

1 **FEDERAL ELECTION COMMISSION**

2 **FIRST GENERAL COUNSEL'S REPORT**

3 **MUR: 7646**

4 DATE COMPLAINT FILED: Sept. 30, 2019

5 DATE OF NOTIFICATION: Oct. 3, 2019

6 LAST RESPONSE RECEIVED: Nov. 20, 2019

7 DATE ACTIVATED: Dec. 3, 2019

8 EXPIRATION OF SOL: Sept. 16, 2024

9 ELECTION CYCLE: 2020

10 **COMPLAINANT:**

11 Maine Democratic Party

12 **RESPONDENTS:**

13 1820 PAC and Thomas Datwyler in his official  
14 capacity as treasurer

15 Collins for Senator and Elizabeth McCandless in  
16 her official capacity as treasurer

17 Susan Collins

18 **RELEVANT STATUTES  
19 AND REGULATIONS:**

20 52 U.S.C. § 30104(b)

21 52 U.S.C. § 30116(a)(1)(A), (a)(7)(B)(iii), (f)

22 11 C.F.R. § 104.3

23 11 C.F.R. § 109.21

24 11 C.F.R. § 109.23

25 11 C.F.R. § 110.1(b)(1)

26 11 C.F.R. § 110.9

27 **INTERNAL REPORTS CHECKED:**

28 Disclosure reports

29 **FEDERAL AGENCIES CHECKED:**

30 None

31 **I. INTRODUCTION**

32 1820 PAC and Thomas Datwyler in his official capacity as treasurer (“1820 PAC”) is an  
33 independent expenditure-only political committee (“IEOPC”) that distributed a television  
34 advertisement supporting the reelection of Maine Senator Susan Collins during the 2020 election  
35 cycle entitled “Maine Tradition,” which 1820 PAC reported as an independent expenditure of  
36 \$276,780. The ad used footage of Collins taken from professional-quality “B-roll” published on  
37 the YouTube page of Collins for Senator and Elizabeth McCandless in her official capacity as  
38 treasurer (the “Committee”), Collins’s authorized committee.

1           The Complaint alleges that 1820 PAC made a prohibited in-kind contribution to Collins  
2 and her Committee, in violation of the Federal Election Campaign Act of 1971, as amended (the  
3 “Act”), by republishing the Committee’s footage of Collins.<sup>1</sup> The Complaint further alleges that  
4 Collins and the Committee may have coordinated with 1820 PAC with respect to the ad and thus  
5 violated the Act by knowingly accepting a prohibited in-kind contribution.<sup>2</sup> 1820 PAC argues  
6 that it did not make an in-kind contribution because its use of the B-roll footage did not  
7 constitute republication, and also contends that it did not coordinate with Collins or the  
8 Committee.<sup>3</sup> Collins and the Committee argue that the Complaint fails to allege sufficient facts  
9 to infer coordination.<sup>4</sup>

10           As discussed below, the facts supporting the allegation that 1820 PAC republished  
11 campaign materials are uncontested; 1820 PAC admits to producing and paying to distribute a  
12 30-second ad in which it incorporated 22 continuous seconds of the Collins B-roll taken from the  
13 Committee’s YouTube page.<sup>5</sup> Republication of campaign materials is considered a contribution  
14 for purposes of the contribution limitations and reporting responsibilities of the person making  
15 the expenditure.<sup>6</sup> Accordingly, we recommend that the Commission find reason to believe that  
16 1820 PAC violated 52 U.S.C. § 30116(a)(1)(A) and 11 C.F.R. § 110.1(b)(1) by making an  
17 excessive in-kind contribution to Collins and the Committee and violated 52 U.S.C. § 30104(b)  
18 and 11 C.F.R. § 104.3(b) by failing to report the in-kind contribution. In addition, we  
19 recommend that the Commission enter into pre-probable cause conciliation with 1820 PAC.

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<sup>1</sup> Compl. at 1-2 (Sept. 30, 2019).

<sup>2</sup> *Id.* at 3-4.

<sup>3</sup> 1820 PAC Resp. at 3-4 (Nov. 22, 2019).

<sup>4</sup> Collins & Committee Resp. at 1, 3 (Oct. 28, 2019).

<sup>5</sup> 1820 PAC Resp. at 2.

<sup>6</sup> 52 U.S.C. § 30116(a)(7)(B)(iii); 11 C.F.R. § 109.23(a).

1           The available information, however, does not support reason to believe that Collins and  
2 the Committee knowingly accepted the contribution from 1820 PAC, because there is  
3 insufficient information to conclude that the republication was a “coordinated communication.”<sup>7</sup>  
4 As discussed below, the record before the Commission does not include any specific information  
5 to satisfy the coordinated communication “conduct” requirement and 1820 PAC provided  
6 affidavits denying that they coordinated with Collins or the Committee. Thus, we recommend  
7 that the Commission dismiss the allegations that Collins and Committee violated 52 U.S.C.  
8 § 30116(f) and 11 C.F.R. § 110.9 by knowingly accepting an excessive contribution, and that the  
9 Committee violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(a) and by failing to report an in-  
10 kind contribution.

## 11   **II.   FACTUAL BACKGROUND**

12           Susan Collins is a 2020 candidate for the U.S. Senate from Maine, and Collins for  
13 Senator is her authorized campaign committee.<sup>8</sup> 1820 PAC is an IEOPC that registered with the  
14 Commission on March 1, 2019.<sup>9</sup> As of the date of this Report, 1820 PAC has reported making  
15 five independent expenditures totaling \$1,703,692 during the 2020 election cycle — all in  
16 support of Collins — including the \$276,780 expenditure associated with producing and  
17 distributing the ad at issue in this matter.<sup>10</sup>

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<sup>7</sup> 11 C.F.R. § 109.23(a).

