee through National Media, Red Eagle, and AMAG

The Complaint in MUR 7524 also alleges that the NRA-PVF and the Hawley Committee coordinated in the distribution and placement of communications through National Media in the 2018 election cycle.⁷⁹ According to the Complaint, on one occasion, the same National Media official placed ads for the NRA-PVF and Hawley Committee on the same stations on the same date.⁸⁰ As before, there is no dispute that the payment and content prongs of the coordinated

⁷⁶ The Commission has stated that “common leadership or overlapping administrative personnel does not defeat the use of a firewall policy,” unless there is specific information that it did not prevent the flow of material information. 71 Fed. Reg. at 33,207. As noted above, the facts indicate that Ferrell and Kowalski had access to material information about ad placements for the NRA Respondents and the Trump Committee, and the pattern of these placements supports an inference that National Media may have used this information to maximize the effect of the ads it placed. This case stands in contrast to MUR 5823, where the Commission concluded that the common vendor standard was not satisfied because the media buyer vendor provided clerical and administrative support and did not have adequate decision-making control or knowledge of communications, *see* Factual & Legal Analysis at 10-11, MUR 5823 (Citizens Club for Growth). National Media does not argue, and the facts do not support, that as a company it was retained merely to provide administrative and clerical support for media buys, it lacked decision-making authority, or it lacked knowledge of the communications at issue.

⁷⁷ We include 52 U.S.C. § 30118(a) because the NRA Respondents are permitted to accept corporate contributions but they are not permitted to contribute them to candidates.

⁷⁸ 11 C.F.R. § 109.21(b)(2); *see* 11 C.F.R. § 109.21(d)(1)-(3).

⁷⁹ Compl. ¶¶ 67-76, MUR 7524.

⁸⁰ *Id.* ¶ 2.

1 communication test are satisfied.⁸¹ Similarly, there is no dispute that the first and second
 2 common vendor elements are satisfied.⁸² As with the Trump Committee and the NRA
 3 Respondents, only the common vendor conduct prong is in dispute.

4 Similar to the record concerning the 2016 election, the record raises a reasonable
 5 inference that information National Media officials gained through their work for the Hawley
 6 Committee was used by them or conveyed to others, including other National Media officials,
 7 and the information influenced the placement of the NRA-PVF's pro-Hawley ads.⁸³ Documents
 8 uploaded to the FCC public database show that Ferrell signed agreements for the placement of
 9 ads on behalf of NRA-PVF and the Hawley Committee with the same television station on the
 10 same date.⁸⁴ Specifically, on September 6, 2018, Ferrell entered into an "Agreement Form for
 11 Non-Candidate/Issue Advertisements" with KYTV for NRA-PVF ads for the "Missouri General
 12 Election U.S. Senate."⁸⁵ On the same day, Ferrell, as an agent of the Hawley Committee, also
 13 entered into an agreement with KYTV for a "coordinated buy" for "Josh Hawley for

⁸¹ See NRA Resp. at 3-4, MUR 7524 (stating that the Commission should reject a finding of reason to believe on the basis that the "payor" and "content" standards are satisfied); *see also supra* notes 27, 34.

⁸² See NRA Resp. at 2, 4, MUR 7524 (not disputing that National Media may be treated as a common vendor but explaining that in the absence of "credible evidence pertaining to the third part of the test," the Commission should not find reason to believe on the basis that the first two parts of the common vendor test are satisfied). National Media qualifies as a "commercial vendor," and the company distributed the NRA-PVF's pro-Hawley communications during the same time period it distributed the Hawley Committee's communications. *See, e.g.*, Compl., Exs. J, K, Q, MUR 7524; KOAM-TV and KFJX-TV, Political Files, <https://publicfiles.fcc.gov/tv-profile/koam-tv/political-files/2018/non-candidate-issue-ads/nra-pvf/39da4b31-e695-2fd6-bfb9-4e8ebc10050a/> (showing NRA-PVF agreement form uploaded on Sept. 7, 2018); KSHB-TV, Political Files, <https://publicfiles.fcc.gov/tv-profile/kshb-tv/political-files/2018/federal/us-senate/hawleyrepublicansenate/99c3bcd1-1299-9995-db1e-903f908a231e/> (showing political disclosure form for Hawley Committee ads by National Media on uploaded Aug. 31, 2018).

⁸³ See Factual & Legal Analysis at 3-4, 6-7, 10-11, MUR 5415 (Club for Growth).

⁸⁴ See Compl. ¶ 70(a)-(b), Exs. J, Q, MUR 7524.

⁸⁵ See *id.*, Ex. J.

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Senate/NRSC.”⁸⁶ In addition, on September 19, 2018, Kovatch asked to buy time to run NRA-PVF ads supporting Hawley on a Missouri station,⁸⁷ and two days later, Angle made a similar request to the same station to buy ad time on behalf of the Hawley Committee.⁸⁸ These circumstances support the inference that National Media used or conveyed non-public information to the NRA-PVF about the “plans, projects, activities or needs” of the Hawley Committee and this information was material to the distribution of the NRA-PVF communications supporting Hawley.

The NRA Respondents, National Media, and the Hawley Committee deny the coordination allegations.⁸⁹ They again assert that Ferrell merely performed an administrative function by signing the “agreement forms,” and those acts alone are not evidence of coordination.⁹⁰ They also assert that all placement decisions regarding advertisements in the 2018 U.S. Senate race in Missouri were made in accordance with National Media’s 2018 Firewall Policy.⁹¹ The firewall policy states that Angle and John Jay, another media buyer at National Media, were assigned to perform work for the Hawley Committee.⁹² Kovatch and

⁸⁶ *See id.*, Ex. Q.

⁸⁷ *See* Compl., Ex. K, MUR 7524.

⁸⁸ *See* KSHB-TV, Political Files, <https://publicfiles.fcc.gov/tv-profile/kshb-tv/political-files/2018/federal/us-senate/hawleyrepublicansenate/99c3bcd1-1299-9995-db1e-903f908a231e/> (showing political disclosure form for Hawley Committee ads by National Media on uploaded Sept. 21, 2018).

⁸⁹ NRA Resp. at 7-9, MUR 7524; Hawley Committee Resp. at 1-3, MUR 7524 (Dec. 3, 2018).

⁹⁰ NRA Resp. at 7-9, Ferrell Affidavit ¶¶ 3-8, Attach. D, MUR 7524; *see* Hawley Committee Resp. at 1-3, MUR 7524.

⁹¹ NRA Resp. at 7-8, MUR 7524.

⁹² NRA Resp., Ex. E, MUR 7524. The policy states that whenever National Media determines that a firewall is required, the procedures that apply in that particular matter will be provided in a written memorandum, along with the firewall policy, to the relevant employees, consultants, and clients. *Id.* Unlike in MUR 7553, where National Media provided a document identified as the Trump Firewall Policy, National Media did not submit a separate memorandum outlining the policies that apply in the U.S. Senate race in Missouri.

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Tracey Robinson are listed as the media buyers for the NRA-PVF.⁹³ However, the policy did not apply to Ferrell, and it does not appear that it prevented the use or conveyance of material information from the Hawley Committee to the NRA respondents.⁹⁴ The policy is also not signed and it is unclear when and how it was distributed or implemented.⁹⁵ Thus, the firewall safe harbor does not apply.⁹⁶

Accordingly, the Commission finds reason to believe that the NRA-PVF violated 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a)⁹⁷ by making and failing to report excessive and prohibited in-kind contributions to the Hawley Committee in the form of coordinated communications.

⁹³ *Id.*

⁹⁴ *See* NRA Resp. at 8, Ex. E MUR 7524.

⁹⁵ Respondents also argue that the documents were publicly available in the stations' political file online. *See* NRA Resp. at 8 n.37, MUR 7524. They do not, however, state whether any National Media official relied on those documents in placing ads for the NRA-PVF, and do not address the fact that National Media placed ads for both the NRA-PVF and the Hawley Committee on the same date. *See id.* Thus, they have failed to carry their burden of showing that ad information from a publicly available source influenced their ad placement decisions. 71 Fed. Reg. 33,190, 33,205.

⁹⁶ *See* 11 C.F.R. § 109.21(h).

⁹⁷ We include 52 U.S.C. § 30118(a) because the NRA Respondents are permitted to accept corporate contributions, but they are not permitted to contribute those funds to candidates.

Attachment B

PROPOSED FACTUAL AND LEGAL ANALYSIS**FEDERAL ELECTION COMMISSION****FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: National Rifle Association of America MURs 7558, 7560, 7621
 Political Victory Fund and Robert Owens,
 in his official capacity as treasurer
 National Rifle Association Institute
 for Legislative Action and Robert Owens,
 in his official capacity as treasurer

I. INTRODUCTION

These matters were generated by three complaints filed with the Federal Election Commission (the “Commission”). *See* 52 U.S.C. § 30109(a)(1). The complaints allege that the National Rifle Association of America Political Victory Fund (the “NRA-PVF”) and the National Rifle Association Institute for Legislative Action (the “NRA-ILA”) (collectively the “NRA Respondents”) violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by making excessive, prohibited, and unreported in-kind contributions to various political committees by financing coordinated communications during the 2016 and 2018 election cycles.¹

The Complaint in MUR 7558 alleges that Donald J. Trump for President, Inc. (the “Trump Committee”) was materially involved in decisions regarding the creation, production, and distribution of the NRA-PVF’s television ads, and they coordinated the placement of those ads using “common vendors” National Media Research Planning and Placement, LLC (“National Media”), Red Eagle Media Group (“Red Eagle”), and American Media & Advocacy Group

¹ *See* Compl. at 1-2, MUR 7558 (Jan. 28, 2019); Compl. at 1-2, MUR 7560 (Jan. 28, 2019); Compl. at 1-2, MUR 7621 (July 10, 2019).

