



FEDERAL ELECTION COMMISSION
Washington, DC 20463

BY ELECTRONIC MAIL

December 21, 2021

James C. Lamb
Erin Tibe
Sandler Reiff Lamb Rosenstein & Birkenstock PC
1090 Vermont Avenue, NW, Suite 750
Washington, DC 20005
lamb@sandlerreiff.com

RE: MUR 7682
Honor Bound PAC,
f/k/a Amy McGrath for Senate, Inc., and
Chris Patton in his official capacity as
treasurer
Mark L. Nickolas

Dear Mr. Lamb and Ms. Tibe:

On January 24, 2020, the Federal Election Commission notified your clients, Honor Bound PAC (formerly known as Amy McGrath for Senate, Inc, and the principal campaign committee for 2020 U.S. Senate candidate Amy McGrath, before its conversion into a multi-candidate political committee in 2021) and Chris Patton in his official capacity as treasurer and Mark L. Nickolas, of a complaint alleging that they violated the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to your clients at that time.

After reviewing the allegations contained in the complaint and your clients' response, the Commission, on December 2, 2021, found reason to believe that your clients violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 300.61, provisions of the Act and Commission regulations. The Factual and Legal Analysis which formed a basis for the Commission's finding is enclosed for your information.

In order to expedite the resolution of this matter, the Commission has authorized the Office of General Counsel to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Pre-probable cause conciliation is not mandated by the Act or the Commission's regulations but is a voluntary step in the enforcement process that the Commission is offering to your clients as a way to resolve this matter at an early stage and without the need for briefing the issue of whether or not the Commission should find probable cause to believe that your clients violated the law.

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Please note that you have a legal obligation to preserve all documents, records, and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

If your clients are interested in engaging in pre-probable cause conciliation, please contact Dominique Dillenseger, the attorney assigned to this matter, at (202) 694-1650 or ddillenseger@fec.gov within seven days of receipt of this letter. During conciliation, you may submit any factual or legal materials that you believe are relevant to the resolution of this matter. No action by the Commission or any person and no information derived in connection with any conciliation attempt by the Commission may be made public by the Commission without the written consent of the respondents and the Commission. 52 U.S.C. § 30109(a)(4)(B). The Commission may proceed to the next step in the enforcement process if your clients are not interested in pre-probable cause conciliation or a mutually acceptable conciliation agreement cannot be reached within 60 days. *See* 52 U.S.C. § 30109(a), 11 C.F.R. Part 111 (Subpart A). Please note that once the Commission enters the next step in the enforcement process, it may decline to engage in further settlement discussions until after making a probable cause finding.

Pre-probable cause conciliation, extensions of time, and other enforcement procedures and options are discussed more comprehensively in the Commission's "Guidebook for Complainants and Respondents on the FEC Enforcement Process," which is available on the Commission's website at https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf.

Please be advised that, although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.¹ This matter will remain confidential in accordance with 52 U.S.C. § 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that your clients wish the matter to be made public.

¹ The Commission has the statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* § 30107(a)(9).

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We look forward to your response.

On behalf of the Commission,

A handwritten signature in blue ink that reads "Shana M. Broussard". The signature is written in a cursive style with a large initial 'S'.

Shana M. Broussard
Chair

Enclosures

Factual and Legal Analysis

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Honor Bound PAC (f/k/a Amy McGrath for Senate, Inc.) MUR 7682
and Chris Patton in his official capacity as treasurer
Mark L. Nickolas

I. INTRODUCTION

The Complaint alleges that Honor Bound PAC (formerly known as Amy McGrath for Senate, Inc., and the principal campaign committee for 2020 U.S. Senate candidate Amy McGrath before its conversion into a multi-candidate political committee in 2021) and Chris Patton in his official capacity as treasurer (“Honor Bound”), through its agent, Mark Nickolas, the then-campaign manager for McGrath’s 2020 Senate campaign, knowingly and willfully solicited non-federal funds to Save America Fund and Edward Galvin in his official capacity as treasurer (“Save America Fund”), an independent expenditure-only political committee (“IEOPC”), in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”).¹ The Complaint is based on a public statement Nickolas made to the press about the formation of the IEOPC that allegedly encouraged potential donors to contribute to Save America Fund.²

Respondents do not dispute whether Nickolas made the statement but contend that the statement was not a solicitation of non-federal funds because the statement was made to the press and not in the context of a fundraiser.³ They also argue that the statement did not contain any indicia of solicitation, such as providing instructions on how or where to make a contribution,

¹ Compl. (Jan. 21, 2020).

