

FEDERAL ELECTION COMMISSION
Washington, DC 20463

VIA ELECTRONIC MAIL

Megan Sowards Newton
Stephen J. Kenny
Jones Day
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Washington, DC 20001
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March 15, 2022

RE: MUR 7758

Dear Ms. Newton and Mr. Kenny:

On July 15, 2020, the Federal Election Commission notified your client, America First Action, Inc. and Jon Proch in his official capacity as treasurer, of a complaint indicating violations of the Federal Election Campaign Act of 1971, as amended. On March 8, 2022, the Commission, on the basis of the information provided in the complaint and information provided by your client, found no reason to believe that your client violated 52 U.S.C. § 30116(a) and (f) by making and receiving excessive contributions, and 52 U.S.C. § 30104(b) (3) and (b)(6) by failing to report in-kind contributions. Accordingly, the Commission closed its file in this matter.

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). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Justine A. di Giovanni, the attorney assigned to this matter, at (202) 694-1574 or jdigiovanni@fec.gov.

Sincerely,

Ana J. Peña-Wallace

Ana J. Peña-Wallace
Acting Assistant General Counsel

Enclosure:
Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENTS:** Make America Great Again PAC (f/k/a Donald J. **MUR: 7758**
4 Trump for President) and Bradley Crate in his
5 official capacity as treasurer
6 America First Action and Jon Proch in his official
7 capacity as treasurer
8 Committee to Defeat the President (f/k/a Committee to
9 Defend the President) and Ted Harvey in his official
10 capacity as treasurer
11 Cory Gardner for Senate and Lisa Lisker in her official
12 capacity as treasurer
13 Cotton for Senate and Theodore V. Koch in his official
14 capacity as treasurer
15 Jason Lewis for Senate and Bradley Crate in his official
16 capacity as treasurer
17 Joni for Iowa and Cabell Hobbs in his official capacity
18 as treasurer
19 Marco Rubio for Senate and Lisa Lisker in her official
20 capacity as treasurer
21 McConnell Senate Committee and Larry J. Steinberg in
22 his official capacity as treasurer
23 Republican National Committee and Ronald C. Kaufman
24 in his official capacity as treasurer
25 Republican State Leadership Committee
26 Scalise for Congress and Benjamin Ottenhoff in his
27 official capacity as treasurer
28 Trump Make America Great Again Committee and Bradley
29 Crate in his official capacity as treasurer

30 **I. INTRODUCTION**

31 This matter was generated by a Complaint filed with the Federal Election Commission by
32 Alexander Joseph Zajac alleging that Respondents violated the Federal Election Campaign Act
33 of 1971, as amended (the “Act”), in connection with fundraising emails sent from the same

1 domain and email address.¹ The Complaint argues that the fact that each of the Respondents’
2 emails was sent from the same email address is “evidence of at least some coordination” among
3 Respondents, raising allegations that they made or received impermissible and unreported in-
4 kind contributions.

5 Respondents, some of whom submitted individual Responses and others joint Responses,
6 deny the allegations and provide the same general explanation why their fundraising emails were
7 sent from the same domain and email address.² Respondents state that they each independently
8 rented a list from the same email list rental company. They further state that the list rental
9 company, following its usual practice and industry custom, was responsible for sending the
10 emails prepared by Respondents. As such, the emails originated from the same domain and
11 email address owned by the list rental company. Several Respondents submitted affidavits that
12 are consistent with Respondents’ general explanation from the list rental company and one of the
13 political consulting firms that assisted with arranging the list rentals. Accordingly, Respondents
14 argue that the Commission’s three-part coordinated communication test is not satisfied. Several