<sup>8</sup> Susan Collins Amended Statement of Candidacy (Oct. 9, 2019) (current filing); Susan Collins Amended Statement of Candidacy (Sept. 15, 2015) (initial filing for 2020 election cycle); Collins for Senator Amended Statement of Org. (Sept. 9, 2019) (current filing).

<sup>9</sup> 1820 PAC Statement of Org. (Mar. 1, 2019).

<sup>10</sup> See 1820 PAC 48-Hour Rpt. (Sept. 16, 2019) (\$276,780); 48-Hour Rpt. (Sept. 20, 2019) (\$11,705); 48-Hour Rpt. (Dec. 3, 2019) (\$398,169); 48-Hour Rpt. (Dec. 7, 2019) (\$14,290); 48-Hour Rpt. (Mar. 10, 2020) (\$1,002,748).

1           On July 18, 2019, the Committee published a 6-minute video on its YouTube page  
2 entitled “Susan Collins – 2019 4k footage” comprised of different segments of video showing  
3 Collins interacting with individuals in various settings, such as a factory, pharmacy, and school,  
4 as well as footage of Collins working in her office.<sup>11</sup> The Collins B-roll is set to music and has  
5 no audible dialogue or overlaid text other than the words “our senator Susan Collins” and “paid  
6 for by Collins for Senator” that appear in the final 4 seconds of the video. The Committee has  
7 used portions of the Collins B-roll footage in several of its own ads.<sup>12</sup>

8           On September 16, 2019, 1820 PAC made an independent expenditure of \$276,780 in  
9 support of Collins for a television ad entitled “Maine Tradition.”<sup>13</sup> The ad was 30 seconds long  
10 and incorporated 22 continuous seconds of the Collins B-roll overlaid with a voiceover and on-

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<sup>11</sup> Compl. at 2; Collins4Senator, *Susan Collins – 2019 4k footage*, YOUTUBE (July 18, 2019), <https://www.youtube.com/watch?v=h0mT9P9tAFc> (“Collins B-roll”) (showing Collins in a number of typical settings, such as talking to individuals and touring businesses).

<sup>12</sup> *E.g.*, Collins4Senator, *Making a Difference for Maine’s Future*, YOUTUBE (Jan. 8, 2020), <https://www.youtube.com/watch?v=U6-Je7Xt2QY> (speaking to children in a school at 0:01-0:08 and 0:25-0:26, from Collins B-roll at 2:17-2:46); *Making Prescription Drugs More Affordable*, YOUTUBE (Nov. 13, 2019), [https://www.youtube.com/watch?v=3\\_7rMNpQCXE](https://www.youtube.com/watch?v=3_7rMNpQCXE) (speaking to constituents in a pharmacy at 0:07-0:17, from Collins B-roll at 3:38-4:32); Collins4Senator, *Flooding Maine*, YOUTUBE (July 18, 2019), <https://www.youtube.com/watch?v=LbEoIeYAjIM> (speaking in a manufacturing facility at 0:18-0:23, from Collins B-roll at 1:19-1:46); Collins4Senator, *Challenging Times*, YOUTUBE (Nov. 13, 2019), [https://www.youtube.com/watch?v=DBui4P\\_P0AQ](https://www.youtube.com/watch?v=DBui4P_P0AQ) (incorporating footage included in the “Flooding Maine” ad); Collins4Senator, *Challenging Times* [alternate version], YOUTUBE (Nov. 13, 2019), <https://www.youtube.com/watch?v=Y5V6bsKckuQ> (speaking to constituents at 0:09-0:11, from Collins B-roll at 2:47-3:37); Collins4Senator, *Senator Susan Collins – A Champion for Maine’s Working Families*, YOUTUBE (Sept. 25, 2019), <https://www.youtube.com/watch?v=80nREe2rXsQ> (speaking to a constituent at her desk at 0:10-0:13, from Collins B-roll at 5:31-5:40; visiting a snow shovel factory at 0:39-0:44, from Collins B-roll at 0:00-0:49; and the same portions of the Collins B-roll included in the ads “Challenging Times,” “Making Prescription Drugs More Affordable,” “Flooding Maine,” and “Making a Difference for Maine’s Future”).

<sup>13</sup> 1820 PAC 48-Hour Rpt. (Sept. 16, 2019) (reporting \$276,780 disbursement to its media vendor, SCRP Media, for placing the ad); 1820 PAC 48-Hour Rpt. (Sept. 20, 2019) (reporting \$11,705 disbursement to SCRP Media for production of the ad).

1 screen text describing the candidate's policy positions and her work supporting the interests of  
2 constituents in Maine.<sup>14</sup> The footage included various scenes from the Collins B-roll.<sup>15</sup>

3 1820 PAC acknowledges that it used "20 seconds" of the Collins B-roll in "Maine  
4 Tradition."<sup>16</sup> Nonetheless, 1820 PAC argues that this use did not constitute republication or  
5 coordination because the "unfinished" B-roll "is of no value" without 1820 PAC's incorporation  
6 of its own message and "the messages, graphics, narration, and script were developed entirely by  
7 [1820 PAC] with no consultation, discussion, or involvement with the Collins campaign or any  
8 person representing the Collins campaign."<sup>17</sup> The 1820 PAC Response attaches affidavits from  
9 the Chairman of 1820 PAC and an official from SCRIP Media, the media vendor that produced  
10 and disseminated the ad, denying there was any coordination with Collins or the Committee.<sup>18</sup>  
11 Collins and the Committee argue that the Complaint "does not allege any facts or other  
12 information suggesting coordination."<sup>19</sup>

### 13 III. LEGAL ANALYSIS

14 The Act prohibits any person from making, and any candidate or committee from  
15 knowingly accepting, an excessive contribution.<sup>20</sup> For the 2020 election cycle, contributions by  
16 persons other than multicandidate committees to any candidate and his or her authorized political

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<sup>14</sup> Compl. at 1-2; 1820 PAC Resp. at 2. The video was also published on 1820 PAC's YouTube channel. 1820 PAC, *Maine Tradition*, YOUTUBE (Oct. 29, 2019), [https://www.youtube.com/watch?v=58R8\\_j\\_Bn6k](https://www.youtube.com/watch?v=58R8_j_Bn6k) ("Maine Tradition").