² *Id.* ¶¶ 12-18.

³ Honor Bound & Nickolas Resp. at 2-3 (Mar. 19, 2020).

1 and should be construed to be a “mere statement of political support” for Save America Fund and
2 its founder.⁴

3 As set forth below, Nickolas made a statement that appears to constitute an improper
4 solicitation of non-federal funds to Save America Fund on behalf of the McGrath campaign.
5 Accordingly, the Commission finds reason to believe that the Honor Bound and Nickolas
6 violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 300.61.

7 **II. FACTUAL BACKGROUND**

8 On July 18, 2019, Amy McGrath registered as a candidate for U.S. Senate in Kentucky.⁵
9 Amy McGrath for Senate, Inc., was her principal campaign committee, and Chris Patton is its
10 treasurer.⁶ Mark Nickolas is McGrath’s former campaign manager.

11 Save America Fund filed a Statement of Organization as an IEOPC on December 24,
12 2019.⁷ Eric Hyers, who was the former campaign manager for Governor Andy Beshear of
13 Kentucky, founded Save America Fund.⁸ Fire Mitch Save America (“FMSA”) is “a project of
14 Save America Fund.”⁹ On January 6, 2020, Save America Fund filed an amended Statement of

⁴ Honor Bound & Nickolas Resp. at 2-3.

⁵ Amy McGrath, Original Statement of Candidacy at 1 (Jul. 18, 2019).

⁶ Amy McGrath for US Senate, Original Statement of Organization (July 9, 2019). The Statement of Organization has been amended several times. Amended Statements of Organization (Aug. 28, 2019; Oct. 8, 2019; Nov. 16, 2019; Dec. 25, 2019; Jan. 3, 2020; Jan. 16, 2020; Apr. 29, 2020; Sept. 7, 2020); Honor Bound PAC, Amended Statement of Organization (Mar. 29, 2021).

⁷ Save America Fund, Statement of Organization (Dec. 24, 2019).

⁸ See Daniel Desrochers, *Former Andy Beshear Staffer Forms Super PAC to Raise Money for Amy McGrath*, LEXINGTON HERALD-LEADER (Jan. 7, 2020), cited in Compl. at 3 (Jan. 21, 2020); Zach Montellaro, *The Democratic Debate Squeeze*, POLITICO (Jan. 7, 2020), cited in Compl. at 3.

⁹ FIRE MITCH SAVE AMERICA, <https://www.firemitschsaveamerica.com/> (last visited Aug. 18, 2020), cited in Compl. at 2; Save America Fund Resp. at 1.

1 Organization listing its website address as www.firemitschsaveamerica.com.¹⁰ Save America
 2 Fund describes itself on that website as “[t]he Super PAC dedicated to replacing Mitch
 3 McConnell with Amy McGrath.”¹¹

4 On January 7, 2020, FMSA’s Twitter handle posted its first tweet announcing Save
 5 America Fund’s formation.¹² The same day, reporters interviewed Nickolas about Save America
 6 Fund. According to an article published by *Politico*, Nickolas, identified as McGrath’s campaign
 7 manager, was quoted as stating:

8 This is a big deal that Eric [Hyers] will lead this effort, given his recent success in
 9 ousting the other unpopular Republican in Kentucky in a race that many didn’t
 10 think was winnable. He knows this electorate better than anyone We very
 11 strongly encourage donors to give to Eric’s group.¹³

12 The Complaint attaches screenshots from Save America Fund’s ActBlue donation page,
 13 which Save America Fund and Hyers promoted on Twitter.¹⁴ On top of the donation pages is the
 14 statement “Fire Mitch Save America” next to a photo of Senator McConnell, followed by
 15 “Donate Now. Fire Mitch,” and a reprint of Nickolas’s above quote in the *Politico* article

¹⁰ Save America Fund, Amended Statement of Organization (Jan. 6, 2020).

¹¹ FIRE MITCH SAVE AMERICA, <https://www.firemitschsaveamerica.com/> (last visited Aug. 18, 2020).

¹² Compl. ¶ 10 (citing to Fire Mitch Save America (@fire_mitch), TWITTER (Jan. 7, 202, 09:02 AM), https://twitter.com/fire_mitch/status/1214547802686132226 (inaugural tweet); Fire Mitch Save America (@fire_mitch), TWITTER (Jan. 7, 2020, 09:30 AM), https://twitter.com/fire_mitch/status/1214555024744951808 (“We are Fire Mitch Save America. We want to see Mitch McConnell lose, we want to see Amy McGrath win and we’ve got the roadmap to do it.”)).