1 (“AMAG”).² According to this Complaint, National Media, Red Eagle, and AMAG are in
2 reality the same company.³ The Complaints in MURs 7560 and 7621 contain similar allegations
3 against The Richard Burr Committee (“Burr Committee”), Matt Rosendale for Montana (the
4 “Rosendale Committee”), and Josh Hawley for Senate (the “Hawley Committee”), namely, that
5 these committees were materially involved in decisions regarding the creation, production, and
6 distribution of the NRA Respondents’ television ads, and the ads were coordinated through
7 National Media.⁴

8 For the reasons that follow, the Commission finds reason to believe that: (1) the NRA-
9 PVF violated 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a) by making and failing to report
10 excessive and prohibited in-kind contributions in the form of coordinated communications to
11 Donald J. Trump for President, Inc. and Bradley T. Crate in his official capacity as treasurer; (2)
12 the NRA-PVF violated 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a) by making and failing to
13 report excessive and prohibited in-kind contributions in the form of coordinated communications
14 to The Richard Burr Committee and Timothy W. Gupton in his official capacity as treasurer; (3)
15 the NRA-PVF violated 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a) by making and failing to
16 report excessive and prohibited in-kind contributions in the form of coordinated communications
17 to Josh Hawley for Senate and Salvatore Purpura in his official capacity as treasurer; and (4) the
18 NRA-ILA violated 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a) by making and failing to
19 report excessive and prohibited in-kind contributions in the form of coordinated communications
20 to Matt Rosendale for Montana and Errol Galt in his official capacity as treasurer.

² Compl. at 6-7, MUR 7558.

³ *Id.* at 7-8.

⁴ Compl. at 9-10, MUR 7560; *see* Compl. at 2, 7-8, MUR 7621.

II. FACTUAL BACKGROUND

The NRA-PVF is registered with the Commission as a separate segregated fund connected to the National Rifle Association of America (“NRA”).⁵ It makes contributions to candidates and political committees and makes independent expenditures through a separate account.⁶ The NRA-ILA is a tax-exempt organization under Section 501(c)(4) of the Internal Revenue Code that, according to the MUR 7560 Complaint, describes itself as “the lobbying arm” of the NRA.⁷

During the 2016 election cycle, Donald J. Trump was the Republican nominee for President, and Richard Burr was seeking reelection to the U.S. Senate in North Carolina.⁸ In the 2018 election cycle, Matt Rosendale was a candidate for U.S. Senate in Montana, and Josh Hawley was a candidate for U.S. Senate in Missouri.⁹

National Media is a Virginia company organized in 2006 that provides political consulting services and operates under the names “Red Eagle Media Group” and “American

⁵ The NRA-PVF’s Amended Statement of Organization also notes that it is a Lobbyist/Registrant PAC. *See* NRA-PVF, Amended Statement of Organization (Mar. 16, 2019).

⁶ *Id.*

⁷ *See* Compl. at 3, MUR 7560.

⁸ *See* Donald J. Trump, Statement of Candidacy (July 29, 2016); Richard M. Burr, Statement of Candidacy, (Mar. 5, 2016).

⁹ *See* Matt Rosendale, Statement of Candidacy (Aug. 14, 2017); Josh Hawley, Statement of Candidacy (Oct. 10, 2017).

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Media & Advocacy Group.”¹⁰ Respondents have previously acknowledged that National Media, Red Eagle, and AMAG are the same company.¹¹

In the 2016 general election, the NRA-PVF disclosed nearly \$9.3 million in independent expenditures supporting Donald J. Trump or opposing Hillary Clinton.¹² Of this amount, the NRA-PVF paid Starboard Strategic, Inc. (“Starboard”) close to \$9 million for advertising expenses.¹³ Starboard, in turn, retained National Media personnel to place the NRA-PVF’s pro-Trump ads, which National Media did using the company’s fictitious name, “Red Eagle.”¹⁴ Reports filed with the Commission show that the Trump Committee paid National Media’s other fictitious name, “AMAG,” nearly \$74 million for “placed media” during the 2016 election cycle.¹⁵

Also in 2016, the NRA-PVF disclosed nearly \$3.6 million in independent expenditures supporting Richard Burr or opposing his opponent, Deborah Ross, in North Carolina.¹⁶ As in the presidential election that year, the NRA-PVF paid Starboard nearly \$3.3 million in “advertising

¹⁰ See National Media, Commonwealth of Virginia State Corporation Commission, <https://sccefile.scc.virginia.gov/Business/S207052>; National Media, Certificate of Assumed or Fictitious Name “Red Eagle Media Group,” Commonwealth of Virginia State Corporation Commission (Mar. 27, 2014); National Media, Certificate of Assumed or Fictitious Name “American Media & Advocacy Group,” Commonwealth of Virginia State Corporation Commission (Dec. 12, 2018).

¹¹ See, e.g., NRA Resp. at 5, MUR 7553 (Jan. 29, 2019) (on behalf of NRA-ILA, NRA-PVF, and National Media); NRA Resp. at 4, MUR 7524 (Dec. 17, 2019) (on behalf of NRA-PVF, NRA-ILA, and National Media, among others).

¹² See NRA-PVF, Disbursements for IEs supporting/opposing Trump or Clinton, 2015-2016 (regularly scheduled reports).

¹³ See NRA-PVF, Disbursements to Starboard for IEs supporting/opposing Trump or Clinton, 2015-2016 (regularly scheduled reports).

¹⁴ See Compl. at 2, MUR 7558; NRA Resp. at 6, MUR 7553.

¹⁵ See Trump Committee, Disbursements to AMAG, 2015-2016 (regularly scheduled reports).

¹⁶ See NRA-PVF, Disbursements for IEs supporting/opposing Burr or Ross, 2015-2016 (regularly scheduled reports).

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expenses,”¹⁷ and it appears that Starboard retained Red Eagle to place the NRA-PVF’s pro-Burr ads.¹⁸ The Burr Committee also purchased ads that National Media placed during this election cycle.¹⁹

In the 2018 election cycle, the NRA-PVF disclosed approximately \$1.3 million in independent expenditures supporting Josh Hawley or opposing his opponent, Claire McCaskill, in Missouri’s U.S. Senate race,²⁰ which included nearly \$1.1 million in disbursements to Starboard for “advertising expenses.”²¹ In the Montana Senate race, the NRA-ILA reported disbursements of \$404,496 to Starboard for “advertising expenses” in connection with independent expenditures supporting Matt Rosendale or opposing Jon Tester.²² In both of these

¹⁷ See NRA-PVF, Disbursements to Starboard for IEs supporting/opposing Burr or Ross, 2015-2016 (regularly scheduled reports).

¹⁸ See Compl., Exs. A-B, MUR 7560. In their Response, the NRA and National Media Respondents did not explicitly state that Starboard retained National Media to place the NRA-PVF’s pro-Burr ads. See generally NRA Resp., MUR 7560 (Mar. 21, 2019) (on behalf of NRA-PVF, NRA-ILA, and National Media). However, in their Response in MUR 7553, which they reference in their Response here, they state, in relevant part, that “the NRA-ILA and NRA-PVF did not engage in ad placements discussions directly with National Media personnel;” rather, “other consultants retained by NRA-ILA and NRA-PVF, namely Starboard Strategic, Inc. performed this role.” NRA Resp. at 6, MUR 7553.

¹⁹ Compl., Exs. C-E, MUR 7560. The Burr Committee reported approximately \$9 million in disbursements for “media buys” to National Media. See Burr Committee, Disbursements to National Media, 2015-2016 (regularly scheduled reports).

²⁰ See NRA-PVF, Disbursements for IEs supporting/opposing Hawley or McCaskill, 2017-2018 (regularly scheduled reports).

²¹ See NRA-PVF, Disbursements to Starboard for IEs supporting/opposing Hawley or McCaskill, 2017-2018 (regularly scheduled reports).

²² See NRA-ILA, Disbursements to Starboard for IEs supporting/opposing Rosendale or Tester, 2017-2018 (regularly scheduled reports).

Senate races, the NRA-PVF's and NRA-ILA's ads were placed by Red Eagle,²³ while the Hawley and Rosendale Committees purchased ads that were placed by AMAG.²⁴

III. LEGAL ANALYSIS

The Act defines the terms "contribution" and "expenditure" to include "anything of value" made by any person for the purpose of influencing an election.²⁵ The term "anything of value" includes in-kind contributions.²⁶ In-kind contributions result when goods or services are provided without charge or at less than the usual and normal charge,²⁷ and when a person makes an expenditure in cooperation, consultation or in concert with, or at the request or suggestion of a candidate or the candidate's authorized committee or their agents.²⁸

Under Commission regulations, expenditures for "coordinated communications" are addressed under a three-prong test at 11 C.F.R. § 109.21 and other coordinated expenditures are addressed under 11 C.F.R. § 109.20(b). The Commission has explained that section 109.20(b) applies to "expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee."²⁹ Under the three-prong test for coordinated communications, a communication is coordinated and treated as an in-kind contribution when it is paid for by someone other than a candidate, a candidate's authorized

²³ See Compl., Exs. G, I, J, MUR 7560.