<sup>15</sup> *Compare* Maine Tradition at 0:00-0:07, 0:08-0:12, 0:13-0:15, 0:16-0:20, 0:21-0:22, *with* Collins B-roll at 5:24-5:40 (taking a meeting and a phone call in an office in front of the Maine flag), 2:47-3:36 (speaking with senior citizens), 5:44-5:53 (meeting with veterans), 0:01-1:58 (visiting two factories), 4:18-4:24 (speaking to a pharmacist).

<sup>16</sup> 1820 PAC Resp., Attach. 1 ¶ 9 (Aff. of Erik Potholm, Partner, SRCPmedia) ("Potholm Affidavit").

<sup>17</sup> 1820 PAC Resp. at 3-4.

<sup>18</sup> Potholm Affidavit; 1820 PAC Resp., Attach. 2 (Aff. of Scott Reed, Chairman, 1820 PAC) ("Reed Affidavit").

<sup>19</sup> Collins & Committee Resp. at 1.

<sup>20</sup> 52 U.S.C. § 30116(a), (f); 11 C.F.R. §§ 110.1(b)(1), 110.9.

1 committees are limited to \$2,800 per election.<sup>21</sup> Committee treasurers are required to disclose  
2 the identification of each person who makes one or more contributions to the committee  
3 aggregating in excess of \$200 within the calendar year (or election cycle, in the case of an  
4 authorized committee), together with the date and amount of any such contribution.<sup>22</sup> If a  
5 committee makes a contribution, it shall disclose the name and address of the recipient.<sup>23</sup>

6 Under the Act, “the financing by any person of the dissemination, distribution, or  
7 republication, in whole or in part, of any broadcast or any written, graphic, or other form of  
8 campaign materials prepared by the candidate, his campaign committees, or their authorized  
9 agents shall be considered to be an expenditure.”<sup>24</sup> Commission regulations further provide that  
10 the republication of campaign materials “shall be considered a contribution for the purposes of  
11 contribution limitations and reporting responsibilities of the person making the expenditure.”<sup>25</sup>  
12 Under Commission regulations, however, the candidate who prepared the materials is not  
13 considered to have received an in-kind contribution and is not required to report an expenditure  
14 unless the dissemination, distribution, or republication of campaign materials is a coordinated  
15 communication or a party coordinated communication.<sup>26</sup>

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<sup>21</sup> 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1)(i); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019). Multicandidate committees are subject to separate limits. *See* 52 U.S.C. § 30116(a)(2).

<sup>22</sup> 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a).

<sup>23</sup> 52 U.S.C. § 30104(b)(6)(B)(i); 11 C.F.R. § 104.3(b).

<sup>24</sup> 52 U.S.C. § 30116(a)(7)(B)(iii). Expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate. *Id.* § 30116(a)(7)(B)(i).

<sup>25</sup> 11 C.F.R. § 109.23(a).

<sup>26</sup> *Id.*; *see also id.* § 109.21 (coordinated communications); § 109.37 (party coordinated communications).

1           **A. The Commission Should Find Reason to Believe that 1820 PAC Made an**  
2           **Excessive In-Kind Contribution to Collins and the Committee**

3           The information in the record before the Commission supports the conclusion that 1820  
4 PAC republished Collins's and her Committee's campaign materials. 1820 PAC acknowledges  
5 that it used portions of the Collins B-roll taken from the Committee's YouTube page for two-  
6 thirds of the visual content in "Maine Tradition" and that it paid \$276,780 to disseminate "Maine  
7 Tradition" on television.<sup>27</sup> Because 1820 PAC republished campaign materials, its payment to  
8 disseminate the ad was an in-kind contribution to Collins and the Committee for the purposes of  
9 1820 PAC's contribution limitations and reporting responsibilities.<sup>28</sup> The amount of the in-kind  
10 contribution exceeds the applicable limit and 1820 PAC incorrectly reported it as an independent  
11 expenditure, thus resulting in violations of the Act and Commission regulations.<sup>29</sup> 1820 PAC,  
12 however, makes several arguments contending that its use of Committee footage was not a  
13 republication of campaign materials. None of these arguments is persuasive.

14           First, 1820 PAC argues that it did not "republish" the Collins B-roll because  
15 republication requires "the wholesale adoption and dissemination" of campaign materials and  
16 1820 PAC used only a "tiny portion" of the 6-minute Collins B-roll.<sup>30</sup> To the contrary, the  
17 statute and the regulation both expressly include partial republication, by defining republication  
18 to mean "the dissemination, distribution, or republication, *in whole or in part*, of any . . .  
19 campaign materials."<sup>31</sup> The Commission explained, when adopting the republication rules, that  
20 Congress had meant the republication provision to apply "in a context where the

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<sup>27</sup> 1820 PAC Resp. at 1 (admitting that 30-second video uses 20 seconds of Collins B-roll).

<sup>28</sup> See 11 C.F.R. § 109.23(a).

<sup>29</sup> See 52 U.S.C. §§ 30116(a)(1)(A), 30104(b)(3)(A); 11 C.F.R. §§ 110.1(b)(1)(i), 110.4(b).

<sup>30</sup> 1820 PAC Resp. at 3.

<sup>31</sup> 52 U.S.C. § 30116(a)(7)(B)(iii) (emphasis added); 11 C.F.R. § 109.23(a) (same).