¹³ Montellaro, *supra* note 8.

¹⁴ Compl., Exs. 3, 4; Fire Mitch Save America (@fire_mitch), TWITTER (Jan. 8, 2020, 12:20 PM), https://twitter.com/fire_mitch/status/1214960192644952064 (including link to ActBlue donation page with reference code “retweet” attached as Exhibit 3 of the Complaint); Eric Hyers (@EricHyers), TWITTER (Jan. 7, 2020, 12:17 PM), <https://twitter.com/EricHyers/status/1214596998424399876> (including link to ActBlue donation page with reference code “fir_or_tw_ah” attached as Exhibit 4 of the Complaint).

1 encouraging donors to give to Save America Fund.¹⁵ The ActBlue donation pages, which are
2 dated January 8, 2020, do not identify any limits to, or source restrictions on, contributions to
3 Save America Fund.¹⁶

4 **III. LEGAL ANALYSIS**

5 The Act prohibits federal candidates and officeholders, their agents, and entities directly
6 or indirectly established, financed, maintained, or controlled by or acting on behalf of federal
7 candidates and officeholders, from soliciting funds in connection with a federal election “unless
8 the funds are subject to the limitations, prohibitions, and reporting requirements of the Act.”¹⁷
9 The Act limits contributions to non-authorized, non-party committees to \$5,000 in any calendar
10 year.¹⁸ Although an IEOPC may accept contributions from corporations and individuals without
11 regard to that \$5,000 limitation,¹⁹ federal officeholders and candidates may only solicit up to
12 \$5,000 from permissible sources on behalf of such a committee.²⁰

13 The available information indicates that Nickolas was acting as an agent of Honor Bound
14 when he made his statement soliciting non-federal funds to Save America Fund.²¹ As campaign

¹⁵ Compl., Exs 3, 4.

¹⁶ *Id.*

¹⁷ See 52 U.S.C. § 30125(e)(1)(A); *see also* 11 C.F.R. §§ 300.60, 300.61.

¹⁸ 52 U.S.C. § 30116(a)(1)(C).

¹⁹ See *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (*en banc*) (holding that contribution limits are unconstitutional as applied to individuals’ contributions to political committees that only make independent expenditures); Advisory Op. 2010-11 (Common Sense Ten) (“AO 2010-11”) (concluding that corporations, labor organizations, political committees, and individuals may each make unlimited contributions to IEOPCs).

²⁰ See Advisory Op. 2011-12 (Majority PAC) at 3 (“AO 2011-12”); Conciliation Agreement ¶¶ 7, 8, MUR 7048 (Cruz for President, *et al.*); Factual & Legal Analysis at 11, MURs 6563 and 6733 (Rep. Aaron Schock).

²¹ For the purposes of the soft money prohibition, an “agent” of a federal candidate or officeholder is “any person who has actual authority, either express or implied, to engage in any of the following activities on behalf of” that candidate or officeholder: “solicit[ing], receiv[ing], direct[ing], transferr[ing], or spend[ing] funds in connection with any election.” 11 C.F.R. § 300.2(b), (b)(3). As the Commission further explained in 2006, the “Commission’s current definitions of ‘agent’ are sufficiently broad to capture actions by individuals where the

1 manager of the McGrath campaign, Nickolas exercised broad authority over the operation of the
2 campaign and was an agent of McGrath and Honor Bound. He was identified as McGrath’s
3 campaign manager when he provided the on-the-record statement at issue in response to question
4 from the press,²² and Respondents do not dispute that Nickolas was acting as an agent of the
5 campaign when he made the statement.²³

6 Through regulation, the Commission has defined “to solicit” broadly to mean “to ask,
7 request, or recommend, explicitly or implicitly, that another person make a contribution,
8 donation, transfer of funds, or otherwise provide anything of value.”²⁴ The regulation further
9 provides that a “solicitation” is “an oral or written communication that, construed as reasonably
10 understood in the context in which it is made, contains a clear message asking, requesting, or
11 recommending that another person make a contribution” and “may be made directly or
12 indirectly” but “does not include mere statements of political support.”²⁵

candidate authorizes an individual to solicit Federal funds on his or her behalf, but privately instructs the individual to avoid raising non-Federal funds.” Definitions of “Agent” for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975, 4978 (Jan. 31, 2006). Indeed, “the candidate/principal may . . . be liable for any impermissible solicitations by the agent, despite specific instructions not to do so.” *Id.*

²² See Montellaro, *supra* note 8 (“Mark Nickolas, her campaign manager, said ‘We very strongly encourage donors to give to Eric’s group.’”); Desrochers, *supra* note 8 (“Mark Nickolas, McGrath’s campaign manager, said that a PAC run by Hyers doesn’t signal that McGrath has the support of the Kentucky Democratic establishment.”).

