

**BEFORE THE  
FEDERAL ELECTION COMMISSION**

American Democracy Legal Fund  
455 Massachusetts Avenue, N.W.  
Washington, DC 20001

Complainant,

v.

National Republican Congressional Committee  
320 First Street, S.E.  
Washington, DC 20003

American Action Network, Inc.  
1747 Pennsylvania Avenue, N.W., 5th Floor  
Washington, DC 20006

American Crossroads  
P.O. Box 34414  
Washington, DC 20043

Respondents.

**COMPLAINT**

Complainant files this complaint under 52 U.S.C. § 30109(a)(1) against the National Republican Congressional Committee, Keith Davis, Treasurer (the "NRCC"); American Action Network, Inc. ("AAN"); and American Crossroads, Caleb Crosby, Treasurer (collectively "Respondents") for violating the Federal Election Campaign Act of 1971, as amended ("the Act") and Federal Election Commission Regulations, as described below.

Based on recent press reports, in the months leading up to the November 2014 election, and perhaps going back even further than that, the NRCC appears to have been illegally coordinating with outside groups such as AAN and American Crossroads through the repeated exchange of encrypted internal political polling information posted on hidden Twitter webpages. The messages were not public information because they were encoded in a format that only members of Respondents' scheme could understand. This ongoing exchange of non-public

strategically material information constitutes "coordination" under the Act and means that purported "independent expenditures" sponsored by AAN and American Crossroads were in fact, excessive, illegal, in-kind contributions to the NRCC. Furthermore, because poll results represent something of value, the donation of polling data constitutes an in-kind contribution that must be reported under the Act. In accordance with the secret, non-public nature of their scheme, Respondents failed to report their repeated exchanges of the polling data in violation of the law.

Polling is the cornerstone of political opinion research. Polling data informs every aspect of a campaign, including media buys, get-out-the-vote efforts, and other activities. In an effort to illegally coordinate their activities and save money, the NRCC and outside groups have been working off of the same polling data, and exchanging all of the data on Twitter in real time. The Commission should act immediately to investigate the full scope of these violations and seek the maximum financial penalties.

#### **A. FACTS**

According to publicly available news reports, it appears that the NRCC and at least two outside organizations – AAN, a section 501(c)(4) nonprofit corporation, and American Crossroads, a federal Super PAC – have been engaging in illegal coordination by sharing internal polling data via hidden Twitter accounts. A November 17, 2014 Cable News Network ("CNN") article details how Respondents created two hidden Twitter accounts, one named @TruthTrain14, and the other @brunogianelli44,<sup>1</sup> to share encrypted polling results for specific

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<sup>1</sup> Notably, the @brunogianelli44 Twitter account appears to have been named after Bruno Gianelli, a fictional character from the TV show *The West Wing*. Gianelli was notorious for encouraging his colleagues to use soft money to fund campaigns. Chris Moody, How the GOP used Twitter to Stretch Election Laws, *CNN*, Nov. 17, 2014, available at <http://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/>. The name of this Twitter account supports the proposition that in executing this illegal coordination scheme, Respondents were intentionally attempting to sidestep campaign finance regulations.

congressional races.<sup>2</sup> Respondents posted the polling information in an encoded format so that any person unfamiliar with the formula Respondents used to organize the information, including members of the public, would be unable to decipher what the posts meant. For example, just days before the November 2014 election, Respondents posted the following tweets to the @brunogianelli44 Twitter page: "MI-N/A-57/34-59/30/30/17-N/A-10/28/14-6" and "CA-N/A-48/36-50/17-30/30-N/A-10/28/14-21."<sup>3</sup> There was no public information that would allow anyone outside of the scheme to decode their messages.

Each of the Respondents has an official Twitter page,<sup>4</sup> but the two hidden Twitter pages exposed by CNN were not publicly associated or linked in any way to Respondents or their official Twitter pages. CNN reported that the hidden Twitter accounts showed that Respondents had been sharing information in this manner since at least July 2014, but that the scheme may have lasted for as long as four years.<sup>5</sup> Tellingly, Respondents deleted both Twitter accounts minutes after CNN contacted the NRCC with questions in an apparent attempt to cover up their activities.<sup>6</sup>

American Crossroads spent approximately \$21.6 million during the 2013-2014 election cycle.<sup>7</sup> AAN spent nearly \$9 million.<sup>8</sup> By examining the shared polling data, the groups could make decisions informed by inside party information about which candidates they should target. For example, if the NRCC posted a Twitter message showing a particular congressional candidate polling significantly ahead of his opponent, the groups would know that the party

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<sup>2</sup> Moody, *supra* note 1.

<sup>3</sup> Moody, *supra* note 1; *see also* Chris Moody, See the GOP's Coded Tweets, *CNN*, Nov. 18, 2014, *available at* <http://www.cnn.com/2014/11/18/politics/gop-tweets-screenshots/>.

