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FEDERAL ELECTION COMMISSION
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OFFICE OF GENERAL COUNSEL

BEFORE THE FEDERAL ELECTION COMMISSION

Foundation for Accountability and Civic Trust
1717 K Street NW
Suite 900
Washington, D.C. 20006

v.

MUR No. **7797**

Sara Gideon
Sara Gideon for Maine
FEC ID: C00709899
PO Box 812
South Freeport, ME 04078

and

SMP (also known as Senate Majority PAC)¹
FEC ID: C00484642
700 13th Street NW
Suite 600
Washington, DC 20005

COMPLAINT

The Foundation for Accountability and Civic Trust (FACT) is a nonprofit organization dedicated to promoting accountability, ethics, and transparency in government and civic arenas. We request the Federal Election Commission (FEC) investigate and take appropriate enforcement actions to address apparent violations of the Federal Election Campaign Act by Sara Gideon and the super PAC Senate Majority PAC (SMP).² Federal law prohibits candidates from coordinating with super PACs on advertising. The facts indicate this is exactly what happened here: On September 1st, 2020, the Gideon campaign used social media to make a specific request—run an ad statewide attacking Gideon’s opponent and run an ad in the Portland area tying Gideon’s opponent to President Trump. SMP ran those

¹ SMP also uses the name and is commonly referred to as Senate Majority PAC. For instance, its website is senatemajoritypac.com and disclaimer states “PAID FOR BY SMP, WWW.SENATEMAJORITYPAC.COM, AND NOT AUTHORIZED BY ANY CANDIDATE OR CANDIDATE COMMITTEE”.

² This complaint is filed pursuant to 52 U.S.C. § 30109(a)(1) and is based upon information and belief that Sara Gideon, her authorized campaign committee Gideon for Maine, and the super PAC SMP have violated the Federal Election Campaign Act.

specific ads in the media markets as requested. Thus, there is reason to believe Gideon coordinated with SMP resulting in an illegal in-kind contribution. We request the Commission investigate and immediately take enforcement actions to address these apparent violations.

I. Facts.

On September 1, 2020, Gideon's Communications Director tweeted:³



Maeve Coyle
@maevemcoyle

Voters across Maine should see and hear how Collins has taken money from drug and insurance companies and then voted their way instead of for Maine people.

In Portland they should also see and hear how Collins has stood with Trump and McConnell instead of Maine people.

1:47 PM · Sep 1, 2020 · Twitter Web App

New to Twitter?

Sign up now to get your own personalized timeline!