²³ Honor Bound & Nickolas Resp. at 3; *accord* Factual & Legal Analysis at 6, MUR 7048 (Cruz for President, *et al.*) (“[T]he record contains no information that the Committee disclaimed any of Lewis’s references to contributions at the events.”).

²⁴ 11 C.F.R. § 300.2(m); *see also* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,086 (July 29, 2002) (defining “to solicit” as to “ask another person to make a contribution or donation, or transfer of funds, or to provide anything of value, including through a conduit or intermediary”).

²⁵ 11 C.F.R. § 300.2(m); *see also* Definitions of “Solicit” and “Direct,” 71 Fed. Reg. 13,926, 13,928 (Mar. 20, 2006) (“Solicit E&J”).

1 In 2006, the Commission revised the definition of “to solicit” following a decision by the
2 United States Court of Appeals for the District of Columbia Circuit in *Shays v. FEC* holding that
3 the Commission’s former regulation, promulgated in 2002, was too narrow and failed to include
4 “implicit requests for money.”²⁶ In promulgating the revised definition, the Commission
5 explained that the revision is broad in order to “ensure[] that candidates and parties may not,
6 implicitly and indirectly, raise unregulated funds for either themselves, or subject to statutory
7 exceptions, ‘friendly outsiders.’”²⁷ The Commission further stated: “By covering implicit and
8 indirect requests and recommendations, the new definition forecloses parties and candidates from
9 using circumlocutions ‘that make their intentions clear without overtly “asking” for money’” and
10 “also squarely addresses the central concern of the Court of Appeals in *Shays* that ‘indirect’ as
11 well as ‘direct’” requests for funds or anything of value must be covered.”²⁸

12 The standard for determining whether a communication is a solicitation is objective and
13 does not turn on the subjective interpretations of the person making the communication or its
14 recipients.²⁹ This objective standard “hinges on whether the recipient should have reasonably
15 understood that a solicitation was made.”³⁰

16 Commission regulations provide specific examples of statements that constitute
17 solicitations, which include, but are not limited to, the following:

- 18 • “Please give \$100,000 to Group X.”
19 • “Group X has always helped me financially in my elections. Keep them in mind this
20 fall.”

²⁶ Solicit E&J, 71 Fed. Reg. at 13,927 (quoting *Shays v. FEC*, 414 F.3d 76, 104-06 (D.C. Cir. 2005)).

²⁷ *Id.* at 13,928 (quoting *Shays*, 414 F.3d at 106).

²⁸ *Id.*

²⁹ 11 C.F.R. § 300.2(m); *see also* Solicit E&J, 71 Fed. Reg. at 13,928.

³⁰ Solicit E&J, 71 Fed. Reg. at 13,929.

- 1 • “X is an effective State party organization; it needs to obtain as many \$100,000
- 2 donations as possible.”
- 3 • “Send all contributions to the following address.”
- 4 • “You have reached the limit of what you may contribute directly to my campaign, but
- 5 you can further help my campaign by assisting the State Party.”³¹

6 Nickolas appears to have made a statement constituting a solicitation under Commission
7 regulations. When speaking to a reporter about the formation of Save America Fund, Nickolas
8 stated: “This is a big deal that Eric [Hyers] will lead this effort, given his recent success in
9 ousting the other unpopular Republican in Kentucky in a race that many didn’t think was
10 winnable. He knows this electorate better than anyone. We very strongly encourage donors to
11 give to Eric’s Group.”³² Nickolas’s statement contains a direct reference to “Eric’s Group,” *i.e.*,
12 Save America Fund, and he appears to be making a direct plea specifically targeted to donors,
13 with the statement: “We very strongly encourage donors to give to Eric’s Group.” This direct
14 solicitation is closely comparable to the Commission’s examples, such as “Please give \$100,000
15 to Group X”; “Send all contributions to the following address”; and “Group X has always
16 helped me financially in my elections. Keep them in mind this fall.”³³ The clarity of this
17 message requesting contributions to Save America Fund likely explains why the IEOPC decided
18 to publish the statement on its ActBlue donation page.³⁴ The solicitation was not limited to
19 federally permissible funds and constitutes an impermissible solicitation of soft money
20 contributions.³⁵

³¹ 11 C.F.R. § 300.2(m)(2).