¹ Respondents include eight principal campaign committees (Make America Great Again PAC (f/k/a Donald J. Trump for President) and Bradley Crate in his official capacity as treasurer (“DJT for President”); Cory Gardner for Senate and Lisa Lisker in her official capacity as treasurer (the “Gardner Committee”); Cotton for Senate and Theodore V. Koch in his official capacity as treasurer (the “Cotton Committee”); Jason Lewis for Senate and Bradley Crate in his official capacity as treasurer (the “Lewis Committee”); Joni for Iowa and Cabell Hobbs in his official capacity as treasurer (the “Ernst Committee”); Marco Rubio for Senate and Lisa Lisker in her official capacity as treasurer (the “Rubio Committee”); McConnell Senate Committee and Larry J. Steinberg in his official capacity as treasurer (the “McConnell Committee”); and Scalise for Congress and Benjamin Ottenhoff in his official capacity as treasurer (the “Scalise Committee”)); two multicandidate political committees (America First Action and Jon Proch in his official capacity as treasurer (“AFA”) and the Committee to Defeat the President (f/k/a Committee to Defend the President) and Ted Harvey in his official capacity as treasurer (“CDP”)); one 527 political organization (Republican State Leadership Committee (“RSLC”)); one joint fundraising committee (Trump Make America Great Again Committee and Bradley Crate in his official capacity as treasurer (“TMAGA”)); and one national party committee (the Republican National Committee and Ronald C. Kaufman in his official capacity as treasurer (the “RNC”)).

² The Lewis Committee did not submit a Response. However, it appears that the information provided by other Respondents — which explains as a general matter why emails separately prepared by clients of a list rental company were sent by the list rental company with the same email address — also applies to the Lewis Committee.

1 Respondents argue that emails are not public communications and therefore fail to satisfy the
2 content prong of the coordinated communication test. The RNC separately argues that the
3 allegations against it should be dismissed because the Complaint does not provide information
4 showing that it sent any of the emails.

5 As explained below, the Commission finds no reason to believe that Respondents
6 violated 52 U.S.C. § 30116(a) and (f) by making or knowingly accepting excessive in-kind
7 contributions, and finds no reason to believe that the political committee Respondents violated
8 52 U.S.C. § 30104(b)(3) and (b)(6) by failing to report in-kind contributions.

9 **II. FACTUAL BACKGROUND**

10 Between June 4 and July 8, 2020, Complainant received 27 fundraising emails from the
11 same address, info@keepingusgreat.com, but each was separately written to him as coming from
12 one of the Respondents.³ The emails, each of which is attached to the Complaint, contained a
13 short statement promoting the candidate or organization, and most included a request for a
14 monetary contribution with a link to a donation page or advertised merchandise with a link to a
15 purchase page. Each email included a disclaimer identifying the name and address of the entity
16 that paid for the email.⁴

³ See Compl. (July 9, 2020), Ex. (emails from Respondents). Complainant did not receive an email from the RNC, but did receive one from TMAGA, which operates partially for the benefit of the RNC. FEC Form 1, TMAGA Amended Statement of Org. at 2 (Nov. 1, 2019) (listing DJT for President and the RNC as the participants in TMAGA joint fundraising).

⁴ For example, one of the emails, sent on behalf of the McConnell Committee, stated in a box at the end of the email, "PAID FOR BY MCCONNELL SENATE COMMITTEE," followed by a P.O. Box address in Kentucky. Compl., Ex. at 10. Some emails contained messages from one candidate or his/her agent soliciting contributions on behalf of another, such as Donald J. Trump soliciting contributions for Mitch McConnell in an email paid for by the McConnell Committee. *E.g., id.*, Ex. at 13-14. In each instance, there is a disclaimer box indicating that the beneficiary committee paid for the email. *E.g., id.*

1 The Complaint asserts that there is “evidence of *at least some* coordination . . . because
2 [Respondents] are using the same email address, domain name, and (likely) email lists, at least
3 for fundraising purposes.”⁵

4 Respondents state that they sent the emails at issue via independent agreements with the
5 same email list rental company, Right Country Lists.⁶ In each case, although the emails were
6 drafted and prepared by Respondents or their digital media consultants, it was Right Country
7 Lists that actually sent the emails to the individuals on the list. Following what it describes as its
8 usual practice and an industry custom, Right Country Lists sent the emails using a verified email
9 address and domain that it owns and operates, info@keepusgreat.com.⁷

10 Several Respondents submitted an affidavit from Carter Kidd, a Partner at Right Country
11 Lists, attesting that when a customer rents one of its lists, all emails to individuals on the list are
12 “distributed exclusively” through its “verified” email address.⁸ She also states that rental access
13 for the various committees and organizations was granted via separate, confidential, arm’s-length
14 contracts, and that clients provided the substantive content of the emails to be distributed.⁹

⁵ Compl. at 1 (emphasis in original).