<sup>4</sup> *See* NRCC Twitter page, *available at* <https://twitter.com/nrcc>; AAN Twitter page, *available at* <https://twitter.com/aan>; American Crossroads Twitter page, *available at* <https://twitter.com/americanxroads>.

<sup>5</sup> Moody, *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> *See* American Crossroads Outside Spending Summary 2014, Center for Responsive Politics, *available at* <https://www.opensecrets.org/outsidespending/detail.php?cmte=C00487363>;

<sup>8</sup> *See* AAN Outside Spending Summary 2014, Center for Responsive Politics, *available at* <https://www.opensecrets.org/outsidespending/detail.php?cycle=2014&cmte=C90011230>.

viewed the candidate as "safe," and that they should not target spending on that race. By contrast, the NRCC could communicate that a race was competitive by posting a message showing close polling results. Independent groups would then know to devote more spending, resources, and time on that race. Consistent with the hidden nature of Respondents' scheme, it appears that none of the Respondents reported these repeated exchanges of polling data on their regularly filed FEC reports.

## **B. LEGAL ARGUMENT**

1. The NRCC and outside groups appear to have engaged in illegal coordination through sharing internal polling data.

Under the Act, "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 a contribution to such candidate."<sup>9</sup> The same rule applies to party committees.<sup>10</sup> The Commission's regulations implementing the coordination provisions explain that an expenditure for a communication will be considered an in-kind contribution to a campaign or party if it meets the following three criteria: (1) it is paid for by an entity other than the party; (2) it meets certain content standards, including by being a public communication that expressly advocates the election or defeat of a clearly identified candidate; and (3) it meets certain conduct standards, including by being created at the request or suggestion of or after substantial discussion with the party.<sup>11</sup>

The "request or suggestion" standard is satisfied if the communication is created, produced, or distributed at the request or suggestion of a party committee.<sup>12</sup> The "substantial discussion" standard is satisfied if the communication is created, produced, or distributed after

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<sup>9</sup> 52 U.S.C. § 30116(a)(7)(B)(i).

<sup>10</sup> *Id.* § 30116(a)(7)(B)(ii).

<sup>11</sup> *See* 11 C.F.R. § 109.21(a), (c)(3), (d)(1), (d)(3).

<sup>12</sup> *Id.* § 109.21(d)(1).

one or more substantial discussions about the communication between the person paying for the communication and a party committee.<sup>13</sup> A discussion is "substantial" if information about the party committee's plans, projects, activities, or needs is conveyed to the person paying for the communication, and that information is material to the creation, production, or distribution of the communication.<sup>14</sup>

Since their inception, AAN and American Crossroads have spent significant amounts of money on communications identified as "independent expenditures." By definition, "independent expenditures" are communications that expressly advocate the election or defeat of a clearly identified candidate.<sup>15</sup> Accordingly, the "independent expenditures" made by AAN and American Crossroads satisfy the first two prongs of the coordination analysis described above: each communication was paid for by someone other than a party or candidate and satisfied the "content prong." The third prong of the coordination standard is also satisfied as it appears that supposed "independent expenditures" sponsored by AAN and American Crossroads were (1) made at the request or suggestion of the NRCC or (2) made after substantial discussion between the NRCC and the outside groups.

- a. Independent expenditures sponsored by AAN and American Crossroads were made at the request or suggestion of or after substantial discussion with the NRCC.

Based on publicly available news reports, it appears that the NRCC posted polling information for certain congressional races on its hidden Twitter pages as coded requests or suggestions for outside groups to get involved by pouring money and other resources into those races. At the same time, the Twitter messages conveyed information about the NRCC's plans,

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<sup>13</sup>*Id.* § 109.21(d)(3).

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* § 100.16(a).

projects, activities, and needs because the messages only communicated polling data for the NRCC's races of interest, including close races and races where the Republican candidate needed help. The NRCC did not post polling data for all of the congressional races. The NRCC's purpose in operating the hidden Twitter pages was to provide a guidepost to outside groups looking to help, but it was also to provide access to the polling data which was itself "material information." As such, the NRCC's Twitter posts apparently prompted advertising buys and other spending by the outside groups in the specific races for which the NRCC posted data. Without access to the NRCC's hidden polling data, the outside groups may not have sponsored communications supporting or opposing certain candidates.

Moreover, because the polling data was encrypted and therefore only valuable if a person knew how to decipher it, and it was only available on anonymous, unconnected Twitter pages, Respondents must have communicated at some point to come up with this illegal coordination scheme. After all, Respondents had to determine what medium they would use to share the information and what formula they would use to communicate so that members of the public, including their opponents, could not make use of the information. This is the hallmark of the "conduct prong" – engaging in conduct, in this case direct communications, that shows an effort to coordinate.

- b. The Twitter messages containing polling data were not publicly available.

