



FEDERAL ELECTION COMMISSION
Washington, DC 20463

VIA ELECTRONIC MAIL

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RE: MUR 7750 (Faith and Power PAC)

Dear Mr. Josefiak and Mr. Bayes:

On June 24, 2020, the Federal Election Commission notified your clients, Faith and Power PAC and Taylor Reed in their official capacity as treasurer ("Faith and Power PAC"), and Senate Leadership Fund and Caleb Crosby in his official capacity as treasurer, of a complaint alleging that they had violated certain sections of the Federal Election Campaign Act of 1971, as amended.

On January 10, 2023, the Commission considered the complaint and found no reason to believe that Faith and Power PAC violated 52 U.S.C. § 30104(b)(6)(B)(iii) or 52 U.S.C. § 30104(g)(3)(B) by improperly reporting independent expenditures, and further found no reason to believe that Faith and Power PAC violated 52 U.S.C. § 30116(a) by making excessive contributions. Accordingly, the Commission closed the file in this matter. The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). If you have any questions, please contact me at (202) 694-1650.

Sincerely,

Ana J. Peña-Wallace

Ana J. Peña-Wallace
Assistant General Counsel

Enclosure
Factual and Legal Analysis

**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

Respondents: Faith and Power PAC and Taylor Reed
in their official capacity as treasurer
Senate Leadership Fund and Caleb Crosby
in his official capacity as treasurer

MUR 7750

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission by Rev. Dr. T. Anthony Spearman and the North Carolina State Conference of the National Association for the Advancement of Colored People, alleging that Faith and Power PAC and Taylor Reed in their official capacity as treasurer (“FPP”), an independent expenditure-only political committee (“IEOPC”), filed false reports of independent expenditures it made in the 2020 North Carolina Democratic Primary for U.S. Senate, in violation of 52 U.S.C. §§ 30104(b)(6)(B)(iii), (g)(3)(B) of the Federal Election Campaign Act of 1971, as amended (the “Act”). The Complaint argues that the reports were false because they indicated that the independent expenditures supported or opposed candidates in the Democratic Primary, whereas FPP’s true intention in making the expenditures was to support incumbent Republican Senator Thom Tillis in the general election by dividing the Democratic candidates and confusing Democratic Primary voters.

The Complaint further alleges that Senate Leadership Fund and Caleb Crosby in his official capacity as treasurer (“SLF”), an IEOPC that is aligned with Republican Party leadership and that exclusively funded FPP, is a “Republican Party front” that operated FPP as a “paper outfit” to influence the North Carolina Democratic Primary. This allegation may suggest that FPP coordinated its expenditures with a political party committee, for which SLF acted as an

1 agent, thus resulting in FFP making excessive in-kind contributions to the party committee in
2 violation of 52 U.S.C. § 30116(a).

3 Respondents deny the allegations in a joint Response. They contend that FFP properly
4 reported independent expenditures for television advertisements and mailers by listing either
5 Erica Smith or Cal Cunningham, the Democratic Primary candidates for or against whom the
6 communications expressly advocated. Respondents assert that none of FFP's communications
7 discussed or depicted Tillis, who was not a candidate in the primary, and thus FFP was not
8 required to list his name on its reporting of the independent expenditures. Respondents also
9 contend that the Complaint offers no support for its apparent claim that FFP coordinated with a
10 political party committee.

11 As discussed below, the available FFP advertisements and mailers do not appear to
12 provide a basis for reporting independent expenditures in support of Tillis. Accordingly, the
13 Commission finds no reason to believe that FFP inaccurately reported independent expenditures
14 in violation of 52 U.S.C. §§ 30104(b)(6)(B)(iii), (g)(3)(B).

15 There is also insufficient information to support a reasonable inference that FFP
16 coordinated its communications with a political party committee. Accordingly, the Commission
17 finds no reason to believe that FFP violated 52 U.S.C. § 30116(a) by making an excessive
18 contribution to a party committee.

