

1 **FEDERAL ELECTION COMMISSION**
2
3 **FIRST GENERAL COUNSEL'S REPORT**

4
5 **MUR 7960**

6 DATE COMPLAINT FILED: Feb. 14, 2022

7 DATE OF NOTIFICATIONS: Feb. 18, 2022

8 LAST RESPONSE RECEIVED: Apr. 8, 2022

9 DATE ACTIVATED: June 22, 2022

10 EXPIRATION OF SOL: Mar. 12-18, 2023

11 ELECTION CYCLE: 2018

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14 **COMPLAINANT:**

Kerri Barber

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16 **RESPONDENTS:**

Casten for Congress and Michelle M. Scheffki in
her official capacity as treasurer

SunshinePAC and John Hennelly in his official
capacity as treasurer

Tom Casten

Michael Garton

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23 **RELEVANT STATUTE
AND REGULATION:**

52 U.S.C. § 30116(a), (f)

11 C.F.R. § 109.21

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27 **INTERNAL REPORTS CHECKED:**

Disclosure Reports

28
29 **FEDERAL AGENCIES CHECKED:**

None

30 **I. INTRODUCTION**

31 This matter arises from a Complaint alleging that SunshinePAC and John Hennelly in his
32 official capacity as treasurer (“SunshinePAC”) made, and Casten for Congress and Michelle M.
33 Scheffki in her official capacity as treasurer (the “Casten Committee”) accepted and failed to
34 report, excessive in-kind contributions in violation of the Federal Election Campaign Act of
35 1971, as amended (the “Act”). The Complaint supports this allegation by asserting that, because
36 the Casten Committee’s campaign manager, Michael Garton, lived at the same address as the
37 candidate’s father, and because the candidate’s father made significant contributions to

1 SunshinePAC, the independent expenditures subsequently made by SunshinePAC were
2 coordinated with the Casten Committee.

3 The Casten Committee filed a Response denying the allegations and stating that the
4 Complaint fails to allege any facts indicating that excessive in-kind contributions occurred, as the
5 Complaint does not allege any facts that would satisfy the conduct prong of the Commission's
6 test for coordinated communications. Michael Garton also filed a response, attaching a sworn
7 affidavit, denying the allegations and stating that he never coordinated with Casten's father or
8 SunshinePAC. Neither Tom Casten nor SunshinePAC submitted a Response.

9 Because the expenditures at issue fail to satisfy the Commission's three-pronged test for
10 coordinated communications, we recommend the Commission find no reason to believe that
11 SunshinePAC or Tom Casten made, and the Casten Committee knowingly accepted, excessive
12 in-kind contributions in violation of 52 U.S.C. § 30116(a), (f). We also recommend the
13 Commission find no reason to believe that Michael Garton accepted an excessive in-kind
14 contribution on behalf of the Casten Committee in violation of 52 U.S.C. § 30116(f).

15 **II. FACTUAL BACKGROUND**

16 Sean Casten is a congressman from Illinois's Sixth District; the events at issue in this
17 matter occurred during the 2018 election cycle when he was a candidate for that seat.¹ Casten
18 for Congress is his principal campaign committee.² During the relevant time period, Michael
19 Garton was the Casten Committee's campaign manager.³

¹ Sean Casten, Statement of Candidacy (June 22, 2017), <https://docquery.fec.gov/pdf/726/201706229065080726/201706229065080726.pdf>.

² Casten for Congress, Amended Statement of Organization (Jan. 19, 2022), <https://docquery.fec.gov/pdf/665/202201199475026665/202201199475026665.pdf>.

³ Garton Resp. at 1 (Apr. 8, 2022); *id.*, Attach. ¶ 4 (Aff. of Michael Garton) [hereinafter Garton Aff.]. According to his LinkedIn profile, Garton left this role in November 2018. Michael Garton, LINKEDIN, <https://www.linkedin.com/in/michaelgarton/> (last visited Oct. 19, 2022).

1 SunshinePAC is an independent expenditure-only political committee that first registered
 2 with the Commission on May 25, 2017.⁴ During the 2018 election cycle, it received \$225,000 in
 3 individual contributions, \$150,000 of which came from Casten's father, Tom Casten, in the form
 4 of a \$100,000 contribution on March 12, 2018, and a \$50,000 contribution on March 15, 2018.⁵
 5 In March 2018, contemporaneous with these contributions, SunshinePAC made three
 6 independent expenditures opposing one of Sean Casten's primary election opponents, Kelly
 7 Mazeski.⁶

Date	Recipient	Purpose	Amount
March 12, 2018	Forest Printing Company	Printing [sic]	\$57,699.57
March 13, 2018	Campaign Industries	Direct Mail	\$30,000.00
March 20, 2018	Campaign Industries	Direct Mail and Phones	\$42,000.00
Total:			\$129,699.57

⁴ SunshinePAC, Statement of Organization (May 25, 2017), <https://docquery.fec.gov/pdf/962/201705259055150962/201705259055150962.pdf>; SunshinePAC, Amended Statement of Organization (June 18, 2018) [hereinafter SunshinePAC Current Statement of Organization], <https://docquery.fec.gov/pdf/085/201806189113732085/201806189113732085.pdf>. SunshinePAC filed one report in which its name was listed as "My Committee" on March 15, 2018, but it changed its name back to SunshinePAC on June 16, 2018. See My Committee, Amended Statement of Organization (Mar. 15, 2018), <https://docquery.fec.gov/pdf/834/201803159096558834/201803159096558834.pdf>; SunshinePAC, Current Statement of Organization. For clarity, this Report will refer to SunshinePAC as "SunshinePAC," even during the period when it was named "My Committee."

⁵ *FEC Receipts: Filtered Results*, FEC.GOV, https://www.fec.gov/data/individual-contributions/?committee_id=C00641530&two_year_transaction_period=2018 (last visited Oct. 19, 2022) (showing all individual contributions reported by SunshinePAC during the 2018 election cycle). None of SunshinePAC's filings name Tom Casten in any capacity other than as a contributor. However, a press report quotes Garton, responding to allegations similar to those at issue in this matter, as stating, "When dark money was spent against Sean in the primary, his dad set up a PAC to respond. . . . We had nothing to do with it and there was no coordination." Mary Ann Ahern, *Questions Raised Over Casten's Campaign Finances*, NBC 5 CHI. (Apr. 25, 2018), <https://www.nbcchicago.com/news/local/sean-casten-super-pac-fec-filing-peter-roskam/48047/>.

⁶ SunshinePAC, 2018 April Quarterly Report at 7-8 (Apr. 14, 2018) [hereinafter SunshinePAC April Quarterly Report], <https://docquery.fec.gov/pdf/593/201804149108081593/201804149108081593.pdf>. The 48-Hour Reports SunshinePAC filed with the Commission report the March 13, 2018 Campaign Industries disbursement for the purpose of "Advertising," and the March 20, 2018 Campaign Industries disbursement for the purpose of "Phones and advertising." SunshinePAC, 48-Hour Report at 1 (Mar. 14, 2018), <https://docquery.fec.gov/pdf/591/201803149096557591/201803149096557591.pdf> (regarding March 13 disbursement); SunshinePAC, 48-Hour Report at 1 (Mar. 20, 2018), <https://docquery.fec.gov/pdf/472/201803209096673472/201803209096673472.pdf> (regarding March 20 disbursement).