²⁴ See *id.*, Exs. F, H, K; see also Hawley Resp. at 3, MUR 7560 (March 5, 2019); Rosendale Resp. at 3 (Mar. 5, 2019).

²⁵ 52 U.S.C §§ 30101(8)(A)(i), 30101(9)(A)(i).

²⁶ 11 C.F.R. § 100.52(d).

²⁷ *Id.*

²⁸ 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.20. See also *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976).

²⁹ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003); see also Advisory Opinion 2011-14 (Utah Bankers Association).

committee, a political party committee, or the authorized agents of either (the “payment prong”); satisfies one of five content standards (the “content prong”); and satisfies one of five conduct standards (the “conduct prong”).³⁰ A communication must satisfy all three prongs to be a “coordinated communication” under the regulation.

The “conduct prong” is satisfied by: (1) communications made at the “request or suggestion” of the relevant candidate or committee; (2) communications made with the “material involvement” of the relevant candidate or committee; (3) communications made after a “substantial discussion” with the relevant candidate or committee; (4) specific actions of a “common vendor”; (5) specific actions of a “former employee or independent contractor”; and (6) specific actions relating to the dissemination of campaign material.³¹

The “common vendor” standard of the conduct prong has three elements: (i) the person paying for the communication, or an agent of such person, uses a “commercial vendor”³² to create, produce, or distribute the communication; (ii) the vendor previously provided certain enumerated services to the candidate identified in the communication during the previous 120 days; and (iii) the commercial vendor uses or conveys to the person paying for the communication:

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate’s opponent, or a political

³⁰ 11 C.F.R. § 109.21(a); *see also id.* § 109.21(b) (describing in-kind treatment and reporting of coordinated communications); *id.* §§ 109.21(c), (d) (describing content and conduct standards, respectively). A sixth conduct standard describes how the other conduct standards apply when a communication republishes campaign materials. *See id.* § 109.21(d)(6).

³¹ *Id.* § 109.21(d).

³² A commercial vendor includes “any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services.” 11 C.F.R. § 116.1(c). A “commercial vendor” also includes “any owner, officer, or employee of the commercial vendor.” *Id.* § 109.21(d).

1 party committee, and that information is material to the creation,
2 production, or distribution of the communication; or

3
4 (B) Information used previously by the commercial vendor in providing
5 services to the candidate who is clearly identified in the communication,
6 or the candidate's authorized committee, the candidate's opponent, the
7 opponent's authorized committee, or a political party committee, and that
8 information is material to the creation, production, or distribution of the
9 communication.³³

10
11 Commission regulations state that a candidate or authorized committee “does not receive
12 or accept an in-kind contribution” resulting from coordination through a common vendor unless
13 the communication was made at the request or suggestion of, with the material involvement of,
14 or after substantial discussions with, the candidate or authorized committee.³⁴ Further, the
15 Commission has crafted a safe harbor provision for commercial vendors that have established
16 and implemented a written firewall policy that meets certain requirements.³⁵

17 A firewall policy satisfies the “safe harbor” if it: (1) is “designed and implemented to
18 prohibit the flow of information between employees or consultants providing services for the
19 person paying for the communication and those employees or consultants currently or previously
20 providing services to the candidate” who is identified in the communication, or “the candidate’s
21 authorized committee, the candidate’s opponent, the opponent’s authorized committee, or a
22 political party committee”; and (2) “described in a written policy that is distributed to all relevant
23 employees, consultants, and clients affected by the policy.”³⁶ The safe harbor, however, “does

³³ 11 C.F.R. § 109.21(d)(4); *see id.* § 116.1(c) (defining commercial vendor as “any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services”).

³⁴ 11 C.F.R. § 109.21(b)(2); *see id.* § 109.21(d)(1)-(3).

³⁵ *Id.* § 109.21(h).

³⁶ *Id.* § 109.21(h)(1)-(2).

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not apply if specific information indicates that, despite the firewall, information about the candidate's . . . campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication."³⁷

A. There is Reason to Believe that the NRA-PVF Coordinated with the Trump Committee Through National Media

The Complaint in MUR 7558 alleges that the NRA-PVF coordinated its ads with the Trump Committee using National Media as a common vendor.³⁸ There is no dispute that the payment and content prongs of the coordinated communications test are satisfied.³⁹ Nor is there any dispute regarding the first two common vendor elements.⁴⁰ Only the third common vendor element of the conduct prong is in dispute.

The MUR 7558 Complaint alleges that the same National Media official placed ads for both the NRA-PVF and the Trump Committee, disseminating ads with the same message, the same intended audience, on the same network, on the same week, and during the same time slots.⁴¹ Attached as exhibits to the Complaint are documents obtained from the Federal

³⁷ *Id.* § 109.21(h).

³⁸ Compl. at 6-7, MUR 7558.

³⁹ *See* NRA Resp. at 1-3, MUR 7558 (Feb. 19, 2019) (on behalf of NRA-PVF, NRA-ILA, and National Media) (referring to NRA Resp. at 25, MUR 7553 (noting that the Commission should reject the Complaint's "invitation to find reason to believe solely on the basis that the 'payor' and 'content' standards are satisfied"))).

⁴⁰ *See id.* at 1-3 (referring to NRA Resp. at 6, 25, MUR 7553 (acknowledging that National Media is a common vendor because the first two parts of the test are satisfied but contending that there must be some evidence that the third part of the test is satisfied before finding reason to believe)). National Media and its officials qualify as "common vendors." *See* 11 C.F.R. § 116.1(c). Information available to the Commission also indicates that National Media placed, from June through November 2016, the NRA-PVF's communications supporting Trump or opposing Clinton. Information available to the Commission also shows that on or about September 16, 2016, through November 2016, National Media selected and purchased advertising — an enumerated service — for the Trump Committee, overlapping with the time period National Media provided services to NRA-PVF.

⁴¹ *See* Compl. at 1-2, 5-6, MUR 7558.

1 Communication Commission's ("FCC") public database that contain information on ads
2 National Media placed for the NRA-PVF and the Trump Committee.

3 As explained below, the available information indicates that National Media used or
4 conveyed non-public information to the NRA-PVF about the Trump Committee's "plans,
5 projects, activities or needs" that was material to the placement of the NRA-PVF's pro-Trump
6 communications. The submitted FCC filings show the same National Media official was
7 involved in the placement of ads for both the NRA-PVF and the Trump Committee, and the ads
8 were placed on the same television station, within days of each other, to run during the same
9 time period. Specifically, Jon Ferrell, National Media's Director of Accounting, appears on
10 behalf of the NRA-PVF on an "Agreement Form for Non-Candidate/Issue Advertisements"
11 dated October 19, 2016, for "Pro Trump" "Anti Clinton" ads scheduled to run from October 25
12 to October 31, 2016, on a Norfolk, Virginia, television station.⁴² Five days later, Ferrell signed
13 an October 24, 2016, "Agreement Form for Political Candidate Advertisements" as an agent of
14 the Trump Committee for "Pro Trump" "Anti Clinton" ads scheduled to run on the same Norfolk
15 station during the same week.⁴³

16 In a previous matter, the Commission found reason to believe that the third element of the
17 common vendor conduct prong was satisfied and investigated where a principal of a common
18 vendor, "while providing consulting services, arranging media buys, and producing television
19 ads" for the candidate committee, was also providing the same services to an organization that
20 supported the candidate.⁴⁴ These dual roles, the Commission explained, placed the principal of

⁴² See Compl., Ex. 1, MUR 7558.

⁴³ See *id.*, Ex. 2.

⁴⁴ See Factual & Legal Analysis at 3-4, 6-7, 10-11, MUR 5415 (Club for Growth).

1 the common vendor “in a position to know non-public information regarding” the candidate’s
 2 campaign and the organization’s plans for the election cycle and to use or convey that
 3 information in advising and guiding both clients, including on issues related to the allocation of
 4 resources.⁴⁵

5 Here, the available information similarly indicates that the same National Media official,
 6 Ferrell, was involved in the placement of ads for both the NRA-PVF and the Trump Committee,
 7 putting him in a position to know non-public information that may have informed the placement
 8 of the NRA-PVF’s ads supporting Trump and opposing Clinton. The timing of the placement
 9 and distribution of these ads provides additional support for the inference that non-public
 10 information about the Trump Committee’s plans, activities, and needs influenced National
 11 Media’s placement of the NRA-PVF’s pro-Trump ads.⁴⁶

12 Respondents argue that the Commission’s coordination standard is not met here.⁴⁷
 13 National Media, for instance, claims that it adopted and implemented a firewall policy that
 14 prohibited the same employees or consultants from performing “work relating to more than one

⁴⁵ *Id.* The Commission ultimately voted to take no further action, concluding that the investigation produced no evidence of common vendor coordination. *See* Commission Certification, MUR 5415 (Nov. 12, 2008) (Club for Growth); Third General Counsel’s Report at 15, MUR 5415 (Club for Growth).