19 **II. FACTUAL BACKGROUND**

20 Faith and Power PAC registered with the Commission as an IEOPC on January 29,
21 2020.¹ It was funded by two contributions from the Senate Leadership Fund, which identifies

¹ Faith and Power PAC, Statement of Organization (Jan. 29, 2020), <https://docquery.fec.gov/pdf/424/202001299182323424/202001299182323424.pdf>.

1 itself as an “independent Super PAC” whose goal is to “protect and expand the Republican
 2 Senate Majority.”² SLF gave FPP an initial \$2.45 million on January 31, 2020, and another
 3 \$500,000 on February 12, 2020.³ These contributions from SLF were the only contributions that
 4 FPP reported receiving. Due to the committees’ reporting deadlines, however, those payments
 5 were not made public until February 20, 2020.⁴ In the interim, FPP spent nearly the entirety of
 6 SLF’s contributions, approximately \$2.93 million, on independent expenditures in the
 7 Democratic Primary for Senate in North Carolina.⁵

8 FPP’s independent expenditures focused on two of the Democratic contenders, Erica
 9 Smith and Cal Cunningham. On February 8, 2020, the committee reported an initial expenditure
 10 of \$2.43 million in support of Smith.⁶ Ten days later, FPP reported independent expenditures of
 11 just over \$250,000 in support of Smith and the same amount in opposition to Cunningham.⁷
 12 Cunningham won the primary on March 3, 2020.⁸

13 The Complaint alleges that FPP is a “paper outfit” created by SLF, a “Republican Party
 14 front,” with the objective of intervening in the North Carolina Democratic Primary on behalf of a

² Senate Leadership Fund, <https://www.senateleadershipfund.org/about/>.

³ Faith and Power PAC, Receipts, https://www.fec.gov/data/receipts/?two_year_transaction_period=2020&committee_id=C00736751&data_type=processed.

⁴ Faith and Power PAC, Pre-Primary Report at 6 (Feb. 20, 2020), <https://docquery.fec.gov/pdf/953/202002209187234953/202002209187234953.pdf> (disclosing both SLF contributions); Senate Leadership Fund, February Monthly Report at 24 (Feb. 20, 2020), <https://docquery.fec.gov/pdf/928/202002209187234928/202002209187234928.pdf> (disclosing the initial \$2.45 million contribution from SLF to FPP).

⁵ Faith and Power PAC, Independent Expenditures, https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C00736751&is_notice=false&min_date=01%2F01%2F2019&max_date=12%2F31%2F2020 (showing three independent expenditures dated February 3, 2020, and February 14, 2020).

⁶ Faith and Power PAC, Independent Expenditure 48-Hour Report (Feb. 8, 2020), <https://docquery.fec.gov/pdf/106/202002089186488106/202002089186488106.pdf>.

⁷ Faith and Power PAC, Independent Expenditure 24-Hour Report (Feb. 18, 2020), <https://docquery.fec.gov/pdf/375/202002189186512375/202002189186512375.pdf>.

⁸ Gary D. Robertson, *Cunningham Wins Senate Primary; Forest Earns GOP Gov’s Nod*, ASSOCIATED PRESS (Mar. 3, 2020), <https://apnews.com/528a57c72cdb6cc528503e5a5b926aba>.

1 “major political party committee.”⁹ The Complaint contends that SLF selected the name Faith
 2 and Power PAC because of its likely appeal to older African American voters, and that its
 3 support of Smith, an African American candidate, was a “race-based wedge tactic to confuse
 4 progressive Black and White voters, deliberately creating bad blood between the two main
 5 competitors in the Democratic Primary.”¹⁰ The objective of this strategy, according to the
 6 Complaint, was to benefit the re-election campaign of Republican Senator Thom Tillis.¹¹ Thus,
 7 the Complaint alleges, when FPP reported making independent expenditures in support of Smith
 8 or in opposition to Cunningham, and when its treasurer certified that the expenditures were not
 9 made in “cooperation, consultation, or concert with, or at the request or suggestion of any . . .
 10 political party committee or its agent,” those representations were false.¹²