1 These independent expenditures were made before the primary election that took place on
2 March 20, 2018.⁷ Neither the Complaint nor the Responses provide any specific information
3 regarding the substance of these communications, but based on the descriptions noted in the
4 disclosure reports, the expenditures appear to have been mailers and telephone banks.⁸ Prior to
5 September 2018, Tom Casten was SunshinePAC's sole reported contributor.⁹

6 The Complaint alleges that, because Tom Casten was SunshinePAC's primary funder,
7 and because Garton lived at the same address as him at the time the communications occurred,
8 there was an "intimate relationship" between Garton and Tom Casten, and that there was no
9 "firewall" between SunshinePAC and the Casten Committee.¹⁰ The Complaint concludes,
10 therefore, that SunshinePAC's communications were coordinated with the Casten Committee,
11 and accordingly that SunshinePAC's payments for the communications constitute excessive in-
12 kind contributions to the Casten Committee.¹¹

13 Garton denies that any coordination between himself, as an agent of the Casten
14 Committee, and SunshinePAC occurred.¹² Specifically, while Garton confirms that he lived at

⁷ SEE PUB. DISCLOSURE & MEDIA RELS. DIV., OFF. OF COMM'CS, FEC, FEDERAL ELECTIONS 2018: ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES at 63(2019), <https://www.fec.gov/resources/cms-content/documents/federaelections2018.pdf>.

⁸ Garton also referred to the expenditures as "the mailers" in his affidavit. See Garton Aff. ¶¶ 18-23.

⁹ *FEC Receipts: Filtered Results*, FEC.GOV, https://www.fec.gov/data/individual-contributions/?committee_id=C00641530&two_year_transaction_period=2018 (last visited Oct. 19, 2022) (showing all individual contributions reported by SunshinePAC during the 2018 election cycle). In September and October 2018, SunshinePAC received eight additional contributions from individuals, other political committees, a corporation, and an LLC. See SunshinePAC, 2018 October Quarterly Report, Sched. A (Oct. 15, 2018), <https://docquery.fec.gov/pdf/026/201810159125168026/201810159125168026.pdf>; SunshinePAC, Amended 2018 12-Day Pre-General Report, Sched. A (Apr. 25, 2019), <https://docquery.fec.gov/pdf/410/201904259149595410/201904259149595410.pdf>; SunshinePAC, Amended 2018 30-Day Post-General Report, Sched. A (May 6, 2019), <https://docquery.fec.gov/pdf/015/201905069149631015/201905069149631015.pdf>.

¹⁰ Compl. at 2-3 (Feb. 14, 2022).

¹¹ *Id.* at 1-3.

¹² Garton Resp. at 2-3.

1 the same address as Casten's father, he states that he "resided in a separate living space" with "its
2 own entrance."¹³ While Garton acknowledges, in his sworn affidavit, "hav[ing] dinner and other
3 common social interactions with Tom Casten," he states that his conversations with Tom Casten
4 were limited "solely to publicly available information," and he specifically denies "request[ing]"
5 contributions to SunshinePAC or discussing Tom Casten's contributions with any representatives
6 of SunshinePAC.¹⁴ Garton acknowledges seeing a copy of one of the mailers that he "believe[s]
7 are the subject of the [C]omplaint,"¹⁵ but he asserts that he had "no involvement whatsoever in
8 decisions regarding the planning, creation, content, production, timing, frequency, media outlet,
9 or any other possible aspect that went into the creation, production, and distribution of the
10 mailers or other communications described in the complaint."¹⁶ He also denies that the vendors
11 involved in these communications, Campaign Industries and Forest Printing Company, provided
12 any services to the Casten Committee while he was "working for the committee for the March
13 2018 Democratic primary and during the 120 days before the communications were
14 distributed."¹⁷

15 The Casten Committee argues that even if all the facts alleged by the complaint were
16 proven true, it would not "indicate that the [Casten Committee] and [SunshinePAC]

¹³ Garton Aff. ¶¶ 10-11.

¹⁴ *Id.* ¶¶ 12-14, 16.

¹⁵ *Id.* ¶ 18.

¹⁶ *Id.* ¶ 21.

¹⁷ *Id.* ¶ 24. A search of the Casten Committee's disbursements confirms that the Casten Committee did not report any disbursements to "Campaign Industries" during the 2018 election cycle. The Casten Committee did report disbursements to "Forest Printing," but these disbursements occurred between July 23, 2018, and December 13, 2018, several months after the expenditures at issue here. See *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00648493&recipient_name=Campaign+Industries&recipient_name=Forest+Printing&two_year_transaction_period=2018 (last visited Oct. 19, 2022) (showing 12 disbursements to Forest Printing totaling \$16,303.03 between July and December 2018, and no disbursements to Campaign Industries).

1 impermissibly coordinated on [SunshinePAC's] independent expenditures.”¹⁸ The Casten
2 Committee also notes that the Complaint “provides no details beyond a statement about Mr.
3 Garton's residency to prove that he shared nonpublic information about the Campaign's plans,
4 projects, activities, or needs with [Tom] Casten,” nor does the Complaint allege specifically that
5 Tom Casten “was an agent or employee of [SunshinePAC] or the [Casten Committee].”¹⁹ The
6 Casten Committee states that “[s]imply being the [c]andidate's father does not turn [Tom] Casten
7 into an agent of the Campaign.”²⁰

8 As noted above, neither Tom Casten nor SunshinePAC submitted a Response to the
9 Complaint, but Garton states in his affidavit that Tom Casten “volunteered with the campaign on
10 an unofficial and unpaid basis.”²¹

11 III. LEGAL ANALYSIS

12 The Act provides that an expenditure made by any person in “cooperation, consultation,
13 or concert with, or at the request or suggestion of, a candidate, his or her authorized political
14 committees, or their agents” constitutes an in-kind contribution.²² Independent expenditure-only
15 political committees may accepted unlimited contributions so long as they do not make
16 contributions to candidates and their authorized committees.²³ It is unlawful for candidates,

¹⁸ Casten Comm. Resp. at 1-2 (Apr. 8, 2022).

¹⁹ *Id.* at 2, 5.

²⁰ *Id.* at 5.

²¹ Garton Aff. ¶ 13.

²² 52 U.S.C. § 30116(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20(a).

²³ *See SpeechNow v. FEC*, 599 F.3d 686, 692-96 (D.C. Cir. 2010) (holding that contribution limits as applicable to independent expenditure-only political committees are unconstitutional); Advisory Opinion 2010-11 at 2-3 (Common Sense Ten) (advising an independent expenditure-only political committee that its plan to accept “unlimited contributions from individuals, political committees, corporations, and labor organizations for the purpose of making independent expenditures,” but not to make “monetary or in-kind contributions (including coordinated communications to any other political committee)” complied with the Act).