1 candidate/author generally views the republication of his or her campaign materials, *even in part*,  
2 as a benefit.”<sup>32</sup> Moreover, while the regulation provides an exemption for “a brief quote of  
3 materials that demonstrate a candidate’s position as part of a person’s expression of its own  
4 views,”<sup>33</sup> the 30-second “Maine Tradition” ad uses 22 continuous seconds (two-thirds) of  
5 footage from the Collins B-roll. Accordingly, 1820 PAC’s use of campaign material for two-  
6 thirds of its communication’s visual content is not a “brief” use.<sup>34</sup> Furthermore, the Commission  
7 has explained that the “brief quote” exemption is designed to “illustrate a candidate’s position on  
8 an issue,” but the scenes of Collins used in the ad, which 1820 PAC claims were “meaningless,”  
9 do not appear to illustrate Collins’s position on any issue.<sup>35</sup> Indeed, the Collins B-roll did not  
10 contain any statements by the candidate, and thus it does not appear that the footage incorporated  
11 into “Maine Tradition” was a “quote” capable of demonstrating Collins’s position. In sum, 1820  
12 PAC’s use of campaign materials does not satisfy the exemption, but rather fits squarely within  
13 the parameters for republication that the Commission has established.<sup>36</sup>

14         Second, 1820 PAC essentially argues that the Collins B-roll is not “campaign materials”  
15 because it is “unfinished”; 1820 PAC asserts that republication implies the dissemination of  
16 “finished campaign products” and, more specifically, that the use of “unfinished” footage such as

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<sup>32</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 443 (Jan. 3, 2003) (“Coordinated and Independent Expenditures E&J”) (emphasis added) (explaining why Commission was not importing from intellectual property law a “fair use” exception for a candidate’s supporter’s republication of “limited portions of campaign materials” because Congress’s purpose in the Act was unlike the intellectual property law arena in which “republication of another person’s work is generally viewed as undesirable by the original author”).

<sup>33</sup> 11 C.F.R. § 109.23(b)(4).

<sup>34</sup> *See, e.g.*, Brief, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/brief> (accessed May 29, 2020) (defining “brief” as “short in duration, extent, or length”). In the context of the 30 second video at issue, the 22 second use of the B-roll is not short in duration but rather comprises more than 70% of the whole.

<sup>35</sup> Coordinated and Independent Expenditures E&J at 443; 1820 PAC Resp. at 2.

<sup>36</sup> *Accord* First Gen. Counsel’s Rpt. at 10, MURs 7666 & 7675 (Peters for Michigan, *et al.*) (similarly analyzing use of B-roll and other materials).



1 B-roll does not result in a violation “where the messages, content, and communications of the Ad  
2 were [] solely the product of [1820 PAC’s] analysis and work.”<sup>37</sup> However, the statute and  
3 regulation state that republication includes “any” form of campaign materials, without conditions  
4 on the finished state of the materials.<sup>38</sup> Further, the Commission has explained that the  
5 republication provision is meant to apply “where the candidate/author generally views the  
6 republication of his or her campaign materials, even in part, *as a benefit*.”<sup>39</sup> To the extent that  
7 the Committee made the B-roll available on its public YouTube page so that groups could use  
8 the footage for the benefit of the candidate, that is precisely what 1820 PAC did here by using  
9 the footage to create a TV ad that expressly advocated for Collins’s re-election.<sup>40</sup>

10 Third, 1820 PAC argues that the republication provision does not apply to the “use of  
11 publicly available” campaign materials.<sup>41</sup> This argument is also unpersuasive. In promulgating  
12 the regulation, the Commission specifically rejected a request to adopt a public domain exception  
13 to republication, explaining that “virtually all campaign material that could be republished” may  
14 be considered in the public domain, and therefore such an exception could “swallow the rule.”<sup>42</sup>  
15 1820 PAC also references “a safe harbor for the use of publicly available information,” but the

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<sup>37</sup> 1820 PAC Resp. at 3 (“The few seconds of b-roll used by the Committee is of no value absent the Committee’s incorporation of its own messages, its own narrative, its own decisions about what to say, how to say it, and where to place the Ad for viewing by the voters.”).

<sup>38</sup> 52 U.S.C. § 30116(a)(7)(B)(iii); 11 C.F.R. § 109.23(a).

<sup>39</sup> Coordinated and Independent Expenditures E&J at 443.

<sup>40</sup> The B-roll is a composite of professionally-shot video produced by the campaign in order to present Collins in a way that the Committee deemed appealing, including through its choices of settings, imagery, participants, and the way Collins herself is presented, all choices that reflect the Committee’s desired electoral messaging. Even if 1820 PAC supplemented the Committee’s message with its own, it does not deprive the extended use of the source footage of its communicative content. 1820 PAC did not simply use inconsequential raw material to devise an entirely new message, but rather used its resources to further disseminate materials that the Committee had spent its limited resources to produce and publish in order to present Senator Collins in its chosen light.

<sup>41</sup> 1820 PAC Resp. at 2.

<sup>42</sup> Coordinated and Independent Expenditures E&J at 442-43 (internal quotation marks omitted). The Commission also rejected a “fair use” exception.” *Id.* at 443.