11 The Response argues that the Complaint’s allegations have no support, and that FPP
 12 made and properly reported independent expenditures in support of Smith and in opposition to
 13 Cunningham.¹³ The Response notes that independent expenditure reports must identify the
 14 candidate that the expenditures support or oppose, and it argues that, in practice, that candidate is
 15 the person whose election or defeat the communication expressly advocates, not the candidate
 16 the spender may subjectively intend to benefit.¹⁴ In support of the argument that FPP followed

⁹ Compl. ¶¶ 2-4, 8 (June 22, 2020) (internal punctuation omitted).

¹⁰ See *id.* ¶¶ 4, 9. The Complaint also suggests, however, that FPP may have intended to draw support away from Smith by “implying Ms. Smith accepted funds from Republicans — a fatal accusation for any Black candidate in the south.” *Id.* ¶ 9.

¹¹ *Id.* ¶¶ 2-3.

¹² See *id.* ¶ 8; *id.*, Ex. 5 (24-hour independent expenditure report containing treasurer’s certification that expenditures were made independently of political party committees and their agents).

¹³ Resp. at 1-2 (July 9, 2020).

¹⁴ *Id.* at 2-3.

these reporting requirements, the Response provides copies of FPP mailers and links to videos it identifies as FPP television advertisements.¹⁵

The Response submits three mailers and five videos, each of which reference only Smith or Cunningham.¹⁶ One of the mailers contains photos of both candidates, describes their positions and backgrounds, and urges recipients to “vote no on Cal Cunningham” and “vote for Erica Smith.”¹⁷ The remaining mailers show only Smith, describe her policy positions, and urge a vote in her favor.¹⁸ Similarly, one of the provided videos features photos of Smith and Cunningham, compares their policy positions, and urges viewers: “on March 3rd, vote Democrat Erica Smith for U.S. Senate.”¹⁹ The remaining videos urge voters to support Smith without reference to Cunningham.²⁰ None of the communications provided by Respondents refer to Tillis in any way.

The Response also contends that, to the extent the Complaint alleges coordination between FPP and a party committee, it provides no information to support that argument.²¹ The Response states that SLF is not a party committee, and that “[a]side from a general reference to

¹⁵ *Id.* at 1 n.1, 2 (emphasis omitted).

¹⁶ *Id.* at 1 n.1 (linking to videos); *id.* at Attach. at 1-6 (providing mailers).

¹⁷ *Id.*, Attach. at 1-2.

¹⁸ *Id.*, Attach. at 3-6.

¹⁹ *Id.* at 1 n.1 (linking to video); Faith and Power PAC, *North Carolina’s Choice*, YOUTUBE (Feb. 19, 2020), https://www.youtube.com/watch?v=2PCuUA2Q6_A.

²⁰ Resp. at 1 n.1 (linking to videos); Faith and Power PAC, *Only Erica Smith*, YOUTUBE (Feb. 6, 2020), <https://www.youtube.com/watch?v=8y6tT6ktQGw>; Faith and Power PAC, *Only Erica Smith – 15 Second Spot*, YOUTUBE (Feb. 6, 2020), <https://www.youtube.com/watch?v=HKpcsjaMfFU>; Faith and Power PAC, *Only Erica Smith – 6 Second Spot*, YOUTUBE (Feb. 6, 2020), <https://www.youtube.com/watch?v=uInUuuaxFAM>; Faith and Power PAC, *Wonder – Radio Spot*, YOUTUBE (Feb. 18, 2020), <https://www.youtube.com/channel/UC2JaMaetwqMgcQqLsElNxyw/videos>.