⁶ See, e.g., DJT for President & TMAGA Joint Resp. at 1 (Aug. 20, 2020); AFA Resp. at 1 (Aug. 13, 2020); CDP Resp. at 1 (Aug. 31, 2020); Gardner Committee, Cotton Committee, Rubio Committee, McConnell Committee, & Ernst Committee Joint Resp. (Sept. 1, 2020) [hereinafter Gardner, *et al.*, Resp.], Attach. 2 (sworn affidavit of Carter Kidd, Partner at Right Country Lists). Some of the Respondents indicate that they contracted with a digital fundraising company, which subcontracted with Right Country Lists on the Respondents’ behalf. E.g., Gardner, *et al.*, Resp. at 2; Scalise Committee Resp. at 2-3, Attachs. (Aug. 14, 2020); RSLC Resp. at 1 (Sept. 1, 2020).

⁷ Gardner, *et al.*, Resp., Attach. 2 ¶¶ 6, 13 (affidavit of Carter Kidd, Partner, Right Country Lists).

⁸ *Id.* (explaining that the “association of this domain and email address with the List is a commercial practice that [Right Country Lists] believes increases response rates and the value of the List”).

⁹ *Id.* ¶¶ 4, 9, 11. Several Respondents indicated that they directly contracted with Targeted Victory, LLC, to manage their digital fundraising, and Targeted Victory, LLC, then contracted with Right Country Lists. These Respondents submitted a copy of Targeted Victory, LLC’s firewall policy, which they assert ensured that each of the emails was created and disseminated independently. These Responses also attached a sworn declaration of Targeted Victory, LLC’s Managing Partner, attesting to the method by which the emails at issue were sent as well as implementation of the firewall policy. Gardner, *et al.*, Resp., Attach. 3 ¶ 5; Scalise Committee Resp., Attach.

1 Further, Kidd attests that Right Country Lists “did not engage in, nor was it privy to, any
 2 substantive or strategic discussions whatsoever with any of its clients regarding the content,
 3 messaging, audience, or timing of an email sen[t] on behalf of any . . . campaign committee, or
 4 about any campaign plans, projects, activities, or needs.”¹⁰

5 Accordingly, Respondents assert that there was no coordination between them regarding
 6 the emails, and thus the coordinated communication test is not satisfied.¹¹ Aside from the issue
 7 of coordination, multiple Respondents also argue that emails do not satisfy the content prong.¹²

8 III. LEGAL ANALYSIS

9 The Act defines “contribution” to include “any gift, subscription, loan, advance, or
 10 deposit of money or anything of value made by any person for the purpose of influencing any
 11 election for Federal office.”¹³ The Act prohibits any person from making, and any candidate or
 12 committee from knowingly accepting, an excessive contribution, subject to limitations defined
 13 by the Act and Commission regulations.¹⁴

14 Commission regulations provide that the term “anything of value includes all in-kind
 15 contributions,” such as the “provision of any goods or services without charge or at a charge that

¹⁰ Gardner, *et al.*, Resp., Attach. 2 ¶ 11.

¹¹ See, e.g., Gardner, *et al.*, Resp. at 4; Scalise Resp. at 1; DJT for President & TMAGA Joint Resp. at 1. Several Respondents further argue that the firewall policy employed by their digital fundraising intermediary satisfies the safe harbor provision at 11 C.F.R. § 109.21(h), exempting the emails from the Commission’s coordinated communication test entirely. AFA Resp. at 2; Gardner, *et al.*, Resp. at 2.

¹² DJT for President & TMAGA Joint Resp. at 1; AFA Resp. at 1; RSLC Resp. at 4.

¹³ 52 U.S.C. § 30101(8)(A)(i); see also *id.* § 30101(9)(A)(i) (similarly defining “expenditure”).

