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June 6, 2003

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COUNSEL

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BY HAND DELIVERY

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 5365 (Club for Growth)

Dear Mr. Norton:

This office represents the Club for Growth ("Club"), which today received a complaint ("Complaint") designated Matter Under Review ("MUR") 5365 by the Federal Election Commission ("FEC" or "Commission")[1]. An executed Designation of Counsel form is attached. Pursuant to 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.6, we hereby file this response.

The Complaint in this matter is based on a "backup" provision of the Bipartisan Campaign Reform Act ("BCRA") that is not in effect because the judgment striking down the primary definition has been stayed. Moreover, the complaint was filed with regard to a modified version of the "backup" definition that two of the three members of the district court panel have ruled to be unenforceable. Thus, the Commission should dismiss this Complaint finding outright that there is no reason to believe that the Club violated the Federal Election Campaign Act, as amended ("FECA" or "Act") that presently is in effect or, alternatively, by exercising its prosecutorial discretion not to pursue a charge based on a provision that a majority of the Court has ruled unenforceable.

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[1] While the complaint, dated May 13, was initially forwarded to the Club for Growth, Inc. PAC, the complaint was filed against the Club for Growth. Thus, this response if filed on behalf of the Club for Growth. The Commission staff was notified of this problem on May 29, and a new complaint was sent to the Club for Growth on June 3, 2003. Despite this attempt to correct its "administrative oversight", the Commission has failed to comply with 2 U.S.C. § 437g(a), and the Club does not waive this failure to comply with the statute and its regulations (see 11 C.F.R. § 111.5). The Club for Growth, Inc. PAC will not respond to this complaint because it has not been named as a respondent.

THE COMPLAINT

Specifically, the Complaint, filed on May 13, 2003 states that the Club for Growth aired issue ads which "contravene the plain terms of the statutory test upheld by the three-judge court in McConnell v. Federal Election Commission." The Complaint is therefore referencing the May 1, 2003 opinion of the district court.

The ad was as follows:

Audio	Visual
PRESIDENT KENNEDY CUT INCOME TAXES AND THE ECONOMY SOARED.	*Footage of Kennedy labeled "President Kennedy".* *On screen: "Cut Income Taxes and The Economy Soared"*
PRESIDENT REAGAN CUT TAXES MORE, AND CREATED FIFTEEN MILLION NEW JOBS.	*Footage of Reagan labeled "President Reagan".* *On screen: "Cut Taxes More, and Created 15 Million New Jobs"*
PRESIDENT BUSH KNOWS TAX CUTS CREATE JOBS, AND THAT HELPS BALANCE THE BUDGET.	*Footage of Bush labeled "President Bush".* *On screen: "Knows Tax Cuts Create Jobs, and That Helps Balance The Budget"*
BUT SENATOR TOM DASCHLE OPPOSES THE PRESIDENT.	*Daschle photo.* *On screen: "But Senator Tom Daschle Opposes The President"*
SOUTH DAKOTA HAS LOST THOUSANDS OF JOBS, AND PRESIDENT BUSH HAS A PLAN TO HELP.	*Images of closed storefronts.* *On screen: "South Dakota unemployed up 1,206 in last two years"*
TELL TOM DASCHLE TO SUPPORT THE KENNEDY, REAGAN, BUSH TAX POLICY THAT WILL BRING JOBS BACK TO SOUTH DAKOTA.	*Daschle photo. On screen: "Tell Tom Daschle"* *Daschle picture fades as Kennedy, Reagan, and Bush pictures come up.* *On Screen: "Bring Jobs Back To South Dakota"* *"PAID FOR BY THE CLUB FOR GROWTH.* *www.clubforgrowth.org*

Thus, this advertisement addressed legislation pending in Congress at the time of its airing – the President's tax cut bill.

THE LAW

BCRA expanded the prohibition on corporate contributions to include electioneering communications. 2 U.S.C. § 441b(b)(2). Pursuant to BCRA, an electioneering communications means:

> (A) *In general.*
>
> (i) The term "electioneering communication" means any broadcast, cable, or satellite communication which—
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.
>
> (ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any

> broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

Id. § 434(f)(3) (emphasis added). The FEC promulgated no regulations with respect to this backup definition of electioneering communications. Therefore, there is no regulation which explains what the clause "promotes or supports a candidate for that office, or attacks or opposes a candidate for that office" means.

The May 1 decision of the Court ruled unconstitutional the primary definition of an electioneering communication. That decision also struck the final clause of the backup definition ("and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.") However, a majority of Court initially ruled that the remainder of the backup division could take effect.

The Club for Growth and others promptly filed a motion under Rule 59(e), which deprived the judgment of finality, preventing the revised backup definition from taking effect (since no final ruling yet struck down the primary definition). Various stay motions also were filed. The Court then simultaneously denied the Rule 59(e) motion and stayed its initial ruling, thus continuing to hold the backup definition in abeyance (since the primary definition was not finally struck down).

Moreover, Judge Leon, who initially held the controlling vote on the definition of an electioneering communication stated in his stay opinion that: "I do believe that the FEC's unfortunate failure to promulgate regulations for the backup definition, as it did for the primary definition, has sufficiently deprived the parties of guidance regarding the contours of the backup definition to warrant a stay of the primary definition portion of our judgment on Section 201." Thus, Judge Leon recognized that the backup definition created by the court was and is unenforceable until and unless adequate regulations are adopted.

DISCUSSION

The complaint was based on the backup definition of an "electioneering communication" as amended by the district court. That definition is not in effect.[2] There is no allegation that the ad in question satisfies the primary definition of an electioneering communication. Indeed it does not because it was not broadcast 30 days before Senator Daschle's primary election or 60 days his general election. Moreover, two of the three judges of the district court believe that the backup definition is unconstitutional or unenforceable. Thus, the Club did not, and could not have violated the law. Under these circumstances, the matter should be expeditiously dismissed.

Sincerely,

Carol A. Laham

Carol A. Laham

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[2] It is also worth noting that even if the backup definition now was in effect, it requires that an individual be a candidate. Unlike his peers who are running for reelection in 2004, a search of the public record indicates that Senator Daschle has not filed a Statement of Candidacy with the Secretary of the Senate. Thus, Senator Daschle has not affirmed that he is a candidate for Senate. If he is a candidate, he seems to have violated 11 C.F.R. §101.1.

STATEMENT OF DESIGNATION OF COUNSEL

Please use one form for each respondent

MUR 5365

NAME OF COUNSEL: Carol A. Laham

FIRM: Wiley Rein & Fielding, LLP

ADDRESS: 1776 K Street, NW

Washington, DC 20006

TELEPHONE: (202) 719-7301

FAX: (202) 719-7207

The above-named individual is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

Stephen Moore
Print Name

5/3/04 _____, President
Date Signature Title

RESPONDENT'S NAME: Club for Growth, Inc.

ADDRESS: 1776 K Street, NW, Suite 300

Washington, DC 20006

TELEPHONE: HOME

BUSINESS( ) _____

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