³² *See* Montellaro, *supra* note 8.

³³ 11 C.F.R. § 300.2(m)(2)(i), (vi).

³⁴ Compl., Exs 3, 4.

³⁵ *See* AO 2011-12 at 3; F&LA at 11, MURs 6563 and 6733 (Rep. Aaron Schock).

1 Respondents contend that Nickolas’s statement is not a solicitation because he was
2 merely expressing political support and was not speaking at a fundraising event.³⁶ These
3 arguments are unpersuasive. On its face, the statement directly encourages donors to make
4 contributions to Save America Fund, and Save America Fund’s decision to include the quoted
5 statement in the fundraising context of its ActBlue donation page underscores the fundraising
6 purpose of the statement, that is, that the communication, as reasonably understood, is asking for,
7 requesting, or recommending that persons make contributions.³⁷ The context of a fundraising
8 event such as in-person fundraiser is not a prerequisite for a statement to be a solicitation.³⁸

9 Although Nickolas’s statement did not specify an amount, Nickolas not only failed to
10 limit the solicitation to contributions of up to \$5,000, but the context of the statement and the
11 article’s reference to the Save America Fund being a “Pro-Amy McGrath super PAC” also
12 conveyed, in widely understood terms, that the organization could receive unlimited non-federal
13 contributions by virtue of its super PAC status.³⁹ Further, while Save America Fund’s ActBlue
14 donation page as accessed through the Save America Fund’s website *currently* limits individual
15 contributions to \$5,000, consistent with the permissible solicitation levels for candidates,⁴⁰ Save

³⁶ Honor Bound & Nickolas Resp. at 3.

³⁷ 11 C.F.R. § 300.2(m).

³⁸ While context should be considered in determining reasonableness, the regulation does not require a particular venue or opine that a particular context is dispositive. As noted above, the Commission’s definition of “to solicit” also depends on the type of communication, including implicit and indirect requests for contributions. *See* Solicit E&J, 71 Fed. Reg. at 13,927, 13,928 (quoting *Shays v. FEC*, 414 F.3d 76, 104-06 (D.C. Cir. 2005)); 11 C.F.R. § 300.2(m).

³⁹ *See* AO 2011-12 at 3 (“Federal candidates, officeholders, and national party committees and their agents may only solicit contributions of up to \$5,000 from individuals . . . and Federal political action committees for an IEOPC.”).

⁴⁰ Save American Fund Donation Page, ACTBLUE, <https://secure.actblue.com/donate/firemitschsaveamerica?refcode=website> (visited June 26, 2020) (accessed via Save America Fund website).

1 America Fund has solicited non-federal funds in other ways. For example, Save America Fund’s
2 ActBlue donation pages, attached to the Complaint, contains no such restrictions,⁴¹ and its
3 ActBlue donation page, when accessed directly through the ActBlue website, likewise contains
4 no such limits.⁴² Save America Fund has reported accepting contributions in excess of \$5,000,
5 including at least one contribution made through ActBlue.⁴³ Accordingly, Nickolas’s statement
6 “very strongly encourag[ing] donors to give to [Save America Fund]” constitutes a soft money
7 solicitation because a reasonable person would understand it to be requesting contributions to
8 Save America Fund without limiting the request to the permissible amount of \$5,000.

9 Under these circumstances, the Commission finds reason to believe that Nickolas and
10 Honor Bound violated 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 300.61 by soliciting non-
11 federal funds.

⁴¹ Compl., Exs. 3, 4.

⁴² See Save American Fund Donation Page, ACTBLUE, <https://secure.actblue.com/donate/save-america-fund-1> (visited June 26, 2020) (accessed via ActBlue website).

⁴³ Save America Fund’s 2020 April Quarterly Report reflects eight individual contributions over \$5,000, totaling \$305,000. See FEC Form 3X, Save America Fund, 2020 April Quarterly Report, Sched. A at 32, 33, 49, 74, 92, 159, 169 (reporting contributions of \$10,000, \$10,000, \$25,000, \$50,000, \$100,000, \$10,000, and two \$50,000 contributions, respectively). The 2020 Pre-Primary Report reflects three individual contributions, totaling \$270,000. See FEC Form 3X, Save America Fund, 2020 Pre-Primary Report, Sched. A at 8, 97, 212 (reporting contributions of \$10,000, \$10,000, and \$250,000, respectively).