⁴⁶ The Complaint, relying on a *Mother Jones* article, states that “[o]ther current and former National Media employees have authorized similar ad buys in other markets for both the NRA-PVF and Trump’s campaign.” Compl. at 2-3, MUR 7558 (citing Mike Spies, *Documents Point to Illegal Campaign Coordination Between Trump and the NRA*, MOTHER JONES, (Dec. 6, 2018), <https://www.motherjones.com/politics/2018/12/nra-trump-2016-campaign-coordination-political-advertising/> (Mother Jones Article)).

⁴⁷ *See generally* NRA Resp., MUR 7558; Trump Committee Resp., MUR 7558 (Mar. 29, 2019).

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client on opposite sides of the firewall, for the same election or race”⁴⁸ but does not provide details regarding when it was distributed or how it was implemented.⁴⁹ Furthermore, under its plain terms, the firewall policy did not apply to management and administrative employees such as Ferrell.⁵⁰ As such, the firewall safe harbor does not apply.

Respondents further contend that common vendor coordination is impossible where, as in this case, the NRA-PVF’s ads were placed before the Trump Committee’s ads and were publicly disclosed “immediately” through the FCC’s public database.⁵¹ The third element of the common vendor standard, however, focuses on whether the commercial vendor uses or conveys to the person paying for the communication information that is material to its distribution, irrespective of when the communication airs.⁵² If Respondents’ position were correct, candidates and third parties could completely avoid common vendor coordination findings by strategically timing the placement of a third party’s fully coordinated communication just before the candidate’s

⁴⁸ NRA Resp. at 3, MUR 7558 (referring to NRA Resp. at 6-8, 10-11, Ex. F, MUR 7553). In particular, the firewall policy states that an employee providing services to the Trump Committee is prohibited “from working for an independent expenditure client” and “from communicating with other company employees who provide services to an independent expenditure client” in connection with the presidential election regarding the substance of team member’s work for the Trump Committee, or regarding the other employees’ work for the independent expenditure client. *See* NRA Resp., Ex. F, MUR 7553.

⁴⁹ The Commission has stated that a “person paying for a communication seeking to use the firewall safe harbor should be prepared to provide reliable information (*e.g.*, affidavits) about an organization’s firewall, and how and when the firewall was distributed and implemented.” Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

⁵⁰ Specifically, the firewall policy excludes “employees or consultants who provide exclusively administrative assistance (*e.g.*, reception, clerical, or IT support)” or “employees who perform management functions (*e.g.*, financial, strategic, or corporate leadership) which affect all AMAG clients” from the firewall policy. NRA Resp. at 6, Ex. F, MUR 7553.

⁵¹ *See* NRA Resp. at 2-3, MUR 7558 (referring to arguments at NRA Resp. at 21-26, MUR 7553); Trump Committee Resp. at 2, MUR 7558. “To qualify for the safe harbor, the person paying for the communication bears the burden of showing that the information used in creating, producing, or distributing the communication was obtained from a publicly available source.” 71 Fed. Reg. at 33,205.

⁵² *See* 11 C.F.R. § 109.21(d)(4)(iii).

1 message. In addition, the argument that the ad buys were publicly available ignores the key fact
 2 that the *same* company and personnel placed ads for both the payor and the candidate committee,
 3 undermining the contention that the relevant participants relied solely on information in the
 4 stations' public inspection files to make placement decisions. Importantly, the NRA
 5 Respondents do not argue that they relied on publicly available information to make their ad
 6 placement decisions, or even that they were aware of the information in the public inspection
 7 files.⁵³

8 Respondents also contend that Ferrell's signature on the NAB Form PB-18, *i.e.*, the
 9 "agreement form," is merely administrative and that Ferrell does not "authorize" the ad buys
 10 placed by National Media's media buyers.⁵⁴ The agreement form, they insist, is not a contract,
 11 but rather "is a template form that broadcast stations use to meet their public disclosure
 12 obligations."⁵⁵ Whether the forms were actual contracts does not change the fact that Ferrell,⁵⁶
 13 even if he did not make the actual decisions on when and where to place the ads, was in a
 14 position to know when and where the ads were being placed and the cost of the ad placements

⁵³ See generally NRA Resp., MUR 7558; NRA Resp. at 3-5, MUR 7553. Respondents' failure to assert that their ad placement decisions were based on information in the stations' public files distinguishes this matter from MUR 5506 (EMILY's List). See First General Counsel's Report at 5-7, MUR 5506 (concluding that the response rebuts allegation of coordination because the committee "states that it made its decisions about placing and pulling ads on information that television stations are required to make public"), Commission Certification, MUR 5506 (Aug. 12, 2005).

⁵⁴ See NRA Resp. at 1-2, MUR 7558; NRA Resp. at 11-14, MUR 7553.

⁵⁵ See NRA Resp. at 2, MUR 7558.

⁵⁶ We note that, contrary to Respondents' argument, the National Association of Broadcasters, the entity that created the agreement forms, explained that the forms were "*designed to serve as actual contracts for the sale of political broadcast time* and to satisfy FCC record retention requirements." National Association of Broadcasters, Political Broadcast Agreement Forms, PB-18, <https://gab.org/wp-content/uploads/2016/06/pb18-form-final-c1.pdf> (emphasis added).

for both the Trump Committee and the NRA-PVF,⁵⁷ information that may have been material to the placement of the NRA’s pro-Trump ads.⁵⁸ That Ferrell may have been acting in an “administrative” capacity does not preclude a coordination finding.⁵⁹

Accordingly, the Commission finds reason to believe that the NRA-PVF violated 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a) by making and failing to report excessive and prohibited in-kind contributions to the Trump Committee in the form of coordinated communications.

B. There is Reason to Believe that the NRA Respondents Coordinated with the Burr, Hawley, and Rosendale Committees through National Media

The Complaints in MURs 7560 and 7621 similarly allege that the NRA Respondents coordinated ads with the Burr, Hawley, and Rosendale Committees using National Media as a

⁵⁷ In signing the agreement forms, Ferrell represented that the “payment for the . . . described broadcast time had been furnished” and that he was “authorized to announce the time as paid” by the NRA-PVF and Trump Committee. *See, e.g.,* Compl., Exs. 1-2, MUR 7558. Respondents, however, assert that “the form authorizes the broadcast station,” not Ferrell, “to announce the purchase of air time.” NRA Resp. at 2 n.2, MUR 7558. As previously stated, the forms serve a dual-purpose — they are designed to satisfy the broadcast station’s record retention requirements for their public files and to serve as an agreement between the station and *the entity purchasing the air time*. *See* National Association of Broadcasters, Political Broadcast Agreement Forms, PB-18, <https://gab.org/wp-content/uploads/2016/06/pb18-form-final-c1.pdf>.

⁵⁸ The Commission has explained that “common leadership or overlapping administrative personnel does not defeat the use of a firewall policy,” unless there is specific information that it did not prevent the flow of material information. 71 Fed. Reg. at 33,207. As noted above, the facts indicate that Ferrell had access to material information about ad placements for the NRA Respondents and the Trump Committee, and the pattern of these placements supports an inference that National Media may have used this information to maximize the effect of the ads it placed. This case stands in contrast to MUR 5823, where the Commission concluded that the common vendor standard was not satisfied because the media buyer vendor provided clerical and administrative support and did not have adequate decision-making control or knowledge of the communications. *See* Factual & Legal Analysis at 10-11, MUR 5823 (Citizens Club for Growth). National Media does not argue, and the facts do not support, that as a company it was retained merely to provide administrative and clerical support for media buys, that it lacked decision-making authority, or that it lacked knowledge of the communications at issue.

⁵⁹ As the Commission explained in the context of the “former employee” conduct standard, the “use or convey” standard “does not make any distinction between categories or ranks of employees. *See* Advisory Opinion 2016-21 at 5 (Great America PAC); *see also* 11 C.F.R. § 109.21(d)(5). The Commission specifically declined to limit its application to “a specified class of employees who are likely to ‘possess material political information.’” Advisory Opinion 2016-21 at 5 (Great America PAC) (quoting 68 Fed. Reg. at 437).

1 common vendor.⁶⁰ None of the Respondents dispute that the NRA Respondents’ ads satisfy the
 2 payment and content prongs of the coordinated communications test and the first two elements of
 3 the common vendor standard of the conduct prong.⁶¹ In dispute is whether the third element of
 4 the common vendor standard has been satisfied — *i.e.*, whether there was use or conveyance of
 5 material information.

6 As in the 2016 presidential race, the record raises a reasonable inference that information
 7 National Media gained by working for the Burr, Hawley, and Rosendale Committees was used
 8 by it or conveyed to others, and this information influenced the placement of the NRA’s ads.
 9 During the 2016 Senate race in North Carolina, FCC filings reveal multiple instances where
 10 Ferrell of National Media was involved in ad buys for the NRA-PVF and the Burr Committee.
 11 Specifically, Ferrell signed two agreement forms with the station WECT, one on September 19,
 12 2016, and the other on October 21, 2016, for NRA-PVF ads described as “Anti-Ross for US
 13 Senate.”⁶² On October 12, October 24, and November 1, 2016, Ferrell’s signature appears on

⁶⁰ See Compl. at 9-10, MUR 7560; Compl. at 2, 7-8, MUR 7621.