If requests or suggestions are made publicly, or if information material to the coordinated communications was obtained from a publicly available source, then the conduct prong may not have been satisfied.<sup>16</sup> Here, however, Respondents shared the private polling data on Twitter, but formatted the data in such a way that it could not be understood by the public. By hiding

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<sup>16</sup> 11 C.F.R. § 109.21; Coordinated Communications, 71 Fed. Reg. 33190, 33205 (June 8, 2006).

their communications on a public website, Respondents intentionally tried to create a loophole in the coordination rules. Such an intentional effort to knowingly flout campaign finance laws cannot be condoned.

While the Commission has taken the position that a request or suggestion on a publicly available website would not satisfy the "conduct prong," it clarified in its Explanation and Justification that the purpose of the rule was to cover communications made to a select audience:

[T]he "request or suggestion" conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1), but a request posted through an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience and thereby satisfies the conduct standard in paragraph (d)(1).<sup>17</sup>

The Commission's Explanation and Justification indicates that the purpose of the "publicly available information" safe harbor is to protect against a finding of coordination based on requests or suggestions made to the public or other information truly made available to the general public. It is clear that this exception to the general coordination rules was never intended to cover encoded communications to a select audience only because they were done on a website that someone else could access but not understand. The hidden Twitter messages were not offered to the public generally; they were posted to anonymous Twitter accounts that only certain groups knew existed. They were also encoded. Members of the public who were not privy to Respondents' translation formula could not decipher what the posts meant. The NRCC did not include a "key" or any other method by which members of the public could decode the polling

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<sup>17</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (emphasis added).

data. The encrypted nature of the messages plainly indicates that they could not have been requests to the general public.

The Commission has recognized that the burden is on the person paying for the communications at issue to show that the information used in creating, producing, or distributing the communications was obtained from a publicly available source.<sup>18</sup> Accordingly, AAN and American Crossroads bear the burden of demonstrating to the Commission that their so-called independent expenditures resulted from publicly available information, and not from information available only to a discrete group of recipients. Respondents simply cannot carry this burden.

If the Commission were to find that Respondents did not engage in illegal coordination, then it would be sending the dangerous message to candidates, party committees, and outside organizations that they can coordinate their efforts so long as they nest their communications – no matter how cryptic or hidden – in a publicly available forum. This is the wrong outcome. Such a finding would upend the Act and Commission regulations, and it would allow entities to make an end run around contribution limits and other protections that the Commission has found are necessary.

2. Respondents failed to report the value of the polling data as an in-kind contribution.

Commission regulations set forth specific rules governing the contribution and valuation of polling data. Because poll results represent something of value, the donation of polling results generally constitutes an in-kind contribution and must be reported under the Act.<sup>19</sup> Consistent with their goal of keeping their illegal coordination scheme hidden, Respondents failed to report the polling data as an in-kind contribution in violation of the Act and Commission regulations.<sup>20</sup>

### **C. REQUESTED ACTION**

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<sup>18</sup> Coordinated Communications, 71 Fed. Reg. 33190, 33205 (June 8, 2006).

<sup>19</sup> 11 C.F.R. § 106.4(b).

<sup>20</sup> *See id.* § 104.3.



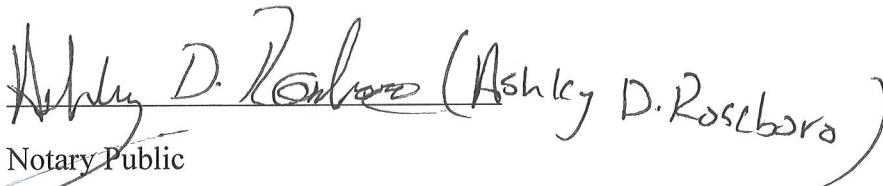
As we have shown, Respondents have violated the Act and Commission regulations by illegally coordinating through the exchange of encrypted internal polling information and by failing to report contributions of costly polling data. Even if Respondents only carried on this scheme during the 2013-2014 election cycle, the legal result is a significant amount of prohibited and excessive contributions to the NRCC. What is more, news reports indicate that Respondents' scheme was an intentional effort to create a loophole in campaign finance laws by illegally coordinating while attempting to avail themselves of the "publicly available information" safe harbor.

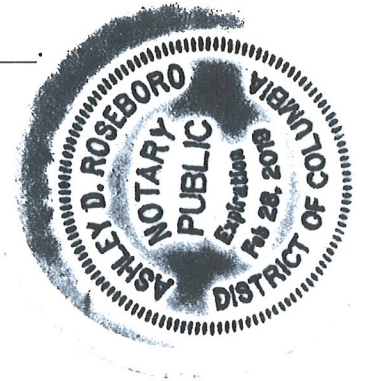
We respectfully request that the Commission investigate these violations, and any additional coordination between the NRCC and other "independent" groups who may have also been involved in this scheme; enjoin Respondents from further violations; and fine Respondents the maximum amount permitted by law.

Sincerely,



SUBSCRIBED AND SWORN to before me this 24 day of November, 2014.

 (Ashley D. Roseboro)  
Notary Public



My Commission Expires:

February 28, 2014