¹⁴ *Id.* § 30116(a), (f); see also 11 C.F.R. §§ 110.1(b)(1), 110.9. Given the number and various types of political committees and organizations involved in this matter, multiple limits are implicated. *E.g., id.* § 102.12(c)(2) (stating that a federal candidate committee may contribute up to \$2,000 per election to the committee of another federal candidate); 52 U.S.C. § 30116(a)(2) (stating that multicandidate committees may contribute up to \$5,000 per election to federal candidates). However, as the Commission finds no reason to believe that any contribution in the form of a coordinated communication between Respondents occurred as a result of the fundraising emails, the specific limits are not relevant to the outcome of this matter.

1 is less than the usual and normal charge for such goods or services.”¹⁵ In-kind contributions also
2 include coordinated communications. Under the Commission’s coordinated communication
3 regulation (codified at 11 C.F.R. § 109.21), the communication at issue must: (1) be paid for by a
4 third party; (2) satisfy a “content” standard; and (3) satisfy a “conduct” standard.¹⁶ All three
5 prongs are required for a communication to be considered a coordinated communication and
6 treated as an in-kind contribution under the regulations.¹⁷

7 Political committees are required to report the identifying information of each person
8 who makes an aggregate contribution in excess of \$200 within the calendar year (or election
9 cycle, in the case of an authorized committee), together with the date and amount of any such
10 contribution.¹⁸ If a political committee makes a contribution to another political committee, it
11 must also report the disbursement along with the name of the recipient committee, the date, and
12 the amount of the contribution.¹⁹

13 The Complaint points to a series of fundraising emails sent on behalf of Respondents
14 from the same email address, info@keepingusgreat.com, raising allegations that the emails were

¹⁵ 11 C.F.R. § 100.52(d) (listing examples of goods or services, such as securities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists).

¹⁶ *Id.* § 109.21. Content standards include: (1) electioneering communications; (2) a public communication that disseminates, distributes, or republishes campaign materials; (3) a public communication containing express advocacy; (4) a public communication that, in relevant part, refers to a clearly identified House or Senate candidate, and is publicly distributed or disseminated 90 days or fewer before a primary, general, or special election, and is directed to voters in the jurisdiction of the clearly identified candidate; and (5) a public communication that is the functional equivalent of express advocacy. *Id.* § 109.21(c).

Conduct standards include: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) common vendor; and (5) former employee or independent contractor. *Id.* § 109.21(d)(1)-(5). A sixth conduct standard describes how the other conduct standards apply when a communication republishes campaign materials. *Id.* § 109.21(d)(6).

¹⁷ *Id.* § 109.21(a).

¹⁸ 52 U.S.C. § 30104(b)(3)(A); *see also* 11 C.F.R. § 104.3(a).

¹⁹ 52 U.S.C. § 30104(b)(6); *see also* 11 C.F.R. § 104.3(b)(3)(v).

1 coordinated communications, resulting in Respondents making or accepting unreported and
2 potentially excessive in-kind contributions.

3 First, based on the available information, there is no reasonable basis to conclude that the
4 “payment prong” of the Commission’s three-part coordinated communications test is satisfied.
5 Respondents assert that they independently contracted, directly or through a digital fundraising
6 consultant, with Right Country Lists, an email list rental company.²⁰ They state that Right
7 Country Lists, following its usual practice and an industry custom, sent the Respondents’
8 fundraising emails using an email address that it owns and operates.²¹ These assertions are
9 supported by affidavits from executives at Right Country Lists and Targeted Victory, LLC, one
10 of the digital fundraising consultants that assisted several Respondents with arranging the list
11 rentals, who attested to the processes by which the emails at issue were sent.²² Accordingly, it

²⁰ Separate from whether Respondents coordinated the emails in some way, the Complaint may also be read to allege that Respondents shared an email list without charge. *See* Compl. at 1 (asserting that Respondents “are using the same . . . (likely) emails lists for fundraising purposes). The Commission has long recognized that committees may sell, rent, or exchange their lists for fair market value. *E.g.*, Advisory Op. 2014-09 (REED Marketing) at 4 n.6; Advisory Op. 2014-06 (Ryan, Ryan for Congress, & Prosperity Action) at 8; Advisory Op. 2002-14 (Libertarian Nat’l Comm.) at 5; Advisory Op. 1982-41 (Dellums) at 2. However, there is no basis to conclude that Respondents shared any such list for the same reason that the Commission concludes the payment prong is not satisfied. The information provided in the Responses shows that the Respondents separately contracted with a third party list vendor and, as such, did not share a list without charge.