⁶¹ See generally NRA Resp. at 4-8, MUR 7560; Burr Committee Resp., MUR 7560; Hawley Committee Resp., MUR 7560; Rosendale Committee Resp., MUR 7560; NRA Resp., MUR 7621 (July 30, 2019). National Media qualifies as a “commercial vendor,” 11 C.F.R. § 116.1(c) and distributed, in September and October 2016, the NRA-PVF’s ads supporting Burr and opposing Ross. See Compl., Exs. A-B, MUR 7560. National Media, in October and November 2016, selected and purchased advertising—an enumerated service—for the Burr Committee, overlapping with the time period National Media provided services to the NRA-PVF. *Id.*, Exs. C-E. As to the claim involving Rosendale, National Media distributed the NRA-ILA’s ads in September 2018. See Compl., Ex. J, MUR 7560; Compl., Ex. D, MUR 7621. Between July 2018 and October 2018, National Media also selected and purchased advertising — an enumerated service — for the Rosendale Committee, covering part of the period that National Media provided services to the NRA-IL. See Compl., Ex. K, MUR 7560; Compl., Exs. A-C, E-F, MUR 7621. Finally, with respect to Hawley, National Media distributed the NRA-PVF’s pro-Hawley ads and the Hawley Committee’s ads during the same time period in September 2018. See Compl. Exs. F-I, MUR 7560.

⁶² Compl., Exs. A-B, MUR 7560.

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1 agreement forms as an agent of the Burr Committee for the placement of ads for the Burr
2 Committee on the same station.⁶³

3 This pattern continued into the 2018 election cycle. For instance, in Missouri’s Senate
4 race, Ferrell signed an agreement form dated September 6, 2018, for “Josh Hawley for
5 Senate/NRSC” ads on stations KOAM and KFJX, and the next day, his signature appears on a
6 form for the placement of NRA-PVF ads on the same television station.⁶⁴ Ferrell’s signature
7 also appears on an agreement form dated September 24, 2018, for the placement of ads for the
8 Hawley Committee on the station KMBC.⁶⁵ Less than two weeks later, and in reference to the
9 same station, Ferrell’s name appears once more on an agreement form dated October 4, 2018, for
10 the placement of NRA-PVF ads with the following notation: “Claire McCaskill sided with the
11 left all 4 times on Supreme Court Justices. Viewers are encouraged to vote for Josh Hawley for
12 Senate.”⁶⁶

13 In Montana’s U.S. Senate race, Ferrell’s name similarly appears on agreement forms for
14 ad purchases on behalf of the Rosendale Committee and the NRA-ILA. The first agreement
15 form, dated August 31, 2018, is for the placement of ads on behalf of the Rosendale Committee
16 with the station KULR.⁶⁷ Days later, Ferrell’s name appears on a September 4, 2018, agreement

⁶³ See *id.*, Exs. C-E.

⁶⁴ *Id.*, Exs. F-G.

⁶⁵ *Id.*, Ex. H. As was the case with the Trump and Burr Committees, Ferrell signed the “Candidate Certification pages” as the “agent for Josh Hawley for Senate.” *Id.*, Exs. F, H.

⁶⁶ *Id.*, Ex. I.

⁶⁷ See Compl., Ex. C, MUR 7621. Attached to the Complaint is the order form, which shows the ads had flight dates of September 4 to September 10, 2018. *Id.*

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1 form with the same station for the placement of NRA-ILA ads mentioning “John Tester.”⁶⁸ And
 2 after one more week, an agreement form dated September 11, 2018, bears Ferrell’s signature for
 3 the placement of ads for the Rosendale Committee with the same station, KULR.⁶⁹ These ads,
 4 according to reporting cited by the Complaint, “ran on many of the same shows that the NRA ads
 5 did.”⁷⁰

6 Respondents deny that the above information is evidence of coordination, arguing: (1)
 7 that the NAB agreement form is not a contract or purchase order form; (2) that Ferrell is not an
 8 “ad buyer,” does not place ads, “authorize ad buys,” or have any involvement in decisions related
 9 to ad purchases; and (3) that National Media maintained appropriate firewalls.⁷¹ The Hawley
 10 and Rosendale Committees specifically argue that they did not have any engagement or
 11 interaction with any agents of the NRA Respondents, and the similarities in the content of the
 12 ads and their distribution are insufficient to establish coordination.⁷² In addition, the Burr
 13 Committee contends that its 2016 media strategy was shaped and implemented by Paul A.
 14 Shumaker, Jr., the campaign’s political consultant, and Douglas J. McAuliffe, the campaign’s
 15 media strategist.⁷³ The Burr Committee also asserts that Shumaker made all the decisions with

⁶⁸ *Id.*, Ex. D; Compl., Ex. J, MUR 7560. According to the order, these ads were slated to run from September 6 to September 19, 2018. *See* Compl., Ex. D, MUR 7621.

⁶⁹ *See* Compl., Ex. E, MUR 7621; Compl., Ex. K, MUR 7560. These ads were slated to run between September 11 and September 17, 2018. *See* Compl., Ex. E, MUR 7621.

⁷⁰ Compl. at 5, MUR 7621 (quoting Christopher Hooks & Mike Spies, *Documents Show NRA and Republican Candidates Coordinated Ads in Key Senate Races*, MOTHER JONES (Jan. 11, 2019), <https://www.motherjones.com/politics/2019/01/nra-republicans-campaign-ads-senate-josh-hawley/>).

⁷¹ *See* NRA Resp. at 4-8, MUR 7560; NRA Resp. at 1-6, John Ferrell Affidavit ¶¶ 3-7, MUR 7621; Hawley Committee Resp. at 1-5, MUR 7560; Rosendale Committee Resp. at 1-5, MUR 7560; Burr Committee Resp. at 2, MUR 7560.

⁷² Hawley Committee Resp. at 2, 4-5, MUR 7560; Rosendale Committee Resp. at 2, 4-5, MUR 7560.

⁷³ *See* Burr Committee Resp. at 2, Paul A. Shumaker Affidavit ¶¶ 2-3, MUR 7560.

1 respect to the markets, content, and the timing of the ads and provided instructions to Kathleen
2 Jones, the only National Media individual with which the Burr Committee communicated, and
3 she implemented those instructions.⁷⁴ According to its Response, “no one representing or acting
4 on behalf of the Burr Committee discussed or otherwise communicated with [Ferrell] during the
5 2016” race.⁷⁵

6 By signing the NAB agreement forms, Ferrell was in a position to know when and where
7 the ads were being placed and the cost of the placements for the NRA Respondents and the Burr,
8 Hawley, and Rosendale Committees. This information, together with the pattern of placement of
9 the ads, supports a reasonable inference that National Media may have used information about
10 the Burr, Hawley, and Rosendale campaigns to place the NRA’s ads supporting these campaigns.
11 While Respondents also contend that National Media implemented and maintained an effective
12 firewall policy, the available information indicates that such a policy would not have applied to

⁷⁴ Burr Committee Resp. at 2, Shumaker Affidavit ¶¶ 3-4, MUR 7560.

⁷⁵ Burr Committee Resp. at 3, MUR 7560. In his sworn affidavit, Shumaker states that Ferrell had no part in any media placement discussions with the Burr Committee, and the Burr Committee made media buys well in advance and adjusted occasionally based on publicly available information contained in periodic reports of spending by groups supporting Burr and opposing Ross. *See* Shumaker Affidavit ¶¶ 4-5, MUR 7560. According to Shumaker, National Media provided these reports which he testifies were “based upon data in the public F[C]C files at the television stations.” *See id.* ¶ 5.

1 Ferrell,⁷⁶ and, in any event, it does not appear that it prevented the use or conveyance of material
 2 information. Thus, the firewall safe harbor does not apply.⁷⁷

3 Accordingly, the Commission finds reason to believe that the NRA-PVF violated
 4 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a) by making and failing to report excessive in-kind
 5 contributions to the Richard Burr Committee and the Hawley Committee in the form of
 6 coordinated communications; and that the NRA-ILA violated 52 U.S.C. §§ 30104(b), 30116(a),
 7 and 30118(a) by making and failing to report excessive in-kind contributions to the Rosendale
 8 Committee in the form of coordinated communications.

⁷⁶ Respondents incorporate by reference the unsigned firewall policies from their Responses in MURs 7524 and 7553, and argue that “National Media implemented and maintained an appropriate firewall policy with respect to” the Senate races involving Burr, Rosendale, and Hawley. NRA Resp. at 6-7, MUR 7560. But the referenced firewall policies in MURs 7524 and 7553 did not identify the National Media individuals who worked on the NRA Respondents’ side of the firewall or the opposite side with the Burr and Rosendale Committees (such information was provided in connection with NRA-PVF and Hawley). *See* NRA Resp., Ex. E, MUR 7524; NRA Resp., Ex. F, MUR 7553. Further, these generic documents explicitly state, “Firewall policies that apply in a *particular matter* will be set forth in a *written memorandum* that will be provided, along with the copy of this policy statement, to all relevant” individuals in advance of starting work for the affected clients. *See* NRA Resp. Ex. E (emphasis added), MUR 7524. While National Media provided a memorandum concerning the “Trump Firewall Implementation,” in MUR 7553, *see* NRA Resp., Ex. F, MUR 7553, it has not provided a separate memorandum for the U.S. Senate races involving Burr, Hawley, or Rosendale.