Sign up

Relevant people



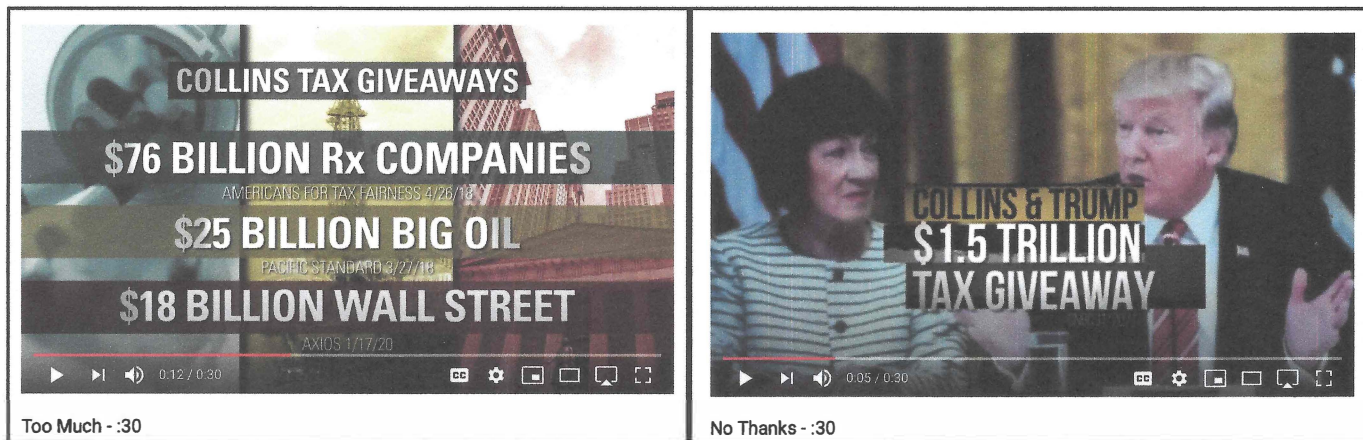
Maeve Coyle
@maevemcoyle

team @saragideon communications director

Follow

³ Maeve Coyle, Twitter Feed, Sept. 1, 2020, available at <https://twitter.com/maevemcoyle/status/1300867976103702530>. The Bangor Daily News reported, "On Tuesday, a Gideon spokesperson issued a tweet that looked to attempt to draw attention to anti-Collins narratives that the campaign wants highlighted by outside groups it is barred from coordinating with formally." Jessica Piper, Michael Shepherd, and Caitlin Andrews, *Attacks In Maine's US Senate Race Shift To The Husbands Of The Party Candidates*, Bangor Daily News, Sept. 2, 2020, available at <https://bangordailynews.com/2020/09/02/politics/daily-brief/attacks-in-maines-us-senate-race-shift-to-the-husbands-of-the-party-candidates/>.

SMP ran the two ads requested in the Tweet: The first one (“Too Much”) aired throughout Maine and attacked Collins for voting for tax giveaways to prescription drug companies.⁴ The second one (“No Thanks”) aired in the Portland area and tied Collins to President Trump.⁵ The following are images from the ads:



⁴ SMP, *Too Much*, YouTube, Sept. 1, 2020, available at <https://www.youtube.com/watch?v=SLRPHIAyfb0&feature=youtu.be>; SMP, *No Thanks*, YouTube, Sept. 1, 2020, available at https://www.youtube.com/watch?v=qgj4Q7g_zKc&feature=youtu.be; Team Collins, Twitter, available at <https://twitter.com/TeamCollins207/status/1301218842702761985> (sharing broadcast data and stating the SMP ad with President Trump ran only in the Portland media market and the drug companies ad ran “across Maine”).



2/Schumer's Super PAC just went up w/2 ads that follow the tweet exactly.

Schumer's ads w/images of Pres. Trump appeared in the Portland TV market, like the tweet directed.

Schumer ads about drug companies without the Pres. only ran "across Maine," not in Portland. #mepolitics

Market	Station	Program	Air Time
Portland-Auburn, ME	WCSH	WCSH News Center 6 Morning Report	09/02/2020 06:13:35
Portland-Auburn, ME	WGME	Good Day Maine on CBS 13	09/02/2020 06:53:11
Portland-Auburn, ME	WPFO	Good Day Maine	09/02/2020 07:42:33
Portland-Auburn, ME	WGME	CBS This Morning	09/02/2020 07:55:53
Portland-Auburn, ME	WMTW	Good Morning America	09/02/2020 08:10:23
Portland-Auburn, ME	WPFO	Good Day Maine	09/02/2020 08:40:04
Portland-Auburn, ME	WMTW	Live With Kelly and Ryan	09/02/2020 09:44:21

Market	Station	Program	Air Time
Bangor, ME	WLZ	WLZ News Center 2 Morning Report	09/02/2020 06:24:24
Presque Isle, ME	WAGMDT1	The People's Court	09/02/2020 06:50:21
Bangor, ME	WLZ	WLZ News Center 2 Morning Report	09/02/2020 06:53:54
Bangor, ME	WVII	Good Morning America	09/02/2020 07:23:55
Presque Isle, ME	WAGMDT1	Judge Matha	09/02/2020 07:25:28
Bangor, ME	WLZ	Today	09/02/2020 08:29:13
Bangor, ME	WABI	CBS This Morning	09/02/2020 08:29:43
Presque Isle, ME	WAGM	CBS This Morning	09/02/2020 08:38:41
Presque Isle, ME	WAGMDT1	News Source 8 Morning Edition	09/02/2020 08:43:02
Bangor, ME	WABI	CBS This Morning	09/02/2020 08:52:44
Bangor, ME	WVII	Good Morning America	09/02/2020 08:58:55
Presque Isle, ME	WAGMDT1	The Doctors	09/02/2020 09:25:40
Bangor, ME	WABI	Live With Kelly and Ryan	09/02/2020 09:43:43
Bangor, ME	WVII	Fame! Feud	09/02/2020 09:45:31