1 political committees, and their officers and employees to knowingly accept an excessive
2 contribution.²⁴

3 The Commission's regulations provide a three-part test for determining when a
4 communication is a coordinated expenditure.²⁵ A communication is coordinated if it: (1) is paid
5 for by a third party (the "payment prong"); (2) satisfies one of five content standards set forth at
6 11 C.F.R. § 109.21(c) (the "content prong");²⁶ and (3) satisfies one of six conduct standards set
7 forth at 11 C.F.R. § 109.21(d) (the "conduct prong").²⁷ All three prongs must be satisfied for a
8 communication to be coordinated under the regulations.²⁸

9 SunshinePAC's expenditures appear to meet two of the three prongs of the coordinated
10 communication test. First, it is undisputed that the payment prong of the test is satisfied because
11 SunshinePAC, a third party, paid for the communications at issue, specifically mailers and
12 telephone bank calls, that are the subject of the Complaint.²⁹ Second, the content prong of the
13 test appears to be met because SunshinePAC reported the disbursements as being made for, *inter*

²⁴ 52 U.S.C. § 30116(f). In the 2018 cycle, an individual was permitted to contribute up to \$2,700 to a candidate per election. Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 82 Fed. Reg. 10,904, 10,906 (Feb. 16, 2017) (setting contribution limit for 2018 cycle).

²⁵ 11 C.F.R. § 109.21(a)-(b).

²⁶ The content standards state that the communication at issue must be (1) a communication that is an electioneering communication; (2) a public communication that disseminates, distributes, or republishes, in whole or in part, campaign material prepared by a candidate or the candidate's authorized committee; (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office; (4) a public communication referring to various types of federal candidates or to political parties that satisfies the requirements of 11 C.F.R. §§ 109.21(c)(4)(i), (ii), (iii) or (iv); or (5) a public communication that is the functional equivalent of express advocacy. 11 C.F.R. § 109.21(c).

²⁷ The conduct standards listed in 11 C.F.R. § 109.21(d) are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) common vendor; (5) former employee; and (6) republication, discussed further in relevant part *infra*.

²⁸ 11 C.F.R. § 109.21(a); *see also* Explanation and Justification for Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 [hereinafter Coordination E&J] (January 3, 2003).

²⁹ SunshinePAC April Quarterly Report at 7-8.

1 *alia*, “Direct Mail” and “Phones,”³⁰ both of which appear to fall under the definition of “public
 2 communication” in the form of mass mailings and a telephone bank,³¹ and as independent
 3 expenditures, which by definition contain express advocacy.³² SunshinePAC’s disbursements
 4 therefore appear to constitute public communications that expressly advocate the election or
 5 defeat of a clearly identified candidate for federal office under 11 C.F.R. § 109.21(c)(3).

6 SunshinePAC’s disbursements, however, do not appear to satisfy the conduct prong of
 7 the coordinated communications test. The Commission’s regulations contemplate a number of
 8 ways in which a communication may satisfy this prong, discussed in relevant part below.³³

9 **A. Substantial Discussion**

10 The Complaint alleges that the substantial discussion conduct standard at 11 C.F.R.
 11 § 109.21(d)(3) was met because Garton lived in the same residence as Tom Casten, who was the
 12 father of the candidate and sole contributor to SunshinePAC at the time the independent
 13 expenditures at issue were made. Under the Commission’s regulations, a communication is
 14 coordinated under the substantial discussion standard if it is:

15 created, produced, or distributed after one or more substantial
 16 discussions about the communication between the person paying

³⁰ *Id.*

³¹ 11 C.F.R. § 100.26 (listing mass mailing, telephone banks, and “other form[s] of general political advertising” as public communications); *see, e.g.*, Factual & Legal Analysis (“F&LA”) at 8 & n.30, MUR 6793 (Steve Stockman for Senate, *et al.*) (finding that publicly disseminated mailers constituted public communications under the content prong of the coordinated communications test); First Gen. Counsel’s Rpt. (“FGCR”) at 7, MUR 6560 (Victory Ohio SuperPAC) (noting that robocalls constituted public communications and recommending the Commission find reason to believe that the respondent accordingly failed to include necessary disclaimers); Certification (“Cert.”) ¶ 2, MUR 6560 (adopting relevant recommendation in FGCR).

³² 52 U.S.C. § 30101(17) (“The term ‘independent expenditure’ means an expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate”); 11 C.F.R. § 100.16 (“The term independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate”); *see supra* note 6 and accompanying text.

³³ The Complaint does not make arguments or present facts that would implicate the other ways in which the conduct standard may be satisfied under 11 C.F.R. § 109.21(d)(5) (former employee or independent contractor) or § 109.21(d)(6) (replication of campaign material). Accordingly, these subsections are not addressed in this Report.

1 for the communications, or the employees or agents of the person
2 paying for the communication, and the candidate who is clearly
3 identified in the communication, or the candidate's authorized
4 committee, the candidate's opponent, the opponent's authorized
5 committee, or a political party committee.³⁴

6 But there is no specific factual support for the allegation that agents of the Casten Committee,
7 including Garton, had substantial discussions with agents of SunshinePAC about “the
8 campaign's plans, projects or activities” that would be material to the creation, production, or
9 distribution of SunshinePAC's mail pieces or phone calls.³⁵ While acknowledging living at the
10 same address as Tom Casten, Garton describes that he occupied separate living quarters that had
11 their own entrance and that he worked “on-site for the [Casten Committee]” at a separate
12 location.³⁶ Garton submitted a sworn affidavit stating that any conversations he had with Tom
13 Casten regarding the Casten Committee or to Sean Casten's primary campaign “related solely to
14 publicly available information.”³⁷

15 With respect to Tom Casten, as the Casten Committee's Response notes, the Complaint
16 does not specifically allege that Tom Casten “was an agent or employee” of SunshinePAC or the
17 Casten Committee, or that he had any involvement with the PAC beyond his contributions.³⁸
18 Further, Tom Casten would not be considered an agent of the Casten Committee solely based on

³⁴ 11 C.F.R. § 109.21(d)(3).

³⁵ Under the Commission's regulations, “any person who has actual authority, either express or implied,” to engage in activities on behalf of a Federal candidate that would satisfy the conduct standard of § 109.21's coordination test is considered an agent of that candidate. *See* 11 C.F.R. 109.3(b) (defining “agent”); *see also* Coordination E&J at 423-24. An agent's actual authority is created by manifestations of consent (express or implied) by the principal to the agent about the agent's authority to act on the principal's behalf. *See* Definitions of “Agent” for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975, 4975-76 (Jan. 31, 2006) [hereinafter Definitions of “Agent”]; Advisory Opinion 2007-05 at 3 (Iverson).

³⁶ Garton Aff. ¶¶ 10-12.

³⁷ *Id.* ¶ 13.

³⁸ Casten Comm. Resp. at 2, 5.

1 his familial relationship to the candidate.³⁹ The Commission has explained that it “has never
 2 determined that a familial relationship — standing alone — is sufficient to find reason to believe
 3 that coordination took place.”⁴⁰

4 Though Garton states that Tom Casten “volunteered with the campaign on an unofficial
 5 and unpaid basis,”⁴¹ without information indicating that Tom Casten had “actual authority, either
 6 express or implied,” to assist in the creation, production, or distribution of the communications
 7 here at issue, there is no information to establish that he was an agent of the Casten Committee
 8 when he made contributions to SunshinePAC or at any point thereafter.⁴² The current record
 9 contains no evidence that Tom Casten shared information about the Casten Committee’s plans,
 10 projects or activities material to the creation, production, or distribution of the communications

³⁹ See Definitions of “Agent” at 4978 n.6 (“Specifically, it is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal.” (quoting Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064-01, 49,083 (July 29, 2002))).