⁷⁷ *See* 11 C.F.R. § 109.21(h).

Attachment C

PROPOSED FACTUAL AND LEGAL ANALYSIS**FEDERAL ELECTION COMMISSION****FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: America First Action, Inc. and Jon Proch MUR 7654
in his official capacity as treasurer

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission (the “Commission”) by Campaign Legal Center, End Citizens United, and Margaret Christ.¹ The Complaint alleges that during the 2018 election cycle America First Action, Inc. and Jon Proch in his official capacity as treasurer (“AFA”) (“Respondent”) made millions in excessive, prohibited, and unreported in-kind contributions to Josh Hawley for Senate (the “Hawley Committee”), Matt Rosendale for Montana (the “Rosendale Committee”), and Pete Sessions for Congress (the “Sessions Committee.”).²

As explained below, the Commission finds reason to believe that AFA violated 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a) by making and failing to report excessive and prohibited in-kind contributions in the form of coordinated communications to the Hawley Committee, the Rosendale Committee, and the Sessions Committee.

II. FACTUAL AND LEGAL ANALYSIS**A. Factual Background**

AFA is registered with the Commission as an independent expenditure-only political committee (“IEOPC”). In registering as an IEOPC, AFA stated its intent “to raise funds in unlimited amounts,” but pledged that it would “not use those funds to make contributions,

¹ See 52 U.S.C. § 30109(a)(1).

² See Compl. at 2 (Oct. 25, 2019).

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whether direct, in-kind, or via coordinated communications to federal candidates or committees.”³

In the 2018 election cycle, Matt Rosendale was a candidate for U.S. Senate in Montana and Josh Hawley was a candidate for U.S. Senate in Missouri.⁴ Pete Sessions was a candidate for the U.S. House in Texas’s 32nd congressional district in 2018.⁵

National Media Research, Planning and Placement, LLC (“National Media”) is a Virginia company organized in 2006 that provides political consulting services and operates under the names “Red Eagle Media Group” and “American Media & Advocacy Group (“AMAG”).”⁶ The available information indicates that National Media, Red Eagle, and AMAG are the same company.

Founded in 2005, OnMessage is a political consulting firm that provides media consulting services.⁷ During the 2018 election cycle, OnMessage provided media consulting services to the Sessions, Hawley, and Rosendale Committees; in some instances, OnMessage subcontracted the placement of ads through National Media.

During the 2018 election cycle, AFA reported making more than \$2.6 million in independent expenditures opposing Hawley’s opponent, Claire McCaskill, in Missouri’s U.S.

³ Compl at 3, citing AFA Amended Statement of Organization, FEC Form 1, at 1 (Nov. 14, 2017).

⁴ See Matt Rosendale, Amended Statement of Candidacy (Oct. 13, 2017); Josh Hawley, Amended Statement of Candidacy (May 9, 2018).

⁵ See Pete Sessions, Amended Statement of Candidacy (Feb. 2, 2018).

⁶ See National Media, Commonwealth of Virginia State Corporation Commission, <https://sccefile.scc.virginia.gov/Business/S207052>; National Media, Certificate of Assumed or Fictitious Name “Red Eagle Media Group,” Commonwealth of Virginia State Corporation Commission (Mar. 27, 2014); National Media, Certificate of Assumed or Fictitious Name “American Media & Advocacy Group,” Commonwealth of Virginia State Corporation Commission (Dec. 12, 2018).

⁷ See OnMessage, Articles of Incorporation (Apr. 13, 2005).

Senate race.⁸ Included in those expenditures were more than \$2.2 million in disbursements to National Media, through its Red Eagle fictitious name, for “placed media.”⁹ In the Montana Senate race, AFA reported disbursements of more than \$1.6 million to Red Eagle Media for “placed media” in connection with independent expenditures opposing Rosendale’s opponent, Jon Tester.¹⁰ And in the U.S. House race in Texas’s 32nd Congressional district, AFA reported disbursements of nearly \$2.8 million paid to Red Eagle Media in connection with independent expenditures opposing Sessions’s opponent, Colin Allred.¹¹

Meanwhile, National Media, through its AMAG fictitious name, provided media services to the Hawley, Rosendale, and Sessions Committees, including selecting and purchasing advertising slots and audiences.¹² Specifically, these committees reported paying OnMessage for media buys in amounts totaling more than \$1.8 million (Sessions), \$6.5 million (Hawley) and \$2.8 million (Rosendale), respectively.¹³ In turn, OnMessage subcontracted with AMAG to place each candidate’s committee broadcast ads during the 2018 election cycle.¹⁴

⁸ See AFA, Disbursements for Independent Expenditures (“IEs”) opposing McCaskill, 2017-2018 (regularly scheduled reports).

⁹ See AFA, Disbursements to Red Eagle for IEs opposing McCaskill, 2017-2018 (regularly scheduled reports).

¹⁰ See AFA, Disbursements to Red Eagle for IEs opposing Tester, 2017-2018 (regularly scheduled reports).

¹¹ See AFA, Disbursements to Red Eagle for IEs opposing Allred, 2017-2018 (regularly scheduled reports).

¹² Compl. at 2.

¹³ See Sessions Committee, TV Ad and Media Buy Disbursements to OnMessage, 2017-2018 (regularly scheduled reports); Hawley Committee, Media Disbursements to OnMessage, 2017-2018 (regularly scheduled reports); and Rosendale Committee, TV Ad and Media Buy Disbursements to OnMessage, 2017-2018. (regularly scheduled reports).

¹⁴ See Compl. at 7, 11, and 14.

B. Legal Analysis

1. Legal Standard

The Federal Election Campaign Act of 1971, as amended, defines the terms “contribution” and “expenditure” to include “anything of value” made by any person for the purpose of influencing an election.¹⁵ The term “anything of value” includes in-kind contributions.¹⁶ In-kind contributions result when goods or services are provided without charge or at less than the usual and normal charge,¹⁷ and when a person makes an expenditure in cooperation, consultation or in concert with, or at the request or suggestion of a candidate or the candidate’s authorized committee or their agents.¹⁸

Under Commission regulations, expenditures for “coordinated communications” are addressed under a three-prong test at 11 C.F.R. § 109.21 and other coordinated expenditures are addressed under 11 C.F.R. § 109.20(b). The Commission has explained that section 109.20(b) applies to “expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee.”¹⁹ Under the three-prong test for coordinated communications, a communication is coordinated and treated as an in-kind contribution when it is paid for by someone other than a candidate, a candidate’s authorized committee, a political party committee, or the authorized agents of either (the “payment prong”);

¹⁵ 52 U.S.C §§ 30101(8)(A)(i), 30101(9)(A)(i).

¹⁶ 11 C.F.R. § 100.52(d).

¹⁷ *Id.*

¹⁸ 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.20. *See also Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976).

¹⁹ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003); *see also* Advisory Opinion 2011-14 (Utah Bankers Association).

1 satisfies one of five content standards (the “content prong”); and satisfies one of five conduct
 2 standards (the “conduct prong”).²⁰ A communication must satisfy all three prongs to be a
 3 “coordinated communication” under the regulation.

4 The “conduct prong” is satisfied by: (1) communications made at the “request or
 5 suggestion” of the relevant candidate or committee; (2) communications made with the “material
 6 involvement” of the relevant candidate or committee; (3) communications made after a
 7 “substantial discussion” with the relevant candidate or committee; (4) specific actions of a
 8 “common vendor;” (5) specific actions of a “former employee or independent contractor”; and
 9 (6) specific actions relating to the dissemination of campaign material.²¹

10 The MUR 7654 Complaint alleges coordination through a common vendor.²² The
 11 “common vendor” standard of the conduct prong has three elements: (i) the person paying for
 12 the communication, or an agent of such person, uses a “commercial vendor”²³ to create, produce,
 13 or distribute the communication; (ii) the vendor previously provided certain enumerated services
 14 to the candidate identified in the communication during the previous 120 days; and (iii) the
 15 commercial vendor uses or conveys to the person paying for the communication:

²⁰ 11 C.F.R. § 109.21(a); *see also id.* § 109.21(b) (describing in-kind treatment and reporting of coordinated communications); *id.* § 109.21(c), (d) (describing content and conduct standards, respectively). A sixth conduct standard describes how the other conduct standards apply when a communication republishes campaign materials. *See id.* § 109.21(d)(6).

²¹ *Id.* § 109.21(d).

²² Compl. at 25.

²³ A commercial vendor includes “any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services.” 11 C.F.R. § 116.1(c). A “commercial vendor” also includes “any owner, officer, or employee of the commercial vendor.” *Id.* § 109.21(d).