²¹ Resp. at 3.

the ‘Republican Party,’ the Complaint does not identify any actual party committee with whom coordination supposedly occurred.”²²

III. LEGAL ANALYSIS

A. The Commission Finds No Reason to Believe that Faith and Power PAC Inaccurately Reported Independent Expenditures

An independent expenditure is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate and that is not made in concert or cooperation with, or at the request or suggestion of, that candidate, the candidate’s authorized committee, their agents, or a political party committee or its agents.²³ A communication constitutes express advocacy if it includes phrases such as “vote for the President” or “vote against Old Hickory,” or if it includes words “which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s).”²⁴ A candidate is “clearly identified” when the candidate’s name, nickname, photograph, or a drawing of the candidate appears, or when the candidate’s identity “is apparent by unambiguous reference,” for example “the Democratic presidential nominee.”²⁵

The Act requires unauthorized committees, like FPP, to report certain information about the independent expenditures they make, including “a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate.”²⁶ The same information is required in 24- and 48-hour reports

²² *Id.*

²³ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

²⁴ 11 C.F.R. § 100.22.

²⁵ 52 U.S.C. § 30101(18); 11 C.F.R. § 100.17.

²⁶ 52 U.S.C. § 30104(b)(6)(B)(iii).

of qualifying independent expenditures, including “the name of each candidate whom an expenditure is intended to support or oppose.”²⁷ The Commission’s regulations echo these requirements.²⁸

There is no basis to conclude that FPP’s independent expenditure reports failed to correctly identify the candidates supported or opposed. The available advertisements and mailers clearly identify and contain express advocacy for Smith and against Cunningham — for example, “vote for Erica Smith” and “vote no on Cal Cunningham.”²⁹ Accordingly, FFP identified Smith and Cunningham as the candidates supported and opposed. However, the Complaint points out that FPP was funded by SLF, an IEOPC aligned with Senate Republicans, and suggests that FPP’s undisclosed intent was to benefit incumbent Senator Thom Tillis.³⁰ The Complaint therefore argues that FPP, with respect to all of its independent expenditures, should have reported Tillis as the supported candidate.³¹

Neither the Act nor the Commission’s regulations require political committees to identify candidates who they believe may indirectly benefit from their communications.³² In *Buckley v. Valeo*, the Supreme Court held that, to avoid constitutional deficiencies in the provisions governing independent expenditures, the reach of the Act in this area must be “limited to communications that include explicit words of advocacy or defeat of a candidate,” given

²⁷ *Id.* § 30104(g)(3)(B).

²⁸ 11 C.F.R. § 104.3(b)(3)(vii) (setting out requirements for regular reporting of independent expenditures); *id.* § 104.4(c)-(d) (setting out requirements for 24- and 48-hour reporting).

²⁹ *E.g.*, Resp., Attach. 2. The Commission notes, however, that Respondents do not indicate which advertisements and mailers correspond with each of FPP’s reported independent expenditures.

³⁰ *Id.* ¶¶ 5-6.

³¹ *See id.*

³² 52 U.S.C. § 30104(b)(6)(B)(iii); *id.* § 30104(g)(3)(B); 11 C.F.R. § 104.3(B)(3)(vii); *id.* § 104.4(c)-(d).

vagueness problems that arise when analyzing based on intent and effect.³³ In the context of electioneering communications, the Court in *FEC v. Wisconsin Right to Life* similarly concluded that “the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect.”³⁴ The Complaint’s request that the Commission require FPP to identify an unnamed additional candidate, which it allegedly intended to benefit through its communications, goes beyond the requirements of the Act and Commission regulations and could pose potential problems of administration.³⁵

Therefore, the Commission finds no reason to believe that, by reporting the relevant candidate as either Smith or Cunningham, FPP’s independent expenditure reports violated 52 U.S.C. §§ 30104(b)(6)(B)(iii), (g)(3)(B).