⁴⁰ See F&LA at 5-8, MUR 6668 (Jay Chen for Congress) (finding no reason to believe in matter involving allegations that a communication disseminated by an organization primarily funded by the candidate’s brother was coordinated with the candidate where the president of the organization submitted a sworn affidavit stating that “no non-public information regarding the plans, projects, or needs of the . . . campaign were communicated to myself or any other agent of” the organization); F&LA at 4-5, MUR 7067 (Friends of Patrick Murphy, *et al.*) (finding no reason to believe that coordination had occurred where an independent expenditure-only political committee making expenditures supporting a candidate was substantially funded by the candidate’s father and the father’s company and where the candidate’s father submitted a sworn affidavit stating that he had made his contributions of his own accord and that he did not participate in any discussions with the committee regarding its subsequent communications). In a different matter, the Commission did not agree with this Office’s recommendations to find violations of the Act occurred via coordinated communications where the candidate’s husband played an official role in the campaign for a brief period and, after his departure, made large contributions to an independent expenditure-only political committee that advocated for the election of the candidate; there, the husband had submitted a sworn affidavit disclaiming any participation in the communications subsequently produced by the political committee. See FGCR at 18, MUR 7139 (Maryland USA, *et al.*) (recommending finding reason to believe); Cert. ¶ 1 (Jan. 28, 2021), MUR 7139 (failing by vote of 2-4 to find reason to believe).

⁴¹ Garton Aff. ¶ 13.

⁴² 11 C.F.R. § 300.2(b)(3). Though the Commission has specifically noted that campaign volunteers are often agents of a campaign, a volunteer must have the expressed or implied actual authority contemplated in the Commission’s regulations to establish agency status. See Definitions of “Agent” at 4977-78 (“Therefore, the Commission’s current definitions of “agent” best effectuate the intent and purpose of BCRA and the Act, and create the appropriate incentives for candidates, party committees, and other political committees to ensure that their employees *and volunteers* are familiar with, and comply with, BCRA’s soft money and coordination provisions.” (emphasis added)). The Complaint does not allege that Tom Casten had such authority.

1 at issue, or that he was even in a position to possess that type of information. Accordingly, there
2 is no information in the record to indicate that Tom Casten, acting as an agent of the Casten
3 Committee, had or could have had a “substantial discussion” with SunshinePAC about the
4 communications at issue.

5 **B. Request or Suggestion**

6 Under Commission regulations, a communication may also satisfy the conduct standard
7 of the coordinated communications test if it is:

8 created, produced, or distributed at the request or suggestion of a
9 candidate, authorized committee, or political party committee;
10 or . . . [t]he communication is created, produced, or distributed at
11 the suggestion of a person paying for the communication and the
12 candidate, authorized committee, or political party committee
13 assents to the suggestion.⁴³

14 Garton’s affidavit asserts that he never discussed or requested Tom Casten’s donations to
15 SunshinePAC, never consulted with any representative of SunshinePAC or its vendors, and that
16 he “never assented to a suggestion by Tom Casten or any employee, officer, or representative of
17 the SunshinePAC to create, produce, or distribute such mailers or other communications that are
18 described in the Complaint.”⁴⁴ There is no available factual information to contradict Garton’s
19 sworn assertions that a request or suggestion did not take place.

20 **C. Material Involvement**

21 Under Commission regulations, a communication may also satisfy the conduct standard
22 of the coordinated communications test if the candidate, authorized committee, or political party
23 committee is “materially involved in decisions regarding” the communication’s “content,” its

⁴³ 11 C.F.R. § 109.21(d)(1).

⁴⁴ Garton Aff. ¶¶ 14-20. The Complaint does not allege that Tom Casten received any such request or suggestion from Sean Casten, but relies instead on the proximity of Tom Casten and Michael Garton.

1 “intended audience,” the “means or mode of the communication,” the “media outlet used for the
2 communication,” its “timing or frequency,” or its size, prominence, or duration.⁴⁵ Garton’s
3 affidavit attests that he “had no involvement whatsoever in decisions regarding the planning,
4 creation, content, strategy, timing, frequency, media outlet, or any other possible aspect that went
5 into the creation, production, and distribution of the mailers or other communications.”⁴⁶ We are
6 not aware of any other available information to support the allegations of material involvement.

7 **D. Common Vendor**

8 Commission regulations further state that a communication may satisfy the conduct
9 standard if all of the following are true: (1) “The person paying for the communication, or an
10 agent of such person, contracts with or employs a commercial vendor . . . to create, produce, or
11 distribute the communication;” (2) the commercial vendor has, during the previous 120 days,
12 worked on the development of media strategy, selection of audiences, polling, fundraising, or
13 other similar activities for the candidate, her authorized committee, her opponent, her opponent’s
14 authorized committee, or a political party committee; and (3) the information material to
15 creating, producing, or distributing the communication is not publicly available.⁴⁷ Here, the
16 Casten Committee did not use the same vendors as SunshinePAC during the 120 days prior to
17 the communications at issue — rather, the Casten Committee only used one of SunshinePAC’s
18 vendors several months *after* the communications were disseminated.⁴⁸

⁴⁵ 11 C.F.R. § 109.21(d)(2).

⁴⁶ Garton Aff. ¶ 21. The Complaint does not allege that Sean Casten had any such involvement, and only discusses an alleged relationship between Garton and Tom Casten due to living at the same address.

⁴⁷ 11 C.F.R. § 109.21(d)(4).

⁴⁸ *See supra* note 17 and accompanying text; *see also* F&LA at 6-7, MUR 7740 (Teresa Tomlinson for Senate, *et al.*) (finding that the common vendor standard was not satisfied where the “record contains no evidence indicating that information about [the committee’s] plans, projects[,] or activities material to the creation, production, or distribution of the communications was used by or conveyed to the vendors”).

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Without more, and in light of Garton's specific sworn denials, there is no basis on which to conclude that the SunshinePAC's mailers and phone banks satisfied the conduct prong of the coordinated communications test.⁴⁹ Accordingly, we recommend the Commission find no reason to believe that Tom Casten or SunshinePAC made, and the Casten Committee knowingly accepted, excessive in-kind contributions in violation of 52 U.S.C. § 30116(a), (f). We also recommend the Commission find no reason to believe that Michael Garton accepted an excessive in-kind contribution on behalf of the Casten Committee in violation of 52 U.S.C. § 30116(f).

IV. RECOMMENDATIONS

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1. Find no reason to believe that SunshinePAC and John Hennelly in his official capacity as treasurer made excessive in-kind contributions in the form of coordinated communications in violation of 52 U.S.C. § 30116(a);

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2. Find no reason to believe that Tom Casten made excessive in-kind contributions in the form of coordinated communications in violation of 52 U.S.C. § 30116(a);

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3. Find no reason to believe that Casten for Congress and Michelle M. Scheffki in her official capacity as treasurer knowingly accepted excessive in-kind contributions in violation of 52 U.S.C. § 30116(f);

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4. Find no reason to believe that Michael Garton accepted an excessive in-kind contribution on behalf of Casten for Congress and Michelle M. Scheffki in her official capacity as treasurer in violation of 52 U.S.C. § 30116(f);

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5. Approve the attached Factual and Legal Analysis;

⁴⁹ See Statement of Reasons, Comm'rs Mason, Sandstrom, Smith & Thomas at 1-2, MUR 4960 (Hillary Rodham Clinton for US Senate Expl. Comm., Inc., *et al.*) ("The Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts which, if proven true, would constitute a violation of the FECA. . . . [M]ere speculation . . . will not be accepted as true.").