(A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or

(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.²⁴

Commission regulations state that a candidate or authorized committee "does not receive or accept an in-kind contribution" resulting from coordination through a common vendor unless the communication was made at the request or suggestion of, with the material involvement of, or after substantial discussions with, the candidate or authorized committee.²⁵ Further, the Commission has crafted a safe harbor provision for commercial vendors that have established and implemented a written firewall policy that meets certain requirements.²⁶

A firewall policy satisfies the "safe harbor" if it: (1) is "designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate" who is identified in the communication, or "the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee"; and (2) is "described in a written policy that is distributed to all relevant employees, consultants, and clients affected by the policy."²⁷ The safe harbor, however,

²⁴ 11 C.F.R. § 109.21(d)(4); *see id.* § 116.1(c).

²⁵ 11 C.F.R. § 109.21(b)(2); *see id.* § 109.21(d)(1)-(3).

²⁶ *Id.* § 109.21(h).

²⁷ *Id.* § 109.21(h)(1)-(2).

“does not apply if specific information indicates that, despite the firewall, information about the candidate’s . . . campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication.”²⁸

2. AFA Made Excessive and Prohibited In-Kind Contributions to the Hawley, Rosendale, and Sessions Committees in the Form of Coordinated Communications Through National Media

The Complaint alleges that AFA coordinated ads with the Hawley, Rosendale, and Sessions Committees using National Media as a common vendor.²⁹ It is undisputed that the AFA’s ads satisfy the payment and content prongs of the coordinated communications test and the first two elements of the common vendor standard of the conduct prong.³⁰ In dispute is whether the third element of the common vendor standard has been satisfied — *i.e.*, whether there was use or conveyance of material information.

The Complaint alleges that the same National Media official placed ads for both the AFA and the aforementioned candidate committees, disseminating ads with the same intended audience, on the same TV station, and at the same time.³¹ Attached as exhibits to the Complaint are documents obtained from the Federal Communication Commission’s (“FCC”) public database that contain information about ads National Media placed for AFA and the aforementioned committees.³²

²⁸ *Id.* § 109.21(h).

²⁹ *See* Compl. at 2.

³⁰ *See generally* AFA Resp.

³¹ *See* Compl. at 1-2, 9, 11-12.

³² These FCC filings were also attached to the Complaint. *See* Compl. Exs.

1 The available information indicates that National Media used or conveyed non-public
 2 information to AFA about the Hawley, Rosendale, and Sessions Committees’ “plans, projects,
 3 activities or needs” that was material to the placement of the AFA’s communications. The
 4 submitted FCC filings show that the same National Media official was involved in the placement
 5 of ads for AFA and the Hawley, Rosendale, and Sessions Committees, and included ads that
 6 were placed on the same television station, within days of each other, running during the same
 7 time period or in close proximity. Specifically, in at least eight instances,³³ Jon Ferrell, National
 8 Media’s Director of Accounting, signed agreements for the placement of ads on behalf of AFA
 9 and either the Sessions, Hawley, or Rosendale Committees.³⁴ In one instance, Farrell signed
 10 agreements on behalf of both the Rosendale Committee and AFA on October 8, 2018, with the
 11 ads for both entities airing on television station KECI at the same time period.³⁵ The Rosendale
 12 Committee ads aired from October 9, 2018, through October 16, 2018, at a cost of \$13,065.³⁶
 13 Contemporaneously, the AFA ads attacking Rosendale’s opponent aired on television station
 14 KECI from October 5, 2018, through October 11, 2018, in amounts totaling \$37,260.³⁷ Over a
 15 three day period — October 9, 2018 through October 11, 2018 — the AFA and Rosendale

³³ The Complaint refers to other instances in which National Media effectively placed ads for AFA and the Sessions Committee without the corresponding forms establishing that Ferrell signed on behalf on both entities. Compl at 7-16. There, AFA either filed the “Agreement Form for Non-Candidate/Issue Advertisements” with Ferrell’s signature but the “Agreement Form for Political Candidate Advertisements” for Sessions Committee ads that aired during the same time period or in close proximity to the AFA ads was not disclosed, or vice versa. *See* Compl. ¶¶ 19(a), (b), (g), and (h). In two other instances, the Complaint refers to Sessions Committee and AFA ads that aired during overlapping periods, but does not include either agreement form. *See* Compl. ¶¶ 19(c) and (f). The FCC’s online public database likewise does not include the forms absent in the Complaint or attached exhibits.

³⁴ *See* Compl. ¶¶ 19, 22, and 25.

³⁵ *See* Compl., Montana Ex. A.

³⁶ *See* Compl., Montana Ex. A at 10-12.

³⁷ *See* Compl., Montana Ex. B at 11, 13.

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Committee ads both appeared on eight television programs, which included “The NBC Today Show,” the local television evening news programs at 5, 6 and 10 p.m., respectively, “Ellen,” “The Voice,” and “The Tonight Show with Jimmy Fallon.”³⁸

This same pattern of overlapping ads appeared with respect to Ferrell’s signed agreements on behalf of the Hawley Committee and AFA. On October 11, 2018, Ferrell signed the “Agreement Form for Political Candidate Advertisements” on behalf of the Hawley Committee, to air ads on television station KOLR from October 16, 2018, through October 22, 2018, in amounts totaling \$25,405.06.³⁹ Six days later, on October 17, 2018, Ferrell signed the corresponding “Agreement Form for Non-Candidate/Issue Advertisements” on behalf of Red Eagle for AFA, to run ads on television station KOLR from October 17, 2018, through October 23, 2018, in amounts totaling \$26,785.⁴⁰ During the overlapping period of October 17, 2018 through October 22, 2018, National Media placed ads to air on the same programs, which included KOLR.’s early morning news broadcasts at 5:00 a.m. and 5:30 a.m., respectively, “NCIS,” “NCIS: New Orleans,” and “NCIS: Los Angeles.”⁴¹ Additionally, National Media placed Hawley Committee and AFA ads to run on programs airing in close proximity. Specifically, on October 23, 2018, National Media placed an AFA sponsored ad to air during the “NFL London Game” on television station KOLR, which had an airtime of 8:30 a.m. to 11:00 a.m.⁴² Subsequently, National Media placed a Hawley Committee ad to air during the next NFL

³⁸ See Compl., Montana Exs. A and B.

³⁹ See Compl., Missouri Ex. L.

⁴⁰ Though not included in the Complaint, the FCC’s online public database discloses this form. See Licensing & Databases Public Inspection Files-Broadcast Stations TV, https://publicfiles.fcc.gov/tv-profile/kolr/search/america_first_action.

⁴¹ See Compl., Missouri Exs. L and M.

⁴² See Compl., Missouri Ex. M.

1 game (Cincinnati Bengals v. the Kansas City Chiefs) on the same television station, which was
2 slotted to air between 12:00 p.m. to 3:00 p.m.⁴³

3 In another example, on a contract originally dated September 27, 2018, and revised
4 October 9, 2018, AFA through Red Eagle contracted to place \$205,800 in AFA ads to run from
5 October 10 through October 16, 2018 on television station KDFW.⁴⁴ Ferrell signed the
6 corresponding “Agreement Form for Non-Candidate/Issue Advertisements” on behalf of Red
7 Eagle for AFA.⁴⁵ On the same television station, Ferrell signed the corresponding “Agreement
8 Form for Political Candidate Advertisements” as an “agent for Pete Sessions for Congress” to a
9 contract originally dated September 28, 2018, which was revised on October 2, 2018, and
10 uploaded to the FCC database on October 4, 2018. Under the terms of this contract, AMAG
11 placed \$77,850 in Sessions Committee ads for the period September 29, 2018, through
12 October 8, 2018. Also during this period, Ferrell signed an “Agreement Form for Political
13 Candidate Advertisements” as an “agent for Josh Hawley for Senate” dated August 16, 2018, for
14 ads totaling \$2,805 supporting Josh Hawley, which ran from October 9, 2018, to October 15,
15 2016, on the television station WSIL⁴⁶ Subsequently, Ferrell signed an October 3, 2018,
16 “Agreement Form for Non-Candidate/Issue Advertisements” on behalf of AFA to run ads
17 totaling \$25,675 supporting Hawley or attacking his opponent on television station WSIL during
18 the same time period.⁴⁷ The Hawley Committee and AFA ads thus aired on numerous television

⁴³ See Compl., Missouri Ex. L.

⁴⁴ See Compl. Texas Ex. M.

⁴⁵ Compl., Texas Exs. M and N.

⁴⁶ See Compl., Missouri Ex. B.

⁴⁷ Compl., Missouri Ex. D.

1 programs on the same date during this time period, including local news broadcasts airing at 6:00
2 a.m., 6:00 p.m., 6:30 p.m., and 10:00 p.m., respectively, “Good Morning America” and “Jimmy
3 Kimmel Live!”⁴⁸

4 In a previous matter, the Commission found reason to believe that the third element of the
5 common vendor conduct prong was satisfied and investigated where a principal of a common
6 vendor, “while providing consulting services, arranging media buys, and producing television
7 ads” for the candidate committee, was also providing the same services to an organization that
8 supported the candidate.⁴⁹ These dual roles, the Commission explained, placed the principal of
9 the common vendor “in a position to know non-public information regarding” the candidate’s
10 campaign and the organization’s plans for the election cycle and to use or convey that
11 information in advising and guiding both clients, including on issues related to the allocation of
12 resources.⁵⁰

13 Here, the available information similarly indicates that the same National Media official,
14 Ferrell, was involved in the placement of ads for both the AFA and the Hawley, Rosendale and
15 Sessions Committees, putting him in a position to know non-public information that may have
16 informed the placement of the AFA’s ads supporting the aforementioned candidates. And as
17 outlined above, the parallel placement and distribution of the ads by National Media provide
18 additional support for the inference that non-public information about these committees’ plans,
19 activities, and needs influenced National Media’s placement of AFA’s ads.

