BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of
Matt Rosendale for Montana;
Errol Galt,
in his official capacity as Treasurer

) ) MUR 7654

Through counsel, Matt Rosendale for Montana and Errol Galt, in his official capacity as Treasurer (collectively, “Respondents”), provide the following response to this complaint (“Complaint”) filed with the Federal Election Commission (“FEC” or “Commission”) by the Campaign Legal Center, End Citizens United, and Ms. Margaret Christ (collectively, “Complainants”). The Complaint has been designated by the Commission as MUR 7654.

As the Commission is aware, the Respondents have already submitted comprehensive responses that substantively address the allegations raised in this Complaint. Specifically, the Respondents have provided answers regarding their relationships with and knowledge (or lack thereof) of the internal operations, policies, and corporate structures at OnMessage, Inc., Starboard Strategic, Inc., National Media Research, Planning and Placement LLC, Red Eagle Media Group, and American Media & Advocacy Group. Therefore, the Respondents direct the Commission to their previous responses submitted in MURs 7497, 7560, and 7621, each of which are attached to this response.

The Commission is undoubtedly aware that the allegations made in this Complaint—at least with respect to these specific Respondents—are not new to the Commission. Time and time again, the Campaign Legal Center has swapped out the ancillary complainants in the caption and resubmitted the same basic rubric of facts and re-produced documents that do nothing to advance their original (and baseless) allegations. As a result, the Respondents' facts and legal arguments remain the same and will not be restated here.

Eventually, the FEC will have a functioning quorum of Commissioners, and those Commissioners will be dealt the challenging task of clearing a backlog of enforcement matters, many of which will be approaching the five-year statute of limitations. It will become clear at that time—if it isn’t already—that the Campaign Legal Center and their cronies have performed a disservice to America’s democracy by bogging down the Commission’s functions with these duplicative allegations and MURs. And yet we can expect that the Campaign Legal Center will have the gall to continue yammering about the Commission’s so-called dysfunction and delays.

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For these reasons—as well as those provided in our previous responses—the Respondents urge the Commission to summarily dismiss this Complaint and swiftly resolve this latest matter along with the others. If the Commission has additional questions related to these matters, please do not hesitate to contact us.

Sincerely,

Chris K. Gober
Counsel to Matt Rosendale for Montana,
And Errol Galt, in his official capacity as Treasurer
BEFORE THE FEDERAL ELECTION COMMISSION

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

) ) ) MUR 7497

RESPONSE

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

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

BACKGROUND

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

According to the documentation provided by the Complainants, the National Rifle Association Institute for Legislative Action (“NRA-ILA”) is a tax-exempt organization that engages in political activity and lobbying consistent with the policies of the National Rifle Association (“NRA”). The Executive Director of the NRA-ILA is Chris Cox. To the best of Mr. Rosendale’s knowledge and recollection, he has only spoken to Mr. Cox on one occasion, and
that was during a meeting on or about June 13, 2018, shortly after Mr. Rosendale secured his party’s nomination in a highly contentious primary against three opponents.\(^1\) The purpose of the meeting, at least from Mr. Rosendale’s perspective, was to shore up support and seek the NRA’s highly coveted endorsement given Montana’s demographics and high rates of gun ownership.

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

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

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

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

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

\(^1\) In the primary election, Mr. Rosendale earned the Republican nomination with 33.8% of the vote, with his opponents collectively receiving 66.2% of the vote.
Supreme Court confirmations are big – that’s what sent the NRA over the line. Because in ’12, with Denny [Rehberg, a Montana Senate candidate] they stayed out. Chris Cox told me – he was like ‘well, we’re going to be in this race.’

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

- A pending confirmation battle for a critical seat on the U.S. Supreme Court, with Republican leadership stating immediately that they intended to confirm Kavanaugh before the Supreme Court’s fall session (meaning confirmation hearings would have to begin in August or early September).

- Mr. Rosendale understood that U.S. Supreme Court nominations are an extremely important issue to the NRA; and

- Mr. Rosendale’s understanding of previous spending by NRA-affiliated entities during previous U.S. Supreme Court confirmation battles.