⁵ *Id.*

II. Law

Under federal law, candidates for federal office are subject to regulations that limit or prohibit contributions from and interactions with individuals, groups, and organizations. Among these regulations, federal candidates are prohibited from soliciting or accepting contributions from an individual or a non-multicandidate PAC in excess of \$2,800, from a multicandidate PAC in excess of \$5,000, or from any corporation or labor organization in any amount.⁶ Federal candidates are also prohibited from accepting contributions from entities that accept contributions from corporations or labor organizations.⁷ On the other hand, individuals, groups, and organizations are also prohibited from making any illegal contribution.⁸

Contributions are broadly defined as “(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.”⁹ “Anything of value” includes in-kind contributions.¹⁰

An “expenditure” is “(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an expenditure.”¹¹ Certain expenditures are also specifically identified as an in-kind contribution, including “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.”¹² To determine whether a communication was made in cooperation with a candidate, a three-part test applies:

⁶ 52 U.S.C. §§ 30116, 30118.

⁷ 52 U.S.C. §§ 30101, 30118.

⁸ *See, e.g.*, 52 U.S.C. § 30116(a)(7)(B).

⁹ 52 U.S.C. § 30101(8)(A); *see also* 11 C.F.R. §§ 100.52(a), 114.1(a)(1).

¹⁰ 11 C.F.R. § 100.52(d)(1). “[T] provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods and services is a contribution. Examples of such goods or services include, but are not limited to: Securities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists.” 11 C.F.R. § 100.52(d)(1).

¹¹ 52 U.S.C. § 30101(9)(A).

¹² 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. §§ 109.20, 109.21.

(1) the communication is paid for by a third-party; (2) the communication satisfies a “content” standard of 11 C.F.R. § 109.21(c); and (3) the communication satisfies one of the “conduct” standards of 11 C.F.R. § 109.21(d).¹³

III. Cause of Action

Illegal Contribution of Coordinated Communication (52 U.S.C. § 30116(a)(7)(B)(i))

There is reason to believe Sara Gideon and Sara Gideon for Maine solicited and accepted an illegal contribution from Senate Majority PAC, and Senate Majority PAC made an illegal contribution to Sara Gideon for Maine, by coordinating communications. Specifically, a communication is coordinated with a candidate, an authorized committee, or a political party committee when (1) the communication is paid for by an entity “other than the candidate, authorized committee, or political party committee”; (2) it satisfies a “content standard” of 11 C.F.R. § 109.21(c), i.e. is a public communication that refers to a clearly identified Senate candidate and is publicly distributed in the candidate’s jurisdiction 90 days or fewer before the candidate’s general election; and (3) satisfies a “conduct standard” of 11 C.F.R. § 109.21(d), i.e. the “communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee.”¹⁴ The “request or suggestion” conduct standard does not have a “safe harbor” for information obtained from a publicly available source. “Agreement or formal collaboration between the person paying for the communication and the [candidate or candidate’s committee] is not required for a communication to be a coordinated communication.”¹⁵

1. Payment Standard. The “payment” standard was met because the ads’ disclaimers state they were paid for by Senate Majority PAC.

2. Content Standard. The “content” standard was met because the ads identified a Senate candidate (Collins) and were publicly broadcast on television in the candidate’s jurisdiction (Maine) within 90 days of the general election (from August 6, 2020 to November 3, 2020).¹⁶

¹³ 11 C.F.R. § 109.21.

¹⁴ 11 C.F.R. § 109.21.

¹⁵ 11 C.F.R. § 109.21(e).