⁴⁸ See Compl., Missouri Exs. C and E.

⁴⁹ See Factual & Legal Analysis at 3-4, 6-7, 10-11, MUR 5415 (Club for Growth).

⁵⁰ *Id.* The Commission subsequently voted to take no further action, concluding that the investigation produced no evidence of common vendor coordination. See Commission Certification, MUR 5415 (Nov. 12, 2008) (Club for Growth); Third General Counsel’s Report at 15, MUR 5415 (Club for Growth).

Respondent argues that the Commission’s coordination standard is not met here.⁵¹ According to the available information, National Media claims that it adopted and implemented a firewall policy that prohibited the same employees or consultants from performing work relating to more than one client on opposite sides of the firewall, for the same election or race. And AFA attaches to its Response a redacted independent contractor agreement with Red Eagle that includes a “Non-Coordination” provision, which prohibits contacts between the vendor and AFA regarding the plans, projects, activities or needs of a federal candidate, or similarly situated contacts between the vendor and the candidate regarding AFA.⁵² But under its plain terms, the National Media policy does not apply to management or administrative employees such as Ferrell.⁵³ Further, the firewall policy was not signed by any National Media employee, and there are no details regarding when it was distributed and how it was implemented.⁵⁴ And while AFA’s stated policy includes provisions regarding coordinated contacts, Ferrell’s activities on both sides of the firewall during the same time period indicates that the policy was insufficient to ensure that the same employees could not simultaneously perform work for AFA and the candidates at issue in this matter. Under these circumstances, it appears that the firewall policy failed to prevent material information about the candidate’s communication strategies from being

⁵¹ See generally AFA Resp.

⁵² AFA Resp.; Ex. A.

⁵³ Specifically, the firewall policy excludes “employees or consultants who provide exclusively administrative assistance (e.g., reception, clerical, or IT support)” or “employees who perform management functions (e.g., financial, strategic, or corporate leadership) which affect all AMAG clients” from the firewall policy.

⁵⁴ The Commission has stated that a “person paying for a communication seeking to use the firewall safe harbor should be prepared to provide reliable information (*e.g.*, affidavits) about an organization’s firewall, and how and when the firewall was distributed and implemented.” Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

1 used by National Media officials, or passing to AFA, and thus that the firewall safe harbor does
2 not apply.⁵⁵

3 Respondent further contends that the fact that ad buy information is publicly available
4 and disclosed “immediately” through the FCC’s public database renders common vendor
5 coordination legally impossible.⁵⁶ But the third element of the common vendor standard focuses
6 on whether the commercial vendor uses or conveys to the person paying for the communication
7 information that is material to its distribution, irrespective of when the communication airs.⁵⁷
8 Further, the argument that the ad buys were publicly available ignores the key fact that the *same*
9 company and personnel placed ads for both the payor and the candidate committee, belying the
10 contention that the relevant participants relied solely on information in the stations’ public
11 inspection files to make placement decisions. Importantly, Respondent does not argue that they
12 in fact relied on publicly available information to make their ad placement decisions, or even that
13 they were contemporaneously aware of the information in the public inspection files.⁵⁸

14 Another argument advanced is that Ferrell’s signature on the NAB Form PB-18, *i.e.*, the
15 “agreement form,” is merely administrative and that Ferrell does not “authorize” the ad buys
16 placed by National Media’s media buyers. This view insists that the “agreement forms” that bear

⁵⁵ See 11 C.F.R. § 109.21(h).

⁵⁶ See AFA Resp. at 2, MUR 7654. “To qualify for the safe harbor, the person paying for the communication bears the burden of showing that the information used in creating, producing, or distributing the communication was obtained from a publicly available source.” 71 Fed. Reg. at 33,205.

⁵⁷ See 11 C.F.R. § 109.21(d)(4)(iii).

⁵⁸ Respondent’s failure to assert that their ad placement decisions were actually based on information in the stations’ public files distinguishes this matter from MUR 5506 (EMILY’s List). See First General Counsel’s Report at 5-7, MUR 5506 (concluding that the response rebuts allegation of coordination because the committee “states that it made its decisions about placing and pulling ads on information that television stations are required to make public”), Commission Certification, MUR 5506 (Aug. 12, 2005).

1 Ferrell’s signature (NAB Form PB-18) are not contracts, do not authorize the airing or placement
 2 of ads, and have nothing whatsoever to do with the selection of audiences and time slots.
 3 Additionally, it is argued that Ferrell performs an administrative position at National Media and
 4 that his position is one that cannot facilitate coordination. The available information includes a
 5 sworn affidavit from Ferrell, who avers that he is not involved in the creation, production, or
 6 distribution of any advertising and that his interaction with National Media’s buyers generally
 7 consist of receiving billing and invoicing instructions from those buyers.

8 These arguments are not persuasive. As the Commission explained in the context of the
 9 former employee conduct standard, the “use or convey” standard “does not make any distinction
 10 between categories or ranks of employees.”⁵⁹ The Commission specifically declined to limit its
 11 application to “a specified class of employees who are likely to ‘possess material political
 12 information.’”⁶⁰ Such reliance on Ferrell’s allegedly administrative responsibilities lacks
 13 merit.⁶¹

14 Further, according to the National Association of Broadcasters — the entity that created
 15 the ad placement forms themselves — the “agreement forms” Ferrell signed were “*designed to*
 16 *serve as actual contracts for the sale of political broadcast time* and to satisfy FCC record

⁵⁹ See Advisory Opinion 2016-21 at 5 (Great America PAC); *see also* 11 C.F.R. § 109.21(d)(5).

⁶⁰ *Id.* (quoting 68 Fed. Reg. at 437).

⁶¹ *Id.* (The Commission specifically declined to limit its application to “a specified class of employees who are likely to ‘possess material political information.’”).

retention requirements.”⁶² By signing the forms, Ferrell represented in writing that the “payment for the above described broadcast time had been furnished” and that he was “authorized to announce the time as paid” by AFA and the Hawley, Rosendale, and Sessions Committees.⁶³ And even if it could be assumed that such writings were not the “actual contracts” they expressly announce themselves to be, it would not change the fact that Ferrell was manifestly in a position to know when and where the ads were being placed and the cost of the ad placements for both the Hawley, Rosendale, and Sessions Committees and AFA — because he placed them.⁶⁴ This information, together with the pattern of placement of the ads, supports a reasonable inference that National Media used information about the Hawley, Rosendale, and Sessions Committees to place the AFA’s ads supporting these campaigns. And Ferrell’s affidavit disclaiming knowledge of the forms’ contents is contravened by his representations in them and his signatures on them.

Based on the foregoing, the Commission finds reason to believe that America First Action, Inc. and Jon Proch in his official capacity as treasurer violated 52 U.S.C. §§ 30104(b),

⁶² See National Association of Broadcasters, Political Broadcast Agreement Forms, PB-18, available at <https://gab.org/wp-content/uploads/2016/06/pb18-form-final-c1.pdf>. Section 315 of the Communications Act requires broadcasters to retain a record containing the following information in connection with political advertisements: “specific schedules of advertising time by candidates and certain issue advertisers, as well as the final dispositions or ‘deals’ agreed to by the broadcaster and the advertiser in response to any requests.” See About Public Inspection Files, Federal Communications Commission, available at <https://publicfiles.fcc.gov/about-station-profiles/>. The NAB PB-18 form is designed to fulfill this requirement.

⁶³ See, e.g., *Compl.*, Texas Ex. L, Missouri Ex. B, and Montana Ex. C. In fact, Ferrell signed each agreement form as the “agent” of the Hawley, Rosendale, and Sessions Committees, respectively. *Id.*

⁶⁴ The Commission has explained that “common leadership or overlapping administrative personnel does not defeat the use of a firewall policy,” unless there is specific information that it did not prevent the flow of material information. 71 Fed. Reg. at 33,207. As noted above, the facts indicate that Ferrell had access to material information about ad placements for AFA and the Hawley, Rosendale and Sessions Committees, and the pattern of these placements supports an inference that National Media may have used this information to maximize the effect of the ads it placed. This situation stands in contrast to MUR 5823, where the Commission concluded that the common vendor standard was not satisfied because the media buyer vendor provided clerical and administrative support and did not have adequate decision-making control or knowledge of the communications. See Factual & Legal Analysis at 10-11, MUR 5823 (Citizens Club for Growth). The available facts do not support that as a company National Media was retained merely to provide administrative and clerical support for media buys, that it lacked decision-making authority, or that it lacked knowledge of the communications at issue.

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- 1 30116(a), and 30118(a) by making and failing to report excessive and prohibited in-kind
- 2 contributions to the Hawley, Rosendale and Sessions Committees in the form of coordinated
- 3 communications.