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

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

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

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

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

1. If the communication is created, produced or distributed at the request or suggestion of the candidate, candidate’s committee, a party committee or agents of the above; or the communication is created, produced or distributed at the suggestion of the person paying for the communication and the candidate, authorized committee, political party committee or agent of any of the foregoing assents to the suggestion.²

2. If the candidate, the candidate’s authorized committee or party committee is materially involved in decisions regarding the content, intended audience, means or mode of the communication, specific media outlet used, the timing or frequency or size or prominence of a communication.³

3. If the communication is created, produced or distributed after one or more substantial discussions about the communication between the person paying for the communication or the employees or agents of that person and the candidate, the candidate’s committee, the candidate’s opponent or opponent’s committee, a political party committee or agents of the above. A discussion is “substantial” if information about the candidate’s or political party committee’s campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.⁴

² 11 C.F.R. § 109.21(d)(1).
³ 11 C.F.R. § 109.21(d)(2).
⁴ 11 C.F.R. § 109.21(d)(3).
4. If the person paying for the communication employs a common vendor to create, produce or distribute the communication, and that vendor:

   a. Is currently providing services or provided services within the previous 120 days with the candidate or party committee that puts the vendor in a position to acquire information about the campaign plans, projects, activities or needs of the candidate or political party committee; and

   b. Uses or conveys information about the plans or needs of the candidate or political party, or information previously used by the vendor in serving the candidate or party, and that information is material to the creation, production or distribution of the communication.5

5. If a person who has previously been an employee or independent contractor of a candidate’s campaign committee or a party committee during the previous 120 days uses or conveys information about the plans or needs of the candidate or political party committee to the person paying for the communication, and that information is material to the creation, production or distribution of the communication.6

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

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

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

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

6 11 C.F.R. § 109.21(d)(5).
Supreme Court and Kavanaugh was nominated to fill the vacancy on July 9, 2018. While Mr. Rosendale’s remarks during the July campaign event could have given the Complainants the false impression that the Respondents had discussed independent expenditures with the NRA-ILA, his remarks were a reflection of the fact he was doing everything he could to generate momentum, raise money, and consolidate support in his race with the backdrop of a contentious U.S. Supreme Court confirmation battle.

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

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

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

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

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8 11 C.F.R. § 109.21(d)(1).
amount to a blanket prohibition against any candidate interaction with outside groups.\(^{12}\) While the Act generally prohibits candidates from raising funds outside of the Act’s contribution limits and source prohibitions (i.e., “soft money”), the Act nevertheless permits great latitude for candidates to interact with entities that raise and spend soft money.\(^{13}\)

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

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

Despite the Complainants’ attempts to stretch the bounds of what constitutes impermissible coordination, the preceding analysis makes clear that candidates can, and often do, interact with persons that support or oppose candidates with independent expenditures. Following this lead, federal courts have clarified that where a candidate interacts with an independent expenditure entity, coordination is only found where the candidate becomes a partner to the speech, similar to a joint venture between the parties. In Fed. Election Comm’n v. Christian Coal., 52 F. Supp. 2d 45, 97 (D.D.C. 1999), the court concluded that the critical inquiry was the action of the candidate and their committee, regardless of the independent expenditure entity’s attempts to interact with the candidate. Even where the candidate and the candidate’s campaign were “armed with the foreknowledge” of the entity’s plans, no coordination existed where the candidate’s campaign did not respond to any attempts to develop those plans.\(^ {17}\)

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

\(^{13}\) 52 U.S.C. § 30125(e).

\(^{14}\) 11 C.F.R. § 300.64(b)(1).

\(^{15}\) Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC).

\(^{16}\) See supra Note 10 at 360-61.