- 1 6. Approve the appropriate letters; and
- 2 7. Close the file.

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Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Associate General Counsel for
Enforcement

October 19, 2022

Date

Jin Lee

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Ana J. Peña-Wallace
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Justine A. di Giovanni
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Attachment:
Factual and Legal Analysis

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENTS:** Casten for Congress and Michelle M. Scheffki **MUR 7960**
4 in her official capacity as treasurer
5 SunshinePAC and John Hennelly in his official
6 capacity as treasurer
7 Tom Casten
8 Michael Garton

9 **I. INTRODUCTION**

10 This matter arises from a Complaint alleging that SunshinePAC and John Hennelly in his
11 official capacity as treasurer (“SunshinePAC”) made, and Casten for Congress and Michelle M.
12 Scheffki in her official capacity as treasurer (the “Casten Committee”) accepted and failed to
13 report, excessive in-kind contributions in violation of the Federal Election Campaign Act of
14 1971, as amended (the “Act”). The Complaint supports this allegation by asserting that, because
15 the Casten Committee’s campaign manager, Michael Garton, lived at the same address as the
16 candidate’s father, and because the candidate’s father made significant contributions to
17 SunshinePAC, the independent expenditures subsequently made by SunshinePAC were
18 coordinated with the Casten Committee.

19 The Casten Committee filed a Response denying the allegations and stating that the
20 Complaint fails to allege any facts indicating that excessive in-kind contributions occurred, as the
21 Complaint does not allege any facts that would satisfy the conduct prong of the Commission’s
22 test for coordinated communications. Michael Garton also filed a response, attaching a sworn
23 affidavit, denying the allegations and stating that he never coordinated with Casten’s father or
24 SunshinePAC. Neither Tom Casten nor SunshinePAC submitted a Response.

25 Because the expenditures at issue fail to satisfy the Commission’s three-pronged test for
26 coordinated communications, the Commission finds no reason to believe that SunshinePAC or

1 Tom Casten made, and the Casten Committee knowingly accepted, excessive in-kind
2 contributions in violation of 52 U.S.C. § 30116(a), (f). The Commission also finds no reason to
3 believe that Michael Garton accepted an excessive in-kind contribution on behalf of the Casten
4 Committee in violation of 52 U.S.C. § 30116(f).

5 **II. FACTUAL BACKGROUND**

6 Sean Casten is a congressman from Illinois’s Sixth District; the events at issue in this
7 matter occurred during the 2018 election cycle when he was a candidate for that seat.¹ Casten
8 for Congress is his principal campaign committee.² During the relevant time period, Michael
9 Garton was the Casten Committee’s campaign manager.³

10 SunshinePAC is an independent expenditure-only political committee that first registered
11 with the Commission on May 25, 2017.⁴ During the 2018 election cycle, it received \$225,000 in
12 individual contributions, \$150,000 of which came from Casten’s father, Tom Casten, in the form

¹ Sean Casten, Statement of Candidacy (June 22, 2017), <https://docquery.fec.gov/pdf/726/201706229065080726/201706229065080726.pdf>.

² Casten for Congress, Amended Statement of Organization (Jan. 19, 2022), <https://docquery.fec.gov/pdf/665/202201199475026665/202201199475026665.pdf>.

³ Garton Resp. at 1 (Apr. 8, 2022); *id.*, Attach. ¶ 4 (Aff. of Michael Garton) [hereinafter Garton Aff.]. According to his LinkedIn profile, Garton left this role in November 2018. Michael Garton, LINKEDIN, <https://www.linkedin.com/in/michaelgarton/> (last visited Oct. 19, 2022).

⁴ SunshinePAC, Statement of Organization (May 25, 2017), <https://docquery.fec.gov/pdf/962/201705259055150962/201705259055150962.pdf>; SunshinePAC, Amended Statement of Organization (June 18, 2018) [hereinafter SunshinePAC Current Statement of Organization], <https://docquery.fec.gov/pdf/085/201806189113732085/201806189113732085.pdf>. SunshinePAC filed one report in which its name was listed as “My Committee” on March 15, 2018, but it changed its name back to SunshinePAC on June 16, 2018. *See* My Committee, Amended Statement of Organization (Mar. 15, 2018), <https://docquery.fec.gov/pdf/834/201803159096558834/201803159096558834.pdf>; SunshinePAC, Current Statement of Organization. For clarity, this Report will refer to SunshinePAC as “SunshinePAC,” even during the period when it was named “My Committee.”

- 1 of a \$100,000 contribution on March 12, 2018, and a \$50,000 contribution on March 15, 2018.⁵
 2 In March 2018, contemporaneous with these contributions, SunshinePAC made three
 3 independent expenditures opposing one of Sean Casten’s primary election opponents, Kelly
 4 Mazeski.⁶

Date	Recipient	Purpose	Amount
March 12, 2018	Forest Printing Company	Printing [sic]	\$57,699.57
March 13, 2018	Campaign Industries	Direct Mail	\$30,000.00
March 20, 2018	Campaign Industries	Direct Mail and Phones	\$42,000.00
Total:			\$129,699.57

- 5 These independent expenditures were made before the primary election that took place on
 6 March 20, 2018.⁷ Neither the Complaint nor the Responses provide any specific information
 7 regarding the substance of these communications, but based on the descriptions noted in the

⁵ *FEC Receipts: Filtered Results*, FEC.GOV, https://www.fec.gov/data/individual-contributions/?committee_id=C00641530&two_year_transaction_period=2018 (last visited Oct. 19, 2022) (showing all individual contributions reported by SunshinePAC during the 2018 election cycle). None of SunshinePAC’s filings name Tom Casten in any capacity other than as a contributor. However, a press report quotes Garton, responding to allegations similar to those at issue in this matter, as stating, “When dark money was spent against Sean in the primary, his dad set up a PAC to respond. . . . We had nothing to do with it and there was no coordination.” Mary Ann Ahern, *Questions Raised Over Casten’s Campaign Finances*, NBC 5 CHI. (Apr. 25, 2018), <https://www.nbcchicago.com/news/local/sean-casten-super-pac-fec-filing-peter-roskam/48047/>.

⁶ SunshinePAC, 2018 April Quarterly Report at 7-8 (Apr. 14, 2018) [hereinafter *SunshinePAC April Quarterly Report*], https://docquery.fec.gov/pdf/593/20180414_9108081593/201804149108081593.pdf. The 48-Hour Reports SunshinePAC filed with the Commission report the March 13, 2018 Campaign Industries disbursement for the purpose of “Advertising,” and the March 20, 2018 Campaign Industries disbursement for the purpose of “Phones and advertising.” SunshinePAC, 48-Hour Report at 1 (Mar. 14, 2018), <https://docquery.fec.gov/pdf/591/201803149096557591/201803149096557591.pdf> (regarding March 13 disbursement); SunshinePAC, 48-Hour Report at 1 (Mar. 20, 2018), <https://docquery.fec.gov/pdf/472/201803209096673472/201803209096673472.pdf> (regarding March 20 disbursement).