1 purported safe harbor that 1820 PAC cites does not apply to the republication regulation at  
 2 11 C.F.R. § 109.23 regarding whether a person republished campaign materials.<sup>43</sup>

3 In sum, because 1820 PAC paid to republish campaign materials, its payment for the  
 4 communication is treated as in-kind contribution for purposes of its contribution limitations and  
 5 reporting requirements. Therefore, we recommend that the Commission find reason to believe  
 6 that 1820 PAC violated 52 U.S.C. § 30116(a)(1)(A) and 11 C.F.R. § 110.1(b)(1) by making an  
 7 excessive in-kind contribution and violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(b) by  
 8 failing to report an in-kind contribution.<sup>44</sup>

9 **B. The Commission Should Dismiss the Allegations That Collins and the**  
 10 **Committee Accepted an Excessive In-Kind Contribution from 1820 PAC**

11 As noted above, the candidate, candidate's authorized committee, or an agent of either  
 12 who prepared the campaign material does not accept an in-kind contribution from a person who  
 13 republishes those materials, and is not required to report an in-kind contribution, unless the  
 14 republication of candidate campaign materials is a "coordinated communication."<sup>45</sup>

15 Commission regulations provide a three-part test for determining when a communication  
 16 is a "coordinated communication."<sup>46</sup> The communication must: (1) be paid for by a third party;  
 17 (2) satisfy one of the five enumerated "content" standards; and (3) satisfy one of the five

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<sup>43</sup> 1820 Resp. at 3 (citing 11 C.F.R. § 109.21(d)(2)-(5)); *see also* 11 C.F.R. § 109.21(d)(2)-(5) (clarifying that information material to the creation, production, or distribution of the communication obtained from a publicly available source will not satisfy four of the "conduct" standards of section 109.21).

<sup>44</sup> The Commission has considered republication allegations relating to B-roll footage in previous matters, resulting in split votes on whether to approve reason to believe recommendations. *See, e.g.*, MUR 6357 (American Crossroads) (10-15 seconds of B-roll in a 30-second TV ad); MUR 6603 (Ben Chandler for Congress) (17 seconds of B-roll in a 30-second TV ad); MUR 6667 (House Majority PAC) (11 seconds of B-roll in a 33-second TV ad); MUR 7185 (Sheriff Scott Jones for Congress) (13-14 seconds of B-roll in a 30-second TV ad); MUR 6801 (Senate Majority PAC) (16 seconds of B-roll in a 30-second TV ad). We note that 1820 PAC used more B-roll footage, as a percentage of its communication's content, than the payors of the communications the Commission considered in any of these prior matters.

<sup>45</sup> 11 C.F.R. § 109.23(a) (citing 11 C.F.R. § 109.21).

<sup>46</sup> *Id.* § 109.21(a).

1 enumerated “conduct” standards.<sup>47</sup> All three prongs are required to be satisfied for a  
 2 communication to be considered a coordinated communication.<sup>48</sup> With respect to  
 3 communications that satisfy the content standard by republication of campaign materials, three  
 4 of the conduct prong standards — request or suggest, material involvement, and substantial  
 5 discussion — may be satisfied only on the basis of conduct between the campaign and third party  
 6 “that occurs after the original preparation of the campaign materials that are disseminated,  
 7 distributed, or republished.”<sup>49</sup>

8 1. Payment

9 The payment prong is satisfied where a communication “[i]s paid for, in whole or in part,  
 10 by a person other than [the] candidate, authorized committee, or political party committee.”<sup>50</sup>  
 11 That prong is satisfied here because 1820 PAC admits that it paid \$276,780 to distribute “Maine  
 12 Tradition” and filed 48-Hour Reports disclosing the expenditure.<sup>51</sup>

13 2. Content

14 The content prong is satisfied if, *inter alia*, the communication is a “public  
 15 communication” that “disseminates, distributes, or republishes in whole or in part, campaign  
 16 materials prepared by a candidate or the candidate’s authorized committee unless the  
 17 dissemination, distribution, or republication is excepted under 11 C.F.R. § 109.23(b).”<sup>52</sup>  
 18 Television ads are included within the definition of “public communication,” and “Maine

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<sup>47</sup> *Id.* (referencing content and conduct standards at 11 C.F.R. § 109.21(c) and (d), respectively)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* § 109.21(d)(6).

<sup>50</sup> *Id.* § 109.21(a)(1).

<sup>51</sup> *Supra* notes 5, 10.

<sup>52</sup> 11 C.F.R. § 109.21(c)(2).

1 Tradition,” as described above, was a television advertisement that republished campaign  
2 materials.<sup>53</sup> Further, none of the section 109.23(b) exceptions apply here.<sup>54</sup>

3 3. Conduct

4 The conduct prong is satisfied by one of five types of interactions between the payor and  
5 the candidate or campaign regarding the communication: a request or suggestion, material  
6 involvement, substantial discussion, use of a common vendor, or involvement of a former  
7 employee or independent contractor.<sup>55</sup>

8 The Complaint does not allege any facts regarding interactions between 1820 PAC and  
9 the Committee (including through common vendors or former employees) about the ad or use of  
10 the Collins B-roll that might satisfy any of the conduct standards at section 109.21(d). Indeed,  
11 the Complaint merely urges the Commission to “investigate whether Senator Collins and Collins  
12 for Senator may have coordinated with 1820 PAC.”<sup>56</sup> 1820 PAC denies engaging in any  
13 discussions about “the messages, graphics, narration, and script,” and has submitted affidavits  
14 from its Chairman and from a representative of the vendor that prepared “Maine Tradition”

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<sup>53</sup> A public communication is “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” 52 U.S.C. § 30101(22) (definition of public communication); 11 C.F.R. § 100.26 (same).

<sup>54</sup> 11 C.F.R. § 109.23(b) (listing exceptions for the following situations: (1) the campaign material is republished by the campaign that initially prepared the material; (2) the campaign material is incorporated into a communication that advocates the defeat of the candidate; (3) the campaign material is subject to the press exemption; (4) the campaign material used consists of a brief quote of materials that demonstrate a candidate’s position as part of a person’s expression of its own views; or (5) a national, state, or local party committee pays for the republication of campaign materials using coordinated party expenditure authority under 11 C.F.R. § 109.32).

<sup>55</sup> *See id.* § 109.21(d)(1)-(5); *see also id.* 109.21(e) (stating that an agreement or formal collaboration “is not required for a communication to be a coordinated communication”).