\(^{17}\) Id. at 93.
candidate cannot be shown to have the necessary interest in the activities to demonstrate the significant inherent value of the expenditures warranting a finding of an in-kind contribution.\(^\text{18}\)

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

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

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

The Complainant has only offered evidence of Mr. Rosendale’s public comments about the anticipate participation of outside groups in the general election. Mr. Rosendale, on the other hand, will submit an affidavit\(^\text{20}\) attesting to several critical facts:

- To the best of Mr. Rosendale’s knowledge and recollection, he has only spoken to Mr. Cox on one occasion, and this was during a meeting on or about June 13, 2018, in which Mr. Rosendale was seeking the NRA’s endorsement of his candidacy.

- To the best of Mr. Rosendale’s knowledge and recollection, during the meeting on or about June 13, 2018, neither Mr. Cox nor anyone else attending the meeting discussed the timing or content of communications supporting Mr. Rosendale or opposing Senator Tester.

\(^{18}\) *Id.* at 92.

\(^{19}\) *Coordinated and Independent Expenditures*, 68 Fed. Reg. at 432.

\(^{20}\) Mr. Rosendale’s affidavit will be transmitted to the Commission under separate cover.
To the best of Mr. Rosendale’s knowledge and recollection, he has not spoken to Mr. Cox or any other NRA-ILA employees or agents since Justice Kennedy announced his retirement from the U.S. Supreme Court and Brett Kavanaugh was nominated to fill the vacancy on July 9, 2018.

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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23 Advisory Opinion 2016-12 (Citizen Super PAC) Draft B.
24 See also Advisory Opinion 2016-12 (Citizen Super PAC) Draft A; Advisory Opinion 2016-12 (Citizen Super PAC) Draft C.
BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )
Matt Rosendale; )
Matt Rosendale for Montana; ) MUR 7560
Errol Galt, )
in his official capacity as )
Treasurer. )

RESPONSE

Through counsel, Matt Rosendale, Matt Rosendale for Montana, and Errol Galt, in his official capacity as Treasurer (collectively, “Respondents”), provide the following response to the complaint filed with the Federal Election Commission (“FEC” or “Commission”) by the American Democracy Legal Fund (“Complainant”) and designated by the Commission as MUR 7560.

The Complainant’s allegations and the scant facts provided to support them are not new to the Commission, and they similarly form the inadequate backbone of other complaints already pending before the Commission; therefore, this response is mostly a restatement of facts and arguments already provided to the Commission in those related matters. And, as the Respondents have repeatedly demonstrated, the Respondents have conformed their conduct to the prescriptions and prohibitions of the Federal Election Campaign Act of 1971, as amended (“FECA” or “the Act”), as well as the Commission’s supplementary regulations, Commission guidance, and legal precedents.

Once again, the Complainant diverts attention from the absence of substantive facts that could prove illegal coordination and focuses instead on exhaustive, irrelevant public filings of entities unaffiliated with the Respondents. The Complainant is attempting to create the appearance of a voluminous factual record that is little more than the reproduction of publicly available corporate disclosures. Despite these documents, the Complainant again fails their most basic requirement: to allege conduct satisfying all three prongs of the FEC’s definition of a “coordinated communication” at 11 C.F.R. § 109.21(a). By correctly focusing on the facts actually alleged in the complaint rather than the Complainant’s rhetorical assumptions, the Commission will see that the complaint alleges no direct conduct on the part of the Respondents that runs afoul of the Act or FEC regulations.

Even if the Commission grants the Complainant’s wish that all alleged conduct be viewed consistent with 11 C.F.R. § 109.21(d)(4), the Complainant has nonetheless failed to
allege that any common commercial vendor conveyed the Respondent’s campaign plans, projects, or other activities to a party that used this material information as part of the preparation and dissemination of an independent expenditure. And, importantly, the Respondents have no reason to believe this occurred. Therefore, the Respondents trust the Commission to look past the Complainant’s unsubstantiated allegations and irrelevant exhibits to determine that the facts do not support a “Reason to Believe” finding.

BACKGROUND

Matt Rosendale was a 2018 U.S. Senate candidate from Montana, and Matt Rosendale for Montana is his authorized candidate committee. Incumbent Senator John Tester defeated Matt Rosendale in Montana’s 2018 general election for U.S. Senate on November 6, 2018.