⁷ *SEE PUB. DISCLOSURE & MEDIA RELS. DIV., OFF. OF COMMC’MS, FEC, FEDERAL ELECTIONS 2018: ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES* at 63 (2019), <https://www.fec.gov/resources/cms-content/documents/federaelections2018.pdf>.

1 disclosure reports, the expenditures appear to have been mailers and telephone banks.⁸ Prior to
 2 September 2018, Tom Casten was SunshinePAC’s sole reported contributor.⁹

3 The Complaint alleges that, because Tom Casten was SunshinePAC’s primary funder,
 4 and because Garton lived at the same address as him at the time the communications occurred,
 5 there was an “intimate relationship” between Garton and Tom Casten, and that there was no
 6 “firewall” between SunshinePAC and the Casten Committee.¹⁰ The Complaint concludes,
 7 therefore, that SunshinePAC’s communications were coordinated with the Casten Committee,
 8 and accordingly that SunshinePAC’s payments for the communications constitute excessive in-
 9 kind contributions to the Casten Committee.¹¹

10 Garton denies that any coordination between himself, as an agent of the Casten
 11 Committee, and SunshinePAC occurred.¹² Specifically, while Garton confirms that he lived at
 12 the same address as Casten’s father, he states that he “resided in a separate living space” with “its
 13 own entrance.”¹³ While Garton acknowledges, in his sworn affidavit, “hav[ing] dinner and other
 14 common social interactions with Tom Casten,” he states that his conversations with Tom Casten
 15 were limited “solely to publicly available information,” and he specifically denies “request[ing]”

⁸ Garton also referred to the expenditures as “the mailers” in his affidavit. *See* Garton Aff. ¶¶ 18-23.

⁹ *FEC Receipts: Filtered Results*, FEC.GOV, https://www.fec.gov/data/individual-contributions/?committee_id=C00641530&two_year_transaction_period=2018 (last visited Oct. 19, 2022) (showing all individual contributions reported by SunshinePAC during the 2018 election cycle). In September and October 2018, SunshinePAC received eight additional contributions from individuals, other political committees, a corporation, and an LLC. *See* SunshinePAC, 2018 October Quarterly Report, Sched. A (Oct. 15, 2018), <https://docquery.fec.gov/pdf/026/201810159125168026/201810159125168026.pdf>; SunshinePAC, Amended 2018 12-Day Pre-General Report, Sched. A (Apr. 25, 2019), <https://docquery.fec.gov/pdf/410/201904259149595410/201904259149595410.pdf>; SunshinePAC, Amended 2018 30-Day Post-General Report, Sched. A (May 6, 2019), <https://docquery.fec.gov/pdf/015/201905069149631015/201905069149631015.pdf>.

¹⁰ Compl. at 2-3 (Feb. 14, 2022).

¹¹ *Id.* at 1-3.

¹² Garton Resp. at 2-3.

¹³ Garton Aff. ¶¶ 10-11.

1 contributions to SunshinePAC or discussing Tom Casten’s contributions with any representatives
2 of SunshinePAC.¹⁴ Garton acknowledges seeing a copy of one of the mailers that he “believe[s]
3 are the subject of the [C]omplaint,”¹⁵ but he asserts that he had “no involvement whatsoever in
4 decisions regarding the planning, creation, content, production, timing, frequency, media outlet,
5 or any other possible aspect that went into the creation, production, and distribution of the
6 mailers or other communications described in the complaint.”¹⁶ He also denies that the vendors
7 involved in these communications, Campaign Industries and Forest Printing Company, provided
8 any services to the Casten Committee while he was “working for the committee for the March
9 2018 Democratic primary and during the 120 days before the communications were
10 distributed.”¹⁷

11 The Casten Committee argues that even if all the facts alleged by the complaint were
12 proven true, it would not “indicate that the [Casten Committee] and [SunshinePAC]
13 impermissibly coordinated on [SunshinePAC’s] independent expenditures.”¹⁸ The Casten
14 Committee also notes that the Complaint “provides no details beyond a statement about Mr.
15 Garton’s residency to prove that he shared nonpublic information about the Campaign’s plans,
16 projects, activities, or needs with [Tom] Casten,” nor does the Complaint allege specifically that

¹⁴ *Id.* ¶¶ 12-14, 16.

¹⁵ *Id.* ¶ 18.

¹⁶ *Id.* ¶ 21.

¹⁷ *Id.* ¶ 24. A search of the Casten Committee’s disbursements confirms that the Casten Committee did not report any disbursements to “Campaign Industries” during the 2018 election cycle. The Casten Committee did report disbursements to “Forest Printing,” but these disbursements occurred between July 23, 2018, and December 13, 2018, several months after the expenditures at issue here. *See FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00648493&recipient_name=Campaign+Industries&recipient_name=Forest+Printing&two_year_transaction_period=2018 (last visited Oct. 19, 2022) (showing 12 disbursements to Forest Printing totaling \$16,303.03 between July and December 2018, and no disbursements to Campaign Industries).

¹⁸ Casten Comm. Resp. at 1-2 (Apr. 8, 2022).

1 Tom Casten “was an agent or employee of [SunshinePAC] or the [Casten Committee].”¹⁹ The
 2 Casten Committee states that “[s]imply being the [c]andidate’s father does not turn [Tom] Casten
 3 into an agent of the Campaign.”²⁰

4 As noted above, neither Tom Casten nor SunshinePAC submitted a Response to the
 5 Complaint, but Garton states in his affidavit that Tom Casten “volunteered with the campaign on
 6 an unofficial and unpaid basis.”²¹

7 III. LEGAL ANALYSIS

8 The Act provides that an expenditure made by any person in “cooperation, consultation,
 9 or concert with, or at the request or suggestion of, a candidate, his or her authorized political
 10 committees, or their agents” constitutes an in-kind contribution.²² Independent expenditure-only
 11 political committees may accepted unlimited contributions so long as they do not make
 12 contributions to candidates and their authorized committees.²³ It is unlawful for candidates,
 13 political committees, and their officers and employees to knowingly accept an excessive
 14 contribution.²⁴

¹⁹ *Id.* at 2, 5.

²⁰ *Id.* at 5.

²¹ Garton Aff. ¶ 13.

²² 52 U.S.C. § 30116(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20(a).

²³ *See SpeechNow v. FEC*, 599 F.3d 686, 692-96 (D.C. Cir. 2010) (holding that contribution limits as applicable to independent expenditure-only political committees are unconstitutional); Advisory Opinion 2010-11 at 2-3 (Common Sense Ten) (advising an independent expenditure-only political committee that its plan to accept “unlimited contributions from individuals, political committees, corporations, and labor organizations for the purpose of making independent expenditures,” but not to make “monetary or in-kind contributions (including coordinated communications to any other political committee)” complied with the Act).

²⁴ 52 U.S.C. § 30116(f). In the 2018 cycle, an individual was permitted to contribute up to \$2,700 to a candidate per election. Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 82 Fed. Reg. 10,904, 10,906 (Feb. 16, 2017) (setting contribution limit for 2018 cycle).