<sup>56</sup> Compl. at 5.

1 denying coordination<sup>57</sup> The information before the Commission, therefore, does not indicate that  
 2 the conduct prong is satisfied.

3 \* \* \*

4 In conclusion, the available information is insufficient to support a reasonable inference  
 5 that all three prongs of the coordinated communication test are satisfied.<sup>58</sup> Accordingly, we  
 6 recommend that the Commission dismiss the allegations that Collins and the Committee violated  
 7 52 U.S.C. § 30116(f) and 11 C.F.R. § 110.9 by knowingly accepting an excessive in-kind  
 8 contribution from 1820 PAC, and that the Committee violated 52 U.S.C. § 30104(b) and 11  
 9 C.F.R. § 104.3(a) and by failing to report the in-kind contribution.

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<sup>57</sup> 1820 PAC Resp. at 3 (citing affidavits from Erik Potholm and Scott Reed). Erik Potholm, a partner from SCRPmedia, the vendor who produced “Maine Tradition,” avers that there were no communications by anyone from SCRPmedia with Collins or the Committee “requesting or suggesting that we develop the Ad” or about “obtaining the footage used in the Ad or the messages and narration in the Ad.” Potholm Aff. ¶ 11. Scott Reed, Chairman of 1820 PAC who was involved in creating the ad, attests that “[n]o person from the Collins campaign suggested or requested that the 1820 PAC develop, produce, or disseminate the Ad.” Reed Aff. ¶ 5. Reed also attests that “[he has] not had any material involvement or substantial discussion with any person involved with the Collins campaign on any subject.” *Id.* ¶ 6.

<sup>58</sup> See 11 C.F.R. § 109.21(a).

1 **V. RECOMMENDATIONS**

- 2 1. Find reason to believe that 1820 PAC violated 52 U.S.C. § 30116(a)(1)(A) and 11  
 3 C.F.R. § 110.1(b)(1) by making an excessive in-kind contribution and violated 52  
 4 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(b) by misreporting the in-kind  
 5 contribution as an independent expenditure;
- 6 2. Dismiss the allegations that Susan Collins and Collins for Senator and Elizabeth  
 7 McCandless in her official capacity as treasurer violated 52 U.S.C. § 30116(f) and  
 8 11 C.F.R. § 110.9 by knowingly accepting an excessive in-kind contribution;
- 9 3. Dismiss the allegation that Collins for Senator and Elizabeth McCandless in her  
 10 official capacity as treasurer violated 52 U.S.C. § 30104(b) and 11 C.F.R.  
 11 § 104.3(a) by failing to report an in-kind contribution;
- 12 4. Approve the attached Factual and Legal Analyses;
- 13 5. Enter into pre-probable cause conciliation with 1820 PAC and Thomas Datwyler  
 14 in his official capacity as treasurer;
- 15 6. Approve the attached proposed Conciliation Agreement; and
- 16 7. Approve the appropriate letters.

17 Lisa J. Stevenson  
 18 Acting General Counsel

19  
 20  
 21 June 4, 2020  
 22 Date

23 *Charles Kitcher*  
 24 \_\_\_\_\_  
 25 Charles Kitcher  
 26 Acting Associate General Counsel for Enforcement

27 *Claudio Pavia*  
 28 \_\_\_\_\_  
 29 Claudio J. Pavia  
 30 Acting Assistant General Counsel

31 *Ray Wolcott*  
 32 \_\_\_\_\_  
 33 Ray Wolcott  
 34 Attorney  
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Cooksey Edits

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

RESPONDENT: Collins for Senator and Elizabeth McCandless in MUR 7646  
her official capacity as treasurer  
Susan Collins

**I. INTRODUCTION**

1820 PAC is an independent expenditure-only political committee (“IEOPC”) that distributed a television advertisement supporting the reelection of Maine Senator Susan Collins during the 2020 election cycle entitled “Maine Tradition,” which 1820 PAC reported as an independent expenditure of \$276,780. The ad used footage of Collins taken from professional-quality “B-roll” published on the YouTube page of Collins for Senator and Elizabeth McCandless in her official capacity as treasurer (the “Committee”), Collins’s authorized committee.

This matter was generated by a Complaint filed with the Federal Election Commission by the Maine Democratic Party alleging that 1820 PAC made a prohibited in-kind contribution to Collins and her Committee, in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”), by republishing the Committee’s footage of Collins.<sup>1</sup> The Complaint further alleges that Collins and the Committee may have coordinated with 1820 PAC with respect to the ad and thus violated the Act by knowingly accepting a prohibited in-kind contribution.<sup>2</sup> Collins and the Committee argue that the Complaint fails to allege sufficient facts to infer coordination.<sup>3</sup>

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<sup>1</sup> Compl. at 1-2 (Sept. 30, 2019).

<sup>2</sup> *Id.* at 3-4.

<sup>3</sup> Collins & Committee Resp. at 1, 3 (Oct. 28, 2019).

1 As discussed below, the facts supporting the allegation that 1820 PAC republished  
2 campaign materials are uncontested. The available information, however, does not support  
3 reason to believe that the Committee knowingly accepted the contribution from 1820 PAC,  
4 because there is insufficient information to conclude that the republication was a “coordinated  
5 communication.”<sup>4</sup> The record before the Commission does not include any specific information  
6 to satisfy the coordinated communication “conduct” requirement. Thus, the Commission finds  
7 no reason to believe that Collins and the Committee violated 52 U.S.C. § 30116(f) and 11 C.F.R.  
8 § 110.9 by knowingly accepting an excessive contribution or that the Committee violated  
9 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(a) by failing to report an in-kind contribution.