According to the documentation provided by the Complainant, the National Rifle Association Political Victory Fund (“NRA-PVF”) is a tax-exempt organization that engages in political activity consistent with the policies of the National Rifle Association (“NRA”). To the best of the Respondents' knowledge and belief, the Respondents did not have any engagement or interaction with any agents of either NRA-PVF or the NRA during the 2018 election. Moreover, the Complainant does not allege any actual interaction between the Respondents and NRA-PVF or the NRA.

The crux of this complaint is the allegation that independent expenditures reported by NRA-PVF (either in support of the Respondents or in opposition to their opponent) and the expenditures reported by the Respondents appear to relay similar content to relevant voters as the 2018 election cycle neared its completion. The Complainant bases this allegation on news reports and documents showing advertising purchases during the 2018 election cycle. Additionally, the Complainant, based on documents not previously reviewed by the Respondents, alleges coordination because of a “common vendor” relationship between marketing vendors American Media & Advocacy (“AMAG”) and Red Eagle Media Group (“Red Eagle”). While the Respondents are in no position to make detailed assertions about the activities of these companies, the Respondents can attest, to the best of their knowledge and belief, that they have conducted their campaign activities entirely independent of Red Eagle.

The Complainant specifically alleges that NRA-PVF used Red Eagle to place independent expenditures to influence the election contests of the Respondents. The Complainant alleges this entity is functionally affiliated with AMAG despite the apparent separate incorporations of these entities. The Respondents are unfamiliar with the legal structures of these entities as the Respondents did not enter into any business agreements with Red Eagle. Regardless, to the best of the Respondents’ knowledge, AMAG established and implemented the type of firewall policy, as detailed in 11 C.F.R. § 109.21(h), that prohibits the flow of information between certain client projects. Importantly, the
Respondents have no reason to believe that AMAG did not adhere to the terms of its firewall policy during the 2018 general election period when the Respondents contracted AMAG for placement services. As noted, the Respondents are not familiar with Red Eagle and, to the extent that Red Eagle is affiliated with any of the other companies identified in the complaint, the Respondents must refer the Commission to those entities for more information.

LEGAL DISCUSSION AND ANALYSIS

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

The “Conduct Prong” is often the critical inquiry in any evaluation and examines the interactions between the person paying for the communication and the candidate, authorized committee, political party committee, or their agents. One way a communication satisfies this part of the test is if the person paying for the communication employs a common vendor to create, produce, or distribute the communication, and that vendor:

a. Is currently providing services or provided services within the previous 120 days to the candidate or party committee that puts the vendor in a position to acquire information about the campaign plans, projects, activities, or needs of the candidate or political party committee; and

b. Uses or conveys information about the plans or needs of the candidate or political party, or information previously used by the vendor in serving the candidate or party, and that information is material to the creation, production, or distribution of the communication.1

This provision is further supplemented by the firewall safe harbor described at 11 C.F.R. § 109.21(h). This safe harbor explains that a communication is not coordinated simply by the use of a common vendor if a written firewall is designed and implemented by the common vendor so as to prohibit the flow of information between service providers of the candidate and those paying for a communication.

1 11 C.F.R. § 109.21(d)(4).
With respect to the allegations against the Respondents, the Complainant asserts that the Respondents illegally coordinated NRA-PVF’s public communications, which necessarily means that the Respondents would have needed to satisfy the Conduct Prong of the Commission’s three-pronged test for coordination. In making this allegation, the Complainant relies on circumstantial evidence and an incomplete understanding of the Act to assume conduct not otherwise shown by facts, and they have offered no evidence to support a violation of 11 C.F.R. § 109.21(d)(4).

The Complainant spends considerable effort highlighting the fact that NRA-PVF disseminated similar content to that of the Respondents directly targeting the Respondents’ relevant electorate in close proximity to the delivery of the Respondents’ own content. The various respondents in this matter were engaged in some of the most publicized and important elections of the 2018 election cycle; therefore, it should hardly be surprising (and it in no way suggests nefarious conduct) to find that, at the height of the 2018 election cycle, groups either supporting or opposing the Respondents distributed content intended to influence the same voters that the Respondents also sought to persuade.