1 The Commission’s regulations provide a three-part test for determining when a
2 communication is a coordinated expenditure.²⁵ A communication is coordinated if it: (1) is paid
3 for by a third party (the “payment prong”); (2) satisfies one of five content standards set forth at
4 11 C.F.R. § 109.21(c) (the “content prong”);²⁶ and (3) satisfies one of six conduct standards set
5 forth at 11 C.F.R. § 109.21(d) (the “conduct prong”).²⁷ All three prongs must be satisfied for a
6 communication to be coordinated under the regulations.²⁸

7 SunshinePAC’s expenditures appear to meet two of the three prongs of the coordinated
8 communication test. First, it is undisputed that the payment prong of the test is satisfied because
9 SunshinePAC, a third party, paid for the communications at issue, specifically mailers and
10 telephone bank calls, that are the subject of the Complaint.²⁹ Second, the content prong of the
11 test appears to be met because SunshinePAC reported the disbursements as being made for, *inter*
12 *alia*, “Direct Mail” and “Phones,”³⁰ both of which appear to fall under the definition of “public

²⁵ 11 C.F.R. § 109.21(a)-(b).

²⁶ The content standards state that the communication at issue must be (1) a communication that is an electioneering communication; (2) a public communication that disseminates, distributes, or republishes, in whole or in part, campaign material prepared by a candidate or the candidate’s authorized committee; (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office; (4) a public communication referring to various types of federal candidates or to political parties that satisfies the requirements of 11 C.F.R. §§ 109.21(c)(4)(i), (ii), (iii) or (iv); or (5) a public communication that is the functional equivalent of express advocacy. 11 C.F.R. § 109.21(c).

²⁷ The conduct standards listed in 11 C.F.R. § 109.21(d) are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) common vendor; (5) former employee; and (6) republication, discussed further in relevant part *infra*.

²⁸ 11 C.F.R. § 109.21(a); *see also* Explanation and Justification for Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 [hereinafter Coordination E&J] (January 3, 2003).

²⁹ SunshinePAC April Quarterly Report at 7-8.

³⁰ *Id.*

1 communication” in the form of mass mailings and a telephone bank,³¹ and as independent
 2 expenditures, which by definition contain express advocacy.³² SunshinePAC’s disbursements
 3 therefore appear to constitute public communications that expressly advocate the election or
 4 defeat of a clearly identified candidate for federal office under 11 C.F.R. § 109.21(c)(3).

5 SunshinePAC’s disbursements, however, do not appear to satisfy the conduct prong of
 6 the coordinated communications test. The Commission’s regulations contemplate a number of
 7 ways in which a communication may satisfy this prong, discussed in relevant part below.³³

8 **A. Substantial Discussion**

9 The Complaint alleges that the substantial discussion conduct standard at 11 C.F.R.
 10 § 109.21(d)(3) was met because Garton lived in the same residence as Tom Casten, who was the
 11 father of the candidate and sole contributor to SunshinePAC at the time the independent
 12 expenditures at issue were made. Under the Commission’s regulations, a communication is
 13 coordinated under the substantial discussion standard if it is:

14 created, produced, or distributed after one or more substantial
 15 discussions about the communication between the person paying
 16 for the communications, or the employees or agents of the person
 17 paying for the communication, and the candidate who is clearly
 18 identified in the communication, or the candidate’s authorized

³¹ 11 C.F.R. § 100.26 (listing mass mailing, telephone banks, and “other form[s] of general political advertising” as public communications); *see, e.g.*, Factual & Legal Analysis (“F&LA”) at 8 & n.30, MUR 6793 (Steve Stockman for Senate, *et al.*) (finding that publicly disseminated mailers constituted public communications under the content prong of the coordinated communications test); First Gen. Counsel’s Rpt. (“FGCR”) at 7, MUR 6560 (Victory Ohio SuperPAC) (noting that robocalls constituted public communications and recommending the Commission find reason to believe that the respondent accordingly failed to include necessary disclaimers); Certification (“Cert.”) ¶ 2, MUR 6560 (adopting relevant recommendation in FGCR).

³² 52 U.S.C. § 30101(17) (“The term ‘independent expenditure’ means an expenditure by a person . . . expressly advocating the election or defeat of a clearly identified candidate”); 11 C.F.R. § 100.16 (“The term independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate”); *see supra* note 6 and accompanying text.

³³ The Complaint does not make arguments or present facts that would implicate the other ways in which the conduct standard may be satisfied under 11 C.F.R. § 109.21(d)(5) (former employee or independent contractor) or § 109.21(d)(6) (republishing of campaign material). Accordingly, these subsections are not addressed in this Report.

1 committee, the candidate’s opponent, the opponent’s authorized
 2 committee, or a political party committee.³⁴

3 But there is no specific factual support for the allegation that agents of the Casten Committee,
 4 including Garton, had substantial discussions with agents of SunshinePAC about “the
 5 campaign’s plans, projects or activities” that would be material to the creation, production, or
 6 distribution of SunshinePAC’s mail pieces or phone calls.³⁵ While acknowledging living at the
 7 same address as Tom Casten, Garton describes that he occupied separate living quarters that had
 8 their own entrance and that he worked “on-site for the [Casten Committee]” at a separate
 9 location.³⁶ Garton submitted a sworn affidavit stating that any conversations he had with Tom
 10 Casten regarding the Casten Committee or to Sean Casten’s primary campaign “related solely to
 11 publicly available information.”³⁷

12 With respect to Tom Casten, as the Casten Committee’s Response notes, the Complaint
 13 does not specifically allege that Tom Casten “was an agent or employee” of SunshinePAC or the
 14 Casten Committee, or that he had any involvement with the PAC beyond his contributions.³⁸
 15 Further, Tom Casten would not be considered an agent of the Casten Committee solely based on

³⁴ 11 C.F.R. § 109.21(d)(3).

³⁵ Under the Commission’s regulations, “any person who has actual authority, either express or implied,” to engage in activities on behalf of a Federal candidate that would satisfy the conduct standard of § 109.21’s coordination test is considered an agent of that candidate. *See* 11 C.F.R. 109.3(b) (defining “agent”); *see also* Coordination E&J at 423-24. An agent’s actual authority is created by manifestations of consent (express or implied) by the principal to the agent about the agent’s authority to act on the principal’s behalf. *See* Definitions of “Agent” for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975, 4975-76 (Jan. 31, 2006) [hereinafter Definitions of “Agent”]; Advisory Opinion 2007-05 at 3 (Iverson).

³⁶ Garton Aff. ¶¶ 10-12.

³⁷ *Id.* ¶ 13.

³⁸ Casten Comm. Resp. at 2, 5.

1 his familial relationship to the candidate.³⁹ The Commission has explained that it “has never
 2 determined that a familial relationship — standing alone — is sufficient to find reason to believe
 3 that coordination took place.”⁴⁰

4 Though Garton states that Tom Casten “volunteered with the campaign on an unofficial
 5 and unpaid basis,”⁴¹ without information indicating that Tom Casten had “actual authority, either
 6 express or implied,” to assist in the creation, production, or distribution of the communications
 7 here at issue, there is no information to establish that he was an agent of the Casten Committee
 8 when he made contributions to SunshinePAC or at any point thereafter.⁴² The current record
 9 contains no evidence that Tom Casten shared information about the Casten Committee’s plans,
 10 projects or activities material to the creation, production, or distribution of the communications

³⁹ See Definitions of “Agent” at 4978 n.6 (“Specifically, it is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal.” (quoting Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064-01, 49,083 (July 29, 2002))).