²¹ DJT for President & TMAGA Joint Resp. at 1; RSLC Resp. at 2; Gardner, *et al.*, Resp., Attach. 2 (affidavit of Carter Kidd, Partner, Right Country Lists) (explaining that this practice is a commercial one that Right Country Lists “believes increases response rates and the value of the List”). In previous matters involving fundraising emails sent by a vendor on behalf of a committee, the email has similarly included the name of the list owner in the “from” line. *E.g.*, Factual & Legal Analysis at 3 n.14, MUR 7004 (The 2016 Committee, *et al.*) (explaining how an email sent on behalf of a candidate committee contained the name of the list owner, an independent expenditure-only political committee, in the “from” line “in accordance with professional fundraising standards and . . . practices”); Factual & Legal Analysis at 4-5, MUR 6775 (Ready for Hillary PAC) (explaining how a list brokerage firm generally “include[d] the owner of the list in the ‘from’ line for security purposes, to protect against unapproved usage of the list, and for legal compliance with federal SPAM opt-out laws”).

²² Gardner, *et al.*, Resp., Attach. 2 (affidavit of Carter Kidd, Partner, Right Country Lists); *id.*, Attach. 3 ¶ 5 (sworn declaration of Abe Adams, Managing Partner, Targeted Victory, LLC); Scalise Committee Resp., Attach. (same). The declaration from the Targeted Victory, LLC, partner attested to the use of a firewall policy to ensure that the emails were sent without any coordination between its clients, which would appear to satisfy the safe harbor provision at 11 C.F.R. § 109.21(h), exempting the emails from the Commission’s coordinated communication test.

1 appears that each of the emails, though originating from the same email address and domain
2 owned by Right Country Lists, were paid for by the committee identified in the disclaimer at the
3 bottom of the email and not by any third party.²³

4 Second, the emails fail the “content prong” of the coordinated communication test. The
5 content standards all require that there be an “electioneering communication” or a “public
6 communication,” neither of which applies to the emails. An electioneering communication is
7 “any broadcast, cable, or satellite communication” that refers to a “clearly identified candidate
8 for Federal office,” is publicly distributed within a certain time before an election, and meets
9 certain requirements regarding the audience.²⁴ The emails were sent via the internet, not
10 broadcast, cable, or satellite, and therefore were not electioneering communications.

11 A public communication is “a communication by means of any broadcast, cable, or
12 satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or
13 telephone bank to the general public, or any other form of general public political advertising.”²⁵
14 Commission regulations provide that public communications “shall not include communications
15 over the Internet, except for communications placed for a fee on another person’s Web site,” a
16 provision referred to as the “internet exemption.”²⁶ Emails are communications over the

²³ As noted above, some of the emails contain solicitations from one candidate or his/her agent on behalf of another, but in each instance there is a disclaimer box indicating that the beneficiary candidate’s committee paid for the email. *Supra* note 4. To the extent these emails implicate the “conduct prong,” it is of no consequence if the emails were paid for by the beneficiary committee, which appears to be the case here.

²⁴ 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 109.29.

²⁵ 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26.

²⁶ 11 C.F.R. § 100.26.

1 internet, but they are not placed for a fee on another person’s website and thus do not qualify as
2 public communications.²⁷

3 In sum, the coordinated communication test is not satisfied with respect to the emails at
4 issue in this matter. Therefore, the Commission finds no reason to believe that Respondents
5 violated 52 U.S.C. § 30116(a) and (f) by making or knowingly accepting excessive in-kind
6 contributions and finds no reason to believe that the political committee Respondents violated 52
7 U.S.C. § 30104(b)(3) and (b)(6) by failing to report in-kind contributions.

²⁷ Factual & Legal Analysis at 5, MUR 6657 (Akin for Senate) (determining that payments to send emails do not fall within the meaning of “placed for a fee on another person’s website”); Advisory Op. 2011-14 at 5 (Utah Bankers Ass’n Action PAC) (concluding that a communication via email is not a public communication).