## 10 II. FACTUAL BACKGROUND

11 Susan Collins was a 2020 candidate for the U.S. Senate from Maine, and Collins for  
12 Senator is her authorized campaign committee.<sup>5</sup> 1820 PAC is an IEOPC that registered with the  
13 Commission on March 1, 2019.<sup>6</sup> 1820 PAC reported multiple independent expenditures during  
14 the 2020 election cycle in support of Collins, including the \$276,780 expenditure associated with  
15 producing and distributing the ad at issue in this matter.<sup>7</sup>

16 On July 18, 2019, the Committee published a 6-minute video on its YouTube page  
17 entitled “Susan Collins – 2019 4k footage” comprised of different segments of video showing

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<sup>4</sup> 11 C.F.R. § 109.23(a).

<sup>5</sup> Susan Collins Amended Statement of Candidacy (Oct. 9, 2019) (current filing); Susan Collins Amended Statement of Candidacy (Sept. 15, 2015) (initial filing for 2020 election cycle); Collins for Senator Amended Statement of Org. (Sept. 9, 2019) (current filing).

<sup>6</sup> 1820 PAC Statement of Org. (Mar. 1, 2019).

<sup>7</sup> *See, e.g.*, 1820 PAC 48-Hour Rpt. (Sept. 16, 2019) (\$276,780); 48-Hour Rpt. (Sept. 20, 2019) (\$11,705); 48-Hour Rpt. (Dec. 3, 2019) (\$398,169); 48-Hour Rpt. (Dec. 7, 2019) (\$14,290); 48-Hour Rpt. (Mar. 10, 2020) (\$1,002,748).



1 Collins interacting with individuals in various settings, such as a factory, pharmacy, and school,  
2 as well as footage of Collins working in her office.<sup>8</sup> The Collins B-roll is set to music and has  
3 no audible dialogue or overlaid text other than the words “our senator Susan Collins” and “Paid  
4 for by Collins for Senator” that appear in the final four seconds of the video. The Committee has  
5 used portions of the Collins B-roll footage in several of its own ads.<sup>9</sup>

6 On September 16, 2019, 1820 PAC made an independent expenditure of \$276,780 in  
7 support of Collins for a television ad entitled “Maine Tradition.”<sup>10</sup> The ad was 30 seconds long  
8 and incorporated 22 continuous seconds of the Collins B-roll overlaid with a voiceover and on-  
9 screen text describing the candidate’s policy positions and her work supporting the interests of  
10 constituents in Maine.<sup>11</sup>

11 The Committee argues that even if 1820 PAC did republish its campaign materials, the  
12 Committee “cannot be liable for 1820 PAC’s alleged republication” unless the ad was a

<sup>8</sup> Compl. at 2; Collins4Senator, *Susan Collins – 2019 4k footage*, YOUTUBE (July 18, 2019), <https://www.youtube.com/watch?v=h0mT9P9tAFc> (“Collins B-roll”) (showing Collins in a number of typical settings, such as talking to individuals and touring businesses).

<sup>9</sup> *E.g.*, Collins4Senator, *Making a Difference for Maine’s Future*, YOUTUBE (Jan. 8, 2020), <https://www.youtube.com/watch?v=U6-Je7Xt2QY> (speaking to children in a school at 0:01-0:08 and 0:25-0:26, from Collins B-roll at 2:17-2:46); *Making Prescription Drugs More Affordable*, YOUTUBE (Nov. 13, 2019), [https://www.youtube.com/watch?v=3\\_7rMNpQCXE](https://www.youtube.com/watch?v=3_7rMNpQCXE) (speaking to constituents in a pharmacy at 0:07-0:17, from Collins B-roll at 3:38-4:32); Collins4Senator, *Flooding Maine*, YOUTUBE (July 18, 2019), <https://www.youtube.com/watch?v=LbEoIeYAjIM> (speaking in a manufacturing facility at 0:18-0:23, from Collins B-roll at 1:19-1:46); Collins4Senator, *Challenging Times*, YOUTUBE (Nov. 13, 2019), [https://www.youtube.com/watch?v=DBui4P\\_P0AQ](https://www.youtube.com/watch?v=DBui4P_P0AQ) (incorporating footage included in the “Flooding Maine” ad); Collins4Senator, *Challenging Times* [alternate version], YOUTUBE (Nov. 13, 2019), <https://www.youtube.com/watch?v=Y5V6bsKckuQ> (speaking to constituents at 0:09-0:11, from Collins B-roll at 2:47-3:37); Collins4Senator, *Senator Susan Collins – A Champion for Maine’s Working Families*, YOUTUBE (Sept. 25, 2019), <https://www.youtube.com/watch?v=80nREe2rXsQ> (speaking to a constituent at her desk at 0:10-0:13, from Collins B-roll at 5:31-5:40; visiting a snow shovel factory at 0:39-0:44, from Collins B-roll at 0:00-0:49; and the same portions of the Collins B-roll included in the ads “Challenging Times,” “Making Prescription Drugs More Affordable,” “Flooding Maine,” and “Making a Difference for Maine’s Future”).

<sup>10</sup> 1820 PAC 48-Hour Rpt. (Sept. 16, 2019) (reporting \$276,780 disbursement to its media vendor, SCRIP Media, for placing the ad); 1820 PAC 48-Hour Rpt. (Sept. 20, 2019) (reporting \$11,705 disbursement to SCRIP Media for production of the ad).

<sup>11</sup> Compl. at 1-2. The video was also published on 1820 PAC’s YouTube channel. 1820 PAC, *Maine Tradition*, YOUTUBE (Oct. 29, 2019), [https://www.youtube.com/watch?v=58R8\\_j\\_Bn6k](https://www.youtube.com/watch?v=58R8_j_Bn6k) (“Maine Tradition”).

