

1 **FEDERAL ELECTION COMMISSION**

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3 **FIRST GENERAL COUNSEL'S REPORT**

4  
5 **MUR 7503**

6 DATE COMPLAINT FILED: Sept. 25, 2018

7 DATE OF NOTIFICATION: Sept. 27, 2018

8 DATE OF RESPONSE: Oct. 12, 2018

9 DATE ACTIVATED: Apr. 4, 2019

10  
11 ELECTION CYCLE: 2018

12 EXPIRATION OF SOL: Aug. 31, 2023 (earliest) –  
13 Sept. 7, 2023 (latest)

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15 **COMPLAINANT:**

Kansas Democratic Party

16 **RESPONDENTS:**

17 Kansas Republican Party and Richard L. Todd,  
18 in his official capacity as treasurer  
19 Congressional Leadership Fund and Caleb Crosby,  
20 in his official capacity as treasurer

21 **RELEVANT STATUTES  
22 AND REGULATIONS:**

23 52 U.S.C. § 30101

24 52 U.S.C. § 30104(b)

25 52 U.S.C. § 30116(f)

26 52 U.S.C. § 30118

27 11 C.F.R. § 109.3(a)(1)-(5)

28 11 C.F.R. § 109.20

29 11 C.F.R. § 109.21(a)-(c)

30 11 C.F.R. § 109.22

31 11 C.F.R. § 100.26

32 11 C.F.R. § 100.29

33 11 C.F.R. § 100.52(d)

34 **INTERNAL REPORTS CHECKED:**

Disclosure Reports

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36 **FEDERAL AGENCIES CHECKED:**

None

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38 **I. INTRODUCTION**

39 The Complaint alleges that Congressional Leadership Fund and Caleb Crosby in his  
40 official capacity as treasurer (“CLF”) made, and the Kansas Republican Party and Richard L.  
41 Todd in his official capacity as treasurer (the “Party”) accepted and failed to report, a prohibited  
42 in-kind contribution in the form of a coordinated communication, in violation of 52 U.S.C.

1 §§ 30104(b), 30116(f), 30118(a). In support of its coordination claim, the Complaint cites the  
2 appearance by then-Party Secretary, Alana Zimmer-Roethle, in a television ad paid for by CLF.

3 Because the information indicates that Zimmer-Roethle appeared in her personal capacity  
4 as a private citizen and not as a representative of the Party, and there is no other information to  
5 suggest coordination between CLF and the Party, we recommend that the Commission exercise  
6 prosecutorial discretion and dismiss the allegation.<sup>1</sup>

## 7 II. FACTUAL AND LEGAL ANALYSIS

### 8 A. Facts

9 CLF is an independent-expenditure-only committee ("IEOPC") registered with the  
10 Commission since 2011.<sup>2</sup> The Kansas Republican Party is a state political party committee  
11 registered with the FEC; Zimmer-Roethle was its Secretary at the time of the events identified in  
12 the Complaint.<sup>3</sup>

13 CLF reported an expenditure of \$265,615 on August 31, 2018, for airtime starting  
14 September 7, 2018, to disseminate television ads that opposed Sharice Davids, a candidate for  
15 the U.S. House of Representatives in Kansas's Third Congressional District.<sup>4</sup> On September 7,  
16 2018, CLF made four expenditures totaling over \$65,000 to a vendor, FP1 Strategies, to produce

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<sup>1</sup> See *Heckler v. Chaney*, 470 U.S. 821 (1985).

<sup>2</sup> See Congressional Leadership Fund Statement of Organization (Oct. 21, 2011),  
<http://docquery.fec.gov/pdf/996/11030681996/11030681996.pdf>.

<sup>3</sup> See Compl. at 2, note 3 (Sept. 25, 2018); Kansas Republican Party 2018 Amended Statement of  
Organization (Feb. 28, 2018), <http://docquery.fec.gov/pdf/681/201802289095636681/201802289095636681.pdf>.