⁴⁰ See F&LA at 5-8, MUR 6668 (Jay Chen for Congress) (finding no reason to believe in matter involving allegations that a communication disseminated by an organization primarily funded by the candidate’s brother was coordinated with the candidate where the president of the organization submitted a sworn affidavit stating that “no non-public information regarding the plans, projects, or needs of the . . . campaign were communicated to myself or any other agent of” the organization); F&LA at 4-5, MUR 7067 (Friends of Patrick Murphy, *et al.*) (finding no reason to believe that coordination had occurred where an independent expenditure-only political committee making expenditures supporting a candidate was substantially funded by the candidate’s father and the father’s company and where the candidate’s father submitted a sworn affidavit stating that he had made his contributions of his own accord and that he did not participate in any discussions with the committee regarding its subsequent communications). In a different matter, the Commission did not agree with this Office’s recommendations to find violations of the Act occurred via coordinated communications where the candidate’s husband played an official role in the campaign for a brief period and, after his departure, made large contributions to an independent expenditure-only political committee that advocated for the election of the candidate; there, the husband had submitted a sworn affidavit disclaiming any participation in the communications subsequently produced by the political committee. See FGCR at 18, MUR 7139 (Maryland USA, *et al.*) (recommending finding reason to believe); Cert. ¶ 1 (Jan. 28, 2021), MUR 7139 (failing by vote of 2-4 to find reason to believe).

⁴¹ Garton Aff. ¶ 13.

⁴² 11 C.F.R. § 300.2(b)(3). Though the Commission has specifically noted that campaign volunteers are often agents of a campaign, a volunteer must have the expressed or implied actual authority contemplated in the Commission’s regulations to establish agency status. See Definitions of “Agent” at 4977-78 (“Therefore, the Commission’s current definitions of “agent” best effectuate the intent and purpose of BCRA and the Act, and create the appropriate incentives for candidates, party committees, and other political committees to ensure that their employees *and volunteers* are familiar with, and comply with, BCRA’s soft money and coordination provisions.” (emphasis added)). The Complaint does not allege that Tom Casten had such authority.

1 at issue, or that he was even in a position to possess that type of information. Accordingly, there
2 is no information in the record to indicate that Tom Casten, acting as an agent of the Casten
3 Committee, had or could have had a “substantial discussion” with SunshinePAC about the
4 communications at issue.

5 **B. Request or Suggestion**

6 Under Commission regulations, a communication may also satisfy the conduct standard
7 of the coordinated communications test if it is:

8 created, produced, or distributed at the request or suggestion of a
9 candidate, authorized committee, or political party committee;
10 or . . . [t]he communication is created, produced, or distributed at
11 the suggestion of a person paying for the communication and the
12 candidate, authorized committee, or political party committee
13 assents to the suggestion.⁴³

14 Garton’s affidavit asserts that he never discussed or requested Tom Casten’s donations to
15 SunshinePAC, never consulted with any representative of SunshinePAC or its vendors, and that
16 he “never assented to a suggestion by Tom Casten or any employee, officer, or representative of
17 the SunshinePAC to create, produce, or distribute such mailers or other communications that are
18 described in the Complaint.”⁴⁴ There is no available factual information to contradict Garton’s
19 sworn assertions that a request or suggestion did not take place.

20 **C. Material Involvement**

21 Under Commission regulations, a communication may also satisfy the conduct standard
22 of the coordinated communications test if the candidate, authorized committee, or political party
23 committee is “materially involved in decisions regarding” the communication’s “content,” its

⁴³ 11 C.F.R. § 109.21(d)(1).

⁴⁴ Garton Aff. ¶¶ 14-20. The Complaint does not allege that Tom Casten received any such request or suggestion from Sean Casten, but relies instead on the proximity of Tom Casten and Michael Garton.

1 “intended audience,” the “means or mode of the communication,” the “media outlet used for the
2 communication,” its “timing or frequency,” or its size, prominence, or duration.⁴⁵ Garton’s
3 affidavit attests that he “had no involvement whatsoever in decisions regarding the planning,
4 creation, content, strategy, timing, frequency, media outlet, or any other possible aspect that went
5 into the creation, production, and distribution of the mailers or other communications.”⁴⁶ The
6 Commission is not aware of any other available information to support the allegations of material
7 involvement.

8 **D. Common Vendor**

9 Commission regulations further state that a communication may satisfy the conduct
10 standard if all of the following are true: (1) “The person paying for the communication, or an
11 agent of such person, contracts with or employs a commercial vendor . . . to create, produce, or
12 distribute the communication;” (2) the commercial vendor has, during the previous 120 days,
13 worked on the development of media strategy, selection of audiences, polling, fundraising, or
14 other similar activities for the candidate, her authorized committee, her opponent, her opponent’s
15 authorized committee, or a political party committee; and (3) the information material to
16 creating, producing, or distributing the communication is not publicly available.⁴⁷ Here, the
17 Casten Committee did not use the same vendors as SunshinePAC during the 120 days prior to

⁴⁵ 11 C.F.R. § 109.21(d)(2).

⁴⁶ Garton Aff. ¶ 21. The Complaint does not allege that Sean Casten had any such involvement, and only discusses an alleged relationship between Garton and Tom Casten due to living at the same address.

⁴⁷ 11 C.F.R. § 109.21(d)(4).

1 the communications at issue — rather, the Casten Committee only used one of SunshinePAC’s
 2 vendors several months *after* the communications were disseminated.⁴⁸

3 * * *

4 Without more, and in light of Garton’s specific sworn denials, there is no basis on which
 5 to conclude that the SunshinePAC’s mailers and phone banks satisfied the conduct prong of the
 6 coordinated communications test.⁴⁹ Accordingly, the Commission finds no reason to believe that
 7 Tom Casten or SunshinePAC made, and the Casten Committee knowingly accepted, excessive
 8 in-kind contributions in violation of 52 U.S.C. § 30116(a), (f). The Commission further finds no
 9 reason to believe that Michael Garton accepted an excessive in-kind contribution on behalf of the
 10 Casten Committee in violation of 52 U.S.C. § 30116(f).

⁴⁸ See *supra* note 17 and accompanying text; see also F&LA at 6-7, MUR 7740 (Teresa Tomlinson for Senate, *et al.*) (finding that the common vendor standard was not satisfied where the “record contains no evidence indicating that information about [the committee’s] plans, projects[,] or activities material to the creation, production, or distribution of the communications was used by or conveyed to the vendors”).

⁴⁹ See Statement of Reasons, Comm’rs Mason, Sandstrom, Smith & Thomas at 1-2, MUR 4960 (Hillary Rodham Clinton for US Senate Expl. Comm., Inc., *et al.*) (“The Commission may find ‘reason to believe’ only if a complaint sets forth sufficient specific facts which, if proven true, would constitute a violation of the FECA. . . . [M]ere speculation . . . will not be accepted as true.”).