A myriad of Super PACs and political parties flooded the airwaves with a constant stream of advertising content to compel voters in the final sprint of the 2018 election. To allege that two separate groups distributed “similar” but not identical content regarding the major issues important to voters within days or weeks of one another at this critical juncture indicates nothing more than the value these groups placed on their distinct content. Relying on this evidence alone, the Complainant’s allegation is akin to asking the Commission to assume individuals standing at a bus stop clearly coordinated their decision to take public transportation when it is much more likely that they separately determined that this option presented the best method for getting where they each needed to be. A basic tenant of statistical science is that correlation alone does not equal causation.

Beyond the timing and content allegations put forth by the Complainant, the Respondents are in no position to make detailed assertions about the activities of the companies also named herein; therefore, Respondents believe AMAG, Red Eagle, and potentially NRA-PVF are better suited to respond to the remaining particular allegations of this complaint. With that said, the Respondents expected all vendors paid for work during the 2018 election cycle to comply with the law, and the Respondents have no reason to believe that their vendors did not adhere to firewall policies that satisfy the safe harbor requirements of 11 C.F.R. § 109.21(h).

The Complainant’s assertions are not aided by the presence of a common agent that performed work for multiple entities named in the complaint. The complaint notes that Jon Ferrell, Chief Financial Officer to National Media and its affiliates, signed placement orders on behalf of the Respondents as well as NRA-PVF. To the best of the Respondents’ knowledge,
Mr. Ferrell is simply an administrative employee who affixes his signature to all third-party documents filed by National Media and any affiliated entities, including AMAG and Red Eagle. No evidence has been presented that Mr. Ferrell provided strategic services to any entities identified in the complaint, nor that he otherwise conveyed the Respondents’ campaign plans, projects, or other activities to a party that used this material information as part of the preparation and dissemination of an independent expenditure. On the other hand, 11 C.F.R. § 109.21(d)(4) makes clear that a common vendor employee must have taken part in the development of strategy, polling, fundraising, production of communications, or other substantive strategic consulting. The Respondents are not aware of any such activities and, as with the timing arguments made by the Complainants, Mr. Ferrell’s signature alone does not equal the level of participation envisioned by the Commission through this regulation.

CONCLUSION

The facts detailed in this response confirm the Respondents conformed their conduct to the prescriptions and prohibitions of the Act, as well as the Commission’s supplementary regulations, Commission guidance, and legal precedents. Therefore, the Respondents respectfully urge the Commission to dismiss this complaint with no further action.

Sincerely,

Chris K. Gober
Counsel to Matt Rosendale, Matt Rosendale for Montana, and Errol Galt, in his official capacity as Treasurer

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of
Matt Rosendale;
Matt Rosendale for Montana;
Errol Galt,
in his official capacity as Treasurer

INTRODUCTION

Through counsel, Matt Rosendale, Matt Rosendale for Montana, and Errol Galt, in his official capacity as Treasurer (collectively, “Respondents”), provide the following response to the supplemental complaint (“Complaint”) filed with the Federal Election Commission (“FEC” or “Commission”) by the Campaign Legal Center (“Complainant”). The Complaint has been designated by the Commission as MUR 7621.

ARGUMENT

1. The Supplemental Complaint is More of the Same

Although the Commission has designated the Complainant’s supplemental filing with a new MUR number, the substantive allegations made in MUR 7497 and this Complaint—at least with respect to these specific Respondents—are not new to the Commission. In fact, it appears that the Campaign Legal Center, Giffords, and the American Democracy Legal Fund are now using the Respondents’ compliance with ongoing disclosure requirements as an underhanded opportunity to pile on to their previous allegations. This amounts to nothing more than “lawfare” designed to drain the Respondents’ resources. And despite the barrage of allegations made by the Campaign Legal Center, Giffords, and the American Democracy Legal Fund in MURs 7497, 7560, and 7621, the Respondents’ facts and legal arguments remain the same.