B. The Commission Finds No Reason to Believe FPP’s Expenditures Were Coordinated Communications

The Complaint generally alleges that SLF is a “front” for the “national Republican Party” and operated on behalf of a “major ‘political party committee’” when it created and funded FPP to influence the North Carolina Democratic Primary, and perpetrated a “scam” when reported making independent expenditures in support of a candidate in the Democratic primary election.³⁶

³³ 424 U.S. 1, 43-44 (1976).

³⁴ 551 U.S. 449, 469 (2007). Section 203 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), which amended the Act, concerned the prohibition on using corporate and labor funds for electioneering communications.

³⁵ In a situation where an advertisement expressly advocated for a clearly identified candidate and also identified and compared the positions of her opponent, the Commission advised that the committee was not required to identify the opponent on its disclosure report. *See* Advisory Op. 2010-10 (Nat’l Right to Life PAC) at 4.

³⁶ Compl. ¶¶ 2, 8.

1 If, as the complaint alleges, FPP's expenditures were coordinated with an agent of a political
2 party committee, it could have potentially made excessive in-kind contributions.

3 A communication is coordinated with a candidate, authorized committee, political party
4 committee, or their agent if it: (1) was paid for, in whole or in part, by a person other than the
5 candidate, authorized committee, or political party committee (the "payment prong");
6 (2) satisfies at least one of the content standards set out at 11 C.F.R. § 109.21 (the "content
7 prong"); and (3) satisfies at least one of the conduct standards set out at 11 C.F.R. § 109.21(d)
8 (the "conduct prong").³⁷ FPP paid for advertisements and mailers, so the payment prong is
9 met.³⁸ The content prong is also met because the advertisements and mailers were public
10 communications that expressly advocated for the election or defeat of clearly identified
11 candidates for federal office, Erica Smith and Cal Cunningham.³⁹

12 There is no information that the conduct prong is met — *i.e.*, that SLF acted as an agent
13 of a political party committee and, in that role, interacted with FPP in a way that would satisfy
14 one of the conduct standards in the Commission's regulation. The Complaint alleges that SLF
15 was a "front" for the Republican Party; that SLF, in turn, used FPP as "cover for a major
16 'political party committee'"; and that FPP's treasurer "knew he was working for the national
17 Republican Party" in support of Tillis.⁴⁰ However, the Complaint does not cite to any source of
18 supporting information or otherwise elaborate on these claims. Such general assertions are not
19 sufficient to assess, at the outset, whether there was an agency relationship between SLF and the

³⁷ 11 C.F.R. § 109.21(a).

³⁸ *Id.* § 109.21(a)(1). *See, e.g.*, Resp., Attach. at 1 (disclaimer attesting that the advertisement was paid for by Faith and Power PAC).

³⁹ *Id.* § 109.21(c)(3). Public communications are defined at 11 C.F.R. 100.26 to include communications "by means of any broadcast, cable, or satellite communication," as well as mass mailings.

⁴⁰ Compl. ¶¶ 2-3, 8.

1 unnamed Republican Party entity.⁴¹ Moreover, they do not describe any particular interactions
2 or communications between SLF and FPP that would satisfy the conduct prong — for example,
3 information indicating that the FPP mailers or television advertisements were created, produced,
4 or distributed at the request or suggestion of SLF.⁴² In sum, the Complaint offers no information
5 to support its assertion that FPP coordinated its communications with a political party committee.
6 Accordingly, the Commission finds no reason to believe that FPP violated 52 U.S.C. § 30116(a)
7 by making excessive contributions.

⁴¹ For purposes of 11 C.F.R. Part 109, which governs coordinated and independent expenditures, Commission regulations define agent to mean “any person who has actual authority, either express or implied” to engage in a list of enumerated activities on behalf of the specified persons. 11 C.F.R. § 109.3. For example, a person is an agent of a political party committee if that person has actual authority to “request or suggest that a communication be created, produced or distributed” on behalf of that committee. *Id.* § 109.3(a)(1).

⁴² *See id.* § 109.21(d)(1) (“request or suggestion” standard).