<sup>4</sup> Congressional Leadership Fund, 24/48 Hour Report of Independent Expenditures (Sept. 9, 2018),  
<http://docquery.fec.gov/cgi-bin/fecimg/?201809099121659185>.

1 ads opposing Davids.<sup>5</sup> On the same day, CLF issued a press release that it would begin airing  
2 two ads opposing Davids on television, including a 30-second ad entitled "Risky."<sup>6</sup> In "Risky,"  
3 a person described as "a local Kansas mom" and identified as "Alana Roethle, Leawood, KS"  
4 directly faces the camera and states,

5 As a mom of four, I care about keeping our communities safe.  
6 That's why I oppose Sharice Davids.  
7 Davids supports an extreme agenda that would put families at risk.  
8 Davids would stand with Pelosi to oppose tougher border security.  
9 And Davids wants to eliminate ICE, the law enforcement agency that  
10 deports criminal illegal aliens.  
11 Davids even said our police departments are rooted in violence.  
12 Sharice Davids is too risky for Kansas families.<sup>7</sup>

13 At the end of the ad, a narrator states, "Congressional Leadership Fund is responsible for the  
14 content of this advertising."<sup>8</sup> A written disclaimer appears at the bottom of the ad and states,  
15 "Congressional Leadership Fund is responsible for the content of this advertising. Paid for by  
16 Congressional Leadership Fund. Not authorized by any candidate or candidate's  
17 committee. [www.congressionalleadership.org](http://www.congressionalleadership.org)."<sup>9</sup>

18 The Complaint alleges that the "local Kansas mom" identified in "Risky" was Zimmer-  
19 Roethle, the Party's Secretary.<sup>10</sup> Based on her appearance in "Risky," the Complaint alleges that

<sup>5</sup> *Id.*; Congressional Leadership Fund, 24/48 Hour Report of Independent Expenditures (Sept. 9, 2018), <http://docquery.fec.gov/cgi-bin/fecimg/?201809099121659187>; Congressional Leadership Fund, 24/48 Hour Report of Independent Expenditures (Sept. 9, 2018), <http://docquery.fec.gov/cgi-bin/fecimg/?201809099121659185>.

<sup>6</sup> Compl. at 2-3, n. 6; Press Release, Congressional Leadership Fund, *New Ads in KS-03: Sharice Davids is Too Risky for Kansas Families* (Sept. 7, 2018) ("CLF Press Release"), <https://www.congressionalleadershipfund.org/new-ads-in-ks-03-sharice-davids-is-too-risky-for-kansas-families/>.

<sup>7</sup> Congressional Leadership Fund, (KS-03) *Risky*, YouTube (Sept. 7, 2018) ("Risky Video"), [https://www.youtube.com/watch?v=ZP\\_vdjWgoUs&feature=youtu.be](https://www.youtube.com/watch?v=ZP_vdjWgoUs&feature=youtu.be).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Compl. at 3; CLF Press Release and Risky Video, notes 6-7.

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1 the ad is a coordinated communication, which should be treated as a prohibited, in-kind  
2 contribution by the Party.

3 The Party and CLF both deny coordination. The Party admits that Zimmer-Roethle was  
4 the Secretary at the time of "Risky's" production and airing, but asserts that it had no knowledge  
5 of Zimmer-Roethle's appearance in the ad, and it only became aware of the ad when it aired on  
6 television.<sup>11</sup> Specifically, the Party states that none of its other officers or staff were aware of  
7 any discussion, consultation, cooperation, or action with CLF or its agents regarding the ad.<sup>12</sup>  
8 The Party further states that it was not consulted and did not counsel Zimmer-Roethle regarding  
9 her participation in "Risky."<sup>13</sup>