The Respondents already submitted comprehensive responses addressing these matters, specifically the Respondents’ relationships and knowledge (or lack thereof) of the inner workings at OnMessage, Inc., Starboard Strategic, Inc., National Media Research, Planning and Placement LLC, Red Eagle Media Group, and American Media & Advocacy Group. Therefore, the Respondents direct the Commission to its previous responses in MURs 7497 and 7560, both of which are attached as Attachments 1 and 2.

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2. The Claim that the Respondents’ Consultants Perpetrated a Layered Scheme to Avoid Detection is Half-Baked.

Despite the Respondents’ primary reliance on its previous responses in MURs 7497 and 7560, we nonetheless want to respond to some of the Complainant’s accusatory rhetoric in its latest submission. Specifically, the Complainant states:

There were therefore two layers to this scheme, which was apparently designed to evade detection of violations of the Commission’s common vendor coordination rules: first, the NRS-ILA and Matt Rosendale for Montana paid the functionally indistinguishable Starboard and OnMessage, respectively, to develop their ads; second they used another layer of functionally indistinguishable firms, and, in some cases, the same National Media employees, to place those ads.

Consistent with our previous responses, the Respondents continue to assert that: (1) they are in no position to make detailed assertions about the activities of OnMessage, American Media & Advocacy Group, or these various other companies; (2) to the best of their knowledge and belief, these various companies implemented the type of firewall policy, as detailed in 11 C.F.R. § 109.21(h), that prohibits the flow of information between certain client projects; and (3) to the best of their knowledge and belief, the Respondents conducted their campaign activities entirely independent of the NRA-ILA. Therefore, the Respondents must once again direct the Commission to those entities for further inquiries and details.

With that said—despite the Respondents’ unfamiliarity with the legal structures, relationships, and inner workings of these various entities—it seems highly unlikely to the Respondents that the supposed perpetrators of such an unlawful scheme would go to great lengths to establish these various companies to “evade detection of violations” but fail to take the rudimentary step of establishing different addresses for each one of them. It is, after all, both easy and cheap to establish unique addresses for each entity by opening a mailbox at a Mailboxes, Etc. or UPS store. OnMessage, American Media & Advocacy Group, and these various other companies will ultimately need to answer this question for themselves, but it is more likely that they established these various companies for valid business reasons other than to “evade detections of violations.”

Furthermore, if the supposed perpetrators went to these great lengths to execute a “layered scheme” to “evade detection of violations,” it also begs the question of why they would be so foolish to have the same person (in this case, Jon Ferrell) sign all the publicly available placement orders for these various entities. In the vital interest of avoiding detection of violations, surely they could have had another employee sign some of these documents! Of course, it is more likely that Mr. Ferrell is simply an administrative employee.
who affixes his signature to all third-party documents filed by National Media and any affiliated entities, including American Media & Advocacy Group and Red Eagle.

As we stated in a previous response, no evidence has been presented that Mr. Ferrell provided strategic services to any entities identified in the complaint, nor that he otherwise conveyed the Respondents’ campaign plans, projects, or other activities to a party that used this material information as part of the preparation and dissemination of an independent expenditure. On the other hand, 11 C.F.R. § 109.21(d)(4) makes clear that a common vendor employee must have taken part in the development of strategy, polling, fundraising, production of communications, or other substantive strategic consulting. The Respondents are not aware of any such activities and, as with the timing arguments made by the Complainants, Mr. Ferrell’s signature alone does not equal the level of participation envisioned by the Commission through this regulation.

CONCLUSION

It is unfortunate that the Campaign Legal Center, Giffords, and the American Democracy Legal Fund continue to force the Respondents and Commission staff to needlessly waste critical time and resources addressing these recycled allegations; however, the Respondents remain committed to assisting the Commission in resolving this on-going matter. If the Commission has additional questions related to these matters, please do not hesitate to contact us.

Sincerely,

Chris K. Gober
Counsel to Matt Rosendale, Matt Rosendale for Montana, and Errol Galt, in his official capacity as Treasurer

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