¹⁶ The advertisement also “is the functional equivalent of express advocacy.” 11 C.F.R. § 109.21(c)(5). The advertisement on its face is “an appeal to vote for or against a clearly identified Federal candidate.” *Id.*

3. Conduct Standard. The “conduct” standard was met because the Gideon campaign tweet was a request or suggestion for specific advertisements. The campaign’s request identified a medium of broadcast where viewers would “see and hear” the information, and identified the specific location for the ads to air that was either throughout Maine or in the Portland area. Moreover, the tweet used the code language that Gideon and other candidates have used in the past to communicate with super PACs and related outside groups.¹⁷ Immediately after the Gideon campaign tweet, the specific ads were distributed as requested or suggested.

The coordination between the Gideon campaign and Senate Majority PAC is not excused because Gideon used a public avenue to make the request for an ad to be distributed. The “publicly-available-information safe harbor” does not apply to the “request or suggestion” conduct standard. The language of the “request or suggestion” conduct standard does **not** contain the “publicly-available-information safe harbor.”¹⁸ This is unlike every other conduct standard, which does explicitly provide for a publicly-available-information safe harbor.¹⁹ It is contrary to the plain language of the regulation and unreasonable and contrary to the statute to apply the publicly-available-information safe harbor to the “request or suggestion” standard.²⁰

¹⁷

Theresa Greenfield and SMP, FEC, MUR 7717 (using the language “Iowa voters need to hear about”);

In re

¹⁸ Compare 11 C.F.R. § 109.21(d)(1) (stating in full: “Any one of the following types of conduct satisfies the conduct standard of this section whether or not there is agreement or formal collaboration, as defined in paragraph (e) of this section: 1. REQUEST OR SUGGESTION. i. The communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee; or ii. The communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, or political party committee assents to the suggestion.”), with 11 C.F.R. § 109.21(d)(2) (“This paragraph, (d)(2), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source.”), 11 C.F.R. § 109.21(d)(3) (“This paragraph, (d)(3), is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source.”), 11 C.F.R. § 109.21(d)(4) (“This paragraph, (d)(4)(iii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the commercial vendor was obtained from a publicly available source.”), and 11 C.F.R. § 109.21(d)(5) (“This paragraph, (d)(5)(ii), is not satisfied if the information material to the creation, production, or distribution of the communication used or conveyed by the former employee or independent contractor was obtained from a publicly available source.”).

¹⁹ *Id.*

²⁰ Compare Coordinated Communications, 71 Fed. Reg. 33190, 33204-05 (June 8, 2006) (explaining the plain language of the statute did not contain an exception for the use of publicly available information and it would be inappropriate to include this type of exception); with FEC, Factual and Legal Analysis, Shaheen for Senate, MUR 6821 (Dec. 2, 2015) (stating “that a communication resulting from a general request to the public or the use of publicly available information, including information contained on a candidate’s website, does not satisfy the content standard.”) and FEC, First General Counsel’s Report, MUR 7136 (Oct. 24, 2017) (same).

The 2006 E&J notes the Commission decided that the publicly-available-information-safe-harbor “more appropriately applies to only four of the five conduct standards, and is being added to the paragraphs currently containing those four conduct standards.”²¹ The “request or suggestion” conduct standard is only applicable to a candidate’s request or suggestion that a communication be created, produced, or distributed, whereas the four standards to which the publicly-available-information-safe-harbor was added “all concern conduct that conveys material information that is subsequently used to create a communication.”²² The request or suggestion standard is different than the other four because it simply is the ask, whereas the other four require conveyance of **information** material to the creation of the communication and not a request or suggestion.²³ The conduct standards that do have a publicly-available-information safe harbor state: “This paragraph . . . is not satisfied if the **information** material to the creation, production, or distribution of the communication was obtained from a publicly available source.”²⁴ The definition of the words and federal law distinguishes between a “request or suggestion” and “information”—they are not the same thing.²⁵ Thus, by its plain language the publicly-available-information-safe-harbor could not apply.

In addition to the fact that it could not technically apply, the Commission noted that one concern commentators expressed was if the publicly-available-information-safe-harbor was added to the “request

²¹ Coordinated Communications, 71 Fed. Reg. 33190, 33205 (June 8, 2006).

²² *Id.*

²³ *See, e.g.*, 11 C.F.R. § 109.21(d)(2).