10 CLF states that Zimmer-Roethle, along with her four young children, appeared in the ad  
11 not on behalf of the Party, but as a private citizen and resident of Kansas's Third Congressional  
12 District.<sup>14</sup> CLF further states that it had no communication with the Party about Zimmer-Roethle  
13 appearing in the ad, and asserts that she was cast "based on a preexisting relationship," without  
14 providing further explanation.<sup>15</sup> CLF asserts that neither Zimmer-Roethle nor anyone else from  
15 the Party had any role in CLF's decision-making concerning the content or dissemination of its  
16 ad, and that Zimmer-Roethle merely read from a script CLF had previously prepared.<sup>16</sup> Finally,  
17 CLF attaches to its Response a copy of its standard release form, signed by Zimmer-Roethle,

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<sup>11</sup> Email from Richard L. Todd, Treasurer, Kansas Republican Party to Christal Dennis, Paralegal, FEC, (Oct. 12, 2018 at 2:36:01 PM) ("Party Resp.").

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Congressional Leadership Fund Resp. (Oct. 19, 2018) at 2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

1 affirming that she had not: (1) participated . . . at the request or suggestion of any federal  
2 candidate or candidate's campaign; (2) requested or suggested that CLF air any ads in any  
3 federal candidate's race; and (3) provided any non-public information about any federal  
4 candidate or committee's private plans, projects, activities, or needs.<sup>17</sup>

5 **B. Analysis**

6 The Act defines "contribution" to include "any gift, subscription, loan, advance, or  
7 deposit of money or anything of value made by any person for the purpose of influencing any  
8 election for Federal office."<sup>18</sup> "Anything of value" includes in-kind contributions.<sup>19</sup> When a  
9 person makes an expenditure in cooperation, consultation, or in concert with, or at the request or  
10 suggest of, a candidate or the candidate's authorized committee or their agents, it is treated as an  
11 in-kind contribution.<sup>20</sup> Any person who is otherwise prohibited from making contributions to  
12 candidates under the Act or Commission regulations is prohibited from making an in-kind  
13 contribution.<sup>21</sup> An IEOPC "may not make contributions to candidates or political party  
14 committees, including in-kind contributions such as coordinated communications."<sup>22</sup>

15 Under the Commission's regulations, a communication is "coordinated" with a candidate,  
16 an authorized committee, a political party committee, or agent thereof, and is treated as an in-

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<sup>17</sup> *Id.*, Attach.

<sup>18</sup> 52 U.S.C. § 30101(8)(A)(i); *see also* 52 U.S.C. § 30101(9)(A)(i) (similarly defining "expenditure").

<sup>19</sup> 11 C.F.R. § 100.52(d)(1).

<sup>20</sup> 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.20; *see also* *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976).

<sup>21</sup> *See* 52 U.S.C. §§ 30116(f), 30118(a); *see also* 11 C.F.R. § 109.22 (noting that any person prohibited from making contributions is prohibited from paying for coordinated communication).

<sup>22</sup> AO 2017-10 (Citizens Against Plutocracy) at 2 (quoting AO 2016-21 (Great America PAC) at 3-4 (citing Press Release, FEC Statement on *Carey v. FEC* Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011)); *see also* Advisory Op. at 2010-11 (Commonsense Ten) at 2-3.

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1 kind contribution, if the communication: (1) is paid for, partly or entirely, by a person other than  
2 the candidate, authorized committee, political party committee, or agent thereof; (2) satisfies at  
3 least one of the "content standards" at 11 C.F.R. § 109.21(c); and (3) satisfies at least one of the  
4 "conduct standards" at 11 C.F.R. § 109.21(d).<sup>23</sup> All three prongs must be satisfied for a  
5 communication to be considered coordinated.<sup>24</sup>

6 A public communication satisfies the "material involvement" conduct prong if, *inter alia*,  
7 "[a] candidate, authorized committee, or political party committee is materially involved in  
8 decisions regarding: (i) [t]he content of the communication; (ii) [the] intended audience of the  
9 communication; (iii) [the] means and mode of the communication; (iv) [t]he specific media  
10 outlet used for the communication; (v) [t]he timing or frequency of the communication; or (vi)  
11 [t]he size or prominence of a printed communication, or duration of a communication by means  
12 of broadcast, cable, or satellite."<sup>25</sup>