1 coordinated communication.<sup>12</sup> The Committee argues that the Complaint “does not allege any  
2 facts or other information suggesting coordination,” and therefore the Commission should find  
3 no reason to believe that the Committee violated the Act.<sup>13</sup>

### 4 **III. LEGAL ANALYSIS**

5 The Act prohibits any candidate or committee from knowingly accepting an excessive  
6 contribution.<sup>14</sup> For the 2020 election cycle, contributions by persons other than multicandidate  
7 committees to any candidate and his or her authorized political committees were limited to  
8 \$2,800 per election.<sup>15</sup> Committee treasurers are required to disclose the identification of each  
9 person who makes one or more contributions to the committee aggregating in excess of \$200  
10 within the calendar year (or election cycle, in the case of an authorized committee), together with  
11 the date and amount of any such contribution.<sup>16</sup>

12 Under the Act, “expenditures made by any person in cooperation, consultation, or  
13 concert, with, or at the request or suggestion of, a candidate, his authorized political committees,  
14 or their agents, shall be considered to be a contribution to such candidate.”<sup>17</sup> Commission  
15 regulations further provide that “[a] payment for a coordinated communication is made for the  
16 purpose of influencing a Federal election, and is an in-kind contribution ... to the candidate,  
17 authorized committee, or political party committee with whom or which it is coordinated,” and

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<sup>12</sup> Collins & Committee Resp. at 2.

<sup>13</sup> *Id.* at 1.

<sup>14</sup> 52 U.S.C. § 30116(f); 11 C.F.R. §§ 110.1(b)(1), 110.9.

<sup>15</sup> 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1)(i); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019). Multicandidate committees are subject to separate limits. *See* 52 U.S.C. § 30116(a)(2).

<sup>16</sup> 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a).

<sup>17</sup> 52 U.S.C. § 30116(a)(7)(B)(i).

1 must be reported as an expenditure by the candidate, authorized committee, or political party  
 2 committee.<sup>18</sup>

3  
 4 Commission regulations provide a three-part test for determining when a communication  
 5 is a “coordinated communication.”<sup>19</sup> The communication must: (1) be paid for by a third party;  
 6 (2) satisfy one of the five enumerated “content” standards; and (3) satisfy one of the five  
 7 enumerated “conduct” standards.<sup>20</sup> All three prongs must be satisfied for a communication to be  
 8 considered a coordinated communication.<sup>21</sup>

9 **A. Payment**

10 The payment prong is satisfied where a communication “[i]s paid for, in whole or in part,  
 11 by a person other than [the] candidate, authorized committee, or political party committee.”<sup>22</sup>  
 12 Payment is satisfied here because 1820 PAC paid \$276,780 to distribute “Maine Tradition” and  
 13 filed a 48-Hour Report disclosing the expenditure.<sup>23</sup>

14 **B. Content**

15 **C.** The content prong is satisfied if, *inter alia*, the communication is a “public  
 16 communication” that “expressly advocates the election or defeat of a clearly  
 17 identified federal candidate.”<sup>24</sup> Television ads are included within the definition of  
 18 “public communication.” 1820 reported its payment for the “Maine Tradition” ad as  
 19 an independent expenditure, which the Act defines in relevant part as an

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<sup>18</sup> 11 C.F.R. § 109.21(b)(1).

<sup>19</sup> *Id.* § 109.21(a).

<sup>20</sup> *Id.* (referencing content and conduct standards at 11 C.F.R. § 109.21(c) and (d), respectively)).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* § 109.21(a)(1).

<sup>23</sup> *Supra* note 7.

<sup>24</sup> 11 C.F.R. § 109.21(c)(3).

1 expenditure “expressly advocating the election or defeat” of a federal candidate.<sup>2526</sup>  
2 Thus, if the ad contains express advocacy, it likely meets the content prong for a  
3 coordinated communication. **Conduct**

4 The conduct prong is satisfied by one of five types of interactions between the payor and  
5 the candidate or campaign regarding the communication: a request or suggestion, material  
6 involvement, substantial discussion, use of a common vendor, or involvement of a former  
7 employee or independent contractor.<sup>27</sup>

8 The Complaint does not allege any facts regarding interactions between 1820 PAC and  
9 the Committee (including through common vendors or former employees) about the ad or use of  
10 the Collins B-roll that might satisfy any of the conduct standards at section 109.21(d). Indeed,  
11 the Complaint merely urges the Commission to “investigate whether Senator Collins and Collins  
12 for Senator may have coordinated with 1820 PAC.”<sup>28</sup> The information before the Commission,  
13 therefore, does not indicate that the conduct prong is satisfied.

14 In conclusion, the available information is insufficient to support a reasonable inference  
15 that all three prongs of the coordinated communication test are satisfied.<sup>29</sup> Accordingly, the  
16 Commission finds no reason to believe that Collins and the Committee violated 52 U.S.C.  
17 § 30116(f) and 11 C.F.R. § 110.9 by accepting an excessive in-kind contribution from 1820

<sup>25</sup> A “public communication” is “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” 52 U.S.C. § 30101(22) (definition of “public communication”); 11 C.F.R. § 100.26 (same).

<sup>26</sup> See 1820 PAC 48-Hour Rpt. (Sept. 16, 2019); 52 U.S.C. § 30101(17) (defining “independent expenditure”).

<sup>27</sup> See 11 C.F.R. § 109.21(d)(1)-(5); see also *id.* § 109.21(e) (stating that an agreement or formal collaboration “is not required for a communication to be a coordinated communication”).

<sup>28</sup> Compl. at 5.

<sup>29</sup> See 11 C.F.R. § 109.21(a).

THIS PROPOSED DRAFT WAS VOTED ON BUT  
NOT APPROVED BY THE COMMISSION.

- 1 PAC. The Commission also finds no reason to believe that the Committee violated 52 U.S.C.
- 2 § 30104(b) and 11 C.F.R. § 104.3(a) by failing to report an in-kind contribution.