²⁴ *See, e.g.*, 11 C.F.R. § 109.21(d)(2) (emphasis added). Information is defined as “(1) knowledge obtained from investigation, study, or instruction; (2) intelligence, news; (3) facts, data.” “Information,” Merriam-Webster Online Dictionary 2019, available at <https://www.merriam-webster.com/dictionary/information>, last accessed Dec. 18, 2019.

²⁵ Coordinated Communications, 71 Fed. Reg. 33190, 33204-05 (June 8, 2006) (explaining the plain language of the statute did not contain an exception for the use of publicly available information and it would be inappropriate to include this type of exception: “Moreover, the four conduct standards that are being revised to include a safe harbor for the use of publicly available information all concern conduct that conveys material information that is subsequently used to create a communication, whereas the “request or suggestion” conduct standard concerns only a candidate’s or political party’s request or suggestion that a communication be created, produced or distributed, and is not dependent upon the nature of information conveyed.”). For example, where the “publicly-available-information safe harbor” applies, the regulations states it is in the context of “decisions,” “discussion,” or knowledge of common employees or vendors—all applications are to conveyance of knowledge or facts. *Compare* 11 C.F.R. § 109.21(d) (applying the “publicly-available-information safe harbor” to “decisions,” “discussion,” and knowledge of a common employee or vendor), *with* 11 C.F.R. § 109.21(d)(6) (providing certain conduct standards are only satisfied “that occurs after the original preparation of the campaign materials that are disseminated, distributed, or republished”). On the other hand, the regulations distinguish “information” from “assets,” including “campaign materials” that are prepared by the campaign. *Id.* The content standards are based upon republication of campaign materials and the conduct standards are based upon the communication of information. *See* 11 C.F.R. § 109.21(d)(6).

or suggestion” conduct standard, it may allow for a loophole that could be exploited by precluding “certain communications from satisfying the coordinated communications test simply because a portion of a given communication was based on publicly available information, even if a candidate privately conveyed a request that a communication be made.”²⁶ The choice not to apply the publicly-available-information safe harbor to the request or suggestion conduct standard was to make the regulation stronger—it was intended to prevent any argument the communication was based upon some information or statement that was publicly available—it did not allow for a request or suggestion to be made publicly. In fact, the concerns addressed ensured that no part of the ask could be made publicly. The language of the statute prevails—the request or suggestion conduct standard does not contain a safe harbor for publicly available information.

In this case, the Gideon campaign made a clear “request or suggestion” that ads be run on television with specific content in specific media markets. This was a “request or suggestion” for ads to be distributed, and was not the conveyance of “information.” Gideon used code words “voters across Maine should see and hear” and formatted the communication in a way to clearly identify the request, which also indicates there were other communications instructing her to use this language. Senate Majority PAC acted on Gideon’s request and ran the ads, also demonstrating it was not “information.” Thus, the “publicly-available-information safe harbor” does not apply. The law does not allow candidates to request specific ads be run by outside organizations regardless of whether the request is made in public—to allow this type of request is contrary to the law and would essentially eviscerate the laws prohibiting coordination.

IV. Conclusion

There is reason to believe Sara Gideon and Gideon for Maine are coordinating with Senate Majority PAC based on (1) Gideon making a request using specifically formatted language for ads to be run with specific content in specific media markets; and (2) Senate Majority PAC responding by distributing those advertisements as requested. If so, this conduct resulted in an illegal in-kind contribution to Gideon’s campaign. If the Commission does not act and punish such a clear violation,

²⁶ *Id.*

candidates will continue to coordinate with outside groups in violation of federal law. FACT respectfully requests the Commission immediately investigate and hold the Respondents accountable.

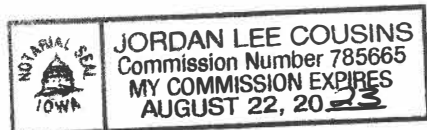
Respectfully submitted,

Karnold

Foundation for Accountability & Civic Trust
By, Kendra Arnold, Executive Director
1717 K Street NW, Suite 900
Washington, D.C. 20006

STATE OF IOWA)
) ss.
COUNTY OF POLK)

Subscribed and sworn to before me on September 11th, 2020.



Jordan Cousins
Notary Public in and for the State of Iowa