13 "Risky" satisfies the payment prong because CLF, a third party, paid for the ad.<sup>26</sup> The ad  
14 also meets the content prong because it is a public communication that refers to a clearly

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<sup>23</sup> 11 C.F.R. § 109.21(a); *see also* 11 C.F.R. § 109.21(b) (describing in-kind treatment and reporting of coordinated communications). The "content standard" requirement is satisfied if the communication at issue constitutes: (1) an "electioneering communication;" (2) a "public communication" that disseminates campaign materials prepared by a candidate or authorized committee; (3) a public communication that "expressly advocates" the election or defeat of a clearly identified federal candidate; (4) certain public communications distributed 120 days or fewer before an election, which refer to a clearly identified federal candidate (or political party); or (5) a public communication that is the functional equivalent of express advocacy. 11 C.F.R. § 109.21(c); *see also* 11 C.F.R. § 100.22 (defining express advocacy); 11 C.F.R. § 100.26 (defining public communication); 11 C.F.R. § 100.29 (defining electioneering communication).

<sup>24</sup> 11 C.F.R. § 109.21(a); *see also* Explanation and Justification, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 453 (Jan. 3, 2003).

<sup>25</sup> 11 C.F.R. § 109.21(c)(5)(d)(2).

<sup>26</sup> 11 C.F.R. § 109.21(a)(1).

1 identified House candidate, Davids, and was publicly disseminated in her district less than 90  
2 days before the election.<sup>27</sup>

3 Zimmer-Roethle's appearance in CLF's "Risky" ad is the only conduct that might satisfy  
4 the conduct prong.<sup>28</sup> However, the Party expressly denies any knowledge of the ad or Zimmer-  
5 Roethle's participation in it.<sup>29</sup> It also expressly denies any consultation, communication, or  
6 cooperation with any political party or its agents regarding the ad.<sup>30</sup> CLF denies that Zimmer-  
7 Roethle was acting as an agent of the Party when she appeared in the ad and relies on the release  
8 Zimmer-Roethle signed, in which she attests that she is not the agent of any candidate,  
9 congressional campaign, or national congressional committee, and that she has not participated  
10 in the CLF campaign at the request or suggestion of any federal candidate or candidate's  
11 committee.<sup>31</sup> In the release, she further affirmed that she had not requested or suggested that  
12 CLF air any ads in any federal candidate's race and that she had not provided any non-public  
13 information about any federal candidate or candidate committee's private plans, projects,  
14 activities, or needs to CLF.<sup>32</sup> She also stated that she would not disclose any of the information  
15 she has received from CLF, including but not limited to plans, strategies, data, lists, or

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<sup>27</sup> 11 C.F.R. § 109.21(c)(4)(i).

<sup>28</sup> In order for a communication to be coordinated with a political party committee, it must satisfy one of six conduct standards at 11 C.F.R. § 109.21(d). The communication must be made (1) at the request or suggestion of the political party committee or its agent, (2) with material involvement, (3) with substantial discussion, (4) using a common vendor, (5) using a former employee or independent contractor, or (6) involving the dissemination, distribution, or republication of campaign materials.

<sup>29</sup> Party Resp. at 1.

<sup>30</sup> *Id.*

<sup>31</sup> CLF Resp., Attach. Responses from the Party and CLF do not include any sworn statements from Zimmer-Roethle or any other party.

<sup>32</sup> *Id.*

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1 information related to its policy, political, legal, operations, communications, or fundraising  
2 activities.<sup>33</sup>

3 Under these facts, Zimmer-Roethle's appearance in "Risky" while serving as the Party's  
4 Secretary, standing alone, is not sufficient to meet the conduct prong. The Commission has  
5 concluded that someone's role as an officer of a party committee does not create a presumption  
6 that all of her private actions are taken on behalf of that party committee.<sup>34</sup> The officer must be  
7 acting in her capacity as an agent of that committee in order to hold the committee liable for her  
8 actions.<sup>35</sup> The Party and CLF responses indicate that Zimmer-Roethle was not acting as an agent  
9 of the Party when she appeared in "Risky."<sup>36</sup> The Party's Response indicates that none of its  
10 other officers knew of the ad until it aired on television.<sup>37</sup> Both the Party and CLF assert that  
11 Zimmer-Roethle was participating in the ad in her personal capacity as a resident of the Third  
12 Congressional District, that there was no consultation or communication between CLF and the  
13 Party regarding the ad, and her title as an officer of the Party does not appear in the ad, so the  
14 information is insufficient to establish that she was acting on the Party's behalf when she

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<sup>33</sup> *Id.*

<sup>34</sup> See Prohibited and Excessive Contributions, 67 Fed. Reg. 49,064, 49,083 (July 29, 2002) (Explanation and Justification) ("E&J") (allowing nonfederal fundraising by state party chairmen who also serve as members of their national party committees because "it is clear that individuals . . . can . . . wear multiple hats."). See also, MUR 6796 (House Majority PAC) Factual & Legal Analysis at 8 (Dec. 17, 2015) (concluding that the appearance of a party member in a television ad does not alone suggest material involvement by the party).

<sup>35</sup> *Id.* at 49,083 ("Under the Commission's final rules defining "agency," a principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals. 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. This additional requirement ensures that liability will not attach due solely to the agency relationship, but only to the agent's performance of prohibited acts for the principal.").

<sup>36</sup> Party Resp. at 1; CLF Resp. at 1-2.

<sup>37</sup> *Id.*

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1 appeared in the ad.<sup>38</sup> Further, by signing the release, Zimmer-Roethle agreed not to divulge any  
2 information about CLF that she might have learned from her participation in the CLF ad.<sup>39</sup>

3 Because there is no other information regarding conduct that might satisfy the conduct  
4 prong, there is insufficient evidence of coordination with respect to the creation and production  
5 of "Risky." Accordingly, we recommend that the Commission exercise its prosecutorial  
6 discretion and dismiss the allegations that Kansas Republican Party and Richard L. Todd in his  
7 official capacity as treasurer, violated 52 U.S.C. §§ 30116(f) and 30104(b) by accepting and  
8 failing to report a prohibited in-kind contribution, and dismiss allegations that Congressional  
9 Leadership Fund and Caleb Crosby, in his official capacity as treasurer violated 52 U.S.C.  
10 § 30118(a) by making a prohibited in-kind contribution.

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<sup>38</sup> Party Resp. at 1; CLF Resp. at 1-2. See 11 C.F.R. §§ 109.3(a)(1)-(5) (establishing that individual must have actual authority to engage in specified activities on behalf of a party committee to qualify as an "agent").

<sup>39</sup> CLF Resp., Attach. We note that the Responses do not include sworn statements from Zimmer-Roethle or the Party to support their denials of coordination. Still, we are aware of no information that would support finding she was acting as the Party's agent when she appeared in "Risky."

1 **IV. RECOMMENDATIONS**


- 2 1. Dismiss the allegations that Kansas Republican Party and Richard L Todd in his  
3 official capacity as treasurer violated 52 U.S.C. §§ 30116(f) and 30104(b) by  
4 accepting and failing to report a prohibited in-kind contribution;  
5  
6 2. Dismiss the allegations that Congressional Leadership Fund and Caleb Crosby in  
7 his official capacity as treasurer violated 52 U.S.C. § 30118(a) by making a  
8 prohibited in-kind contribution;  
9  
10 3. Approve the attached Factual and Legal Analyses;  
11  
12 4. Approve the appropriate letters; and  
13  
14 5. Close the file.  
15

16 Lisa J. Stevenson  
17 Acting General Counsel

18 Charles Kitcher  
19 Acting Associate General Counsel  
20 for Enforcement

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25 7.2.19

26 Date

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29 Deputy Associate General Counsel  
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