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COUNSEL  
WASHINGTON, VA 20186  
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October 18, 2010

Christopher Hughey, Esq.  
General Counsel's Office  
999 E Street, NW  
Washington, DC 20463

***Re: Response of American Crossroads and Margee Clancy, Treasurer, in MUR 6357***

Dear Mr. Hughey,

This Response is submitted by the undersigned counsel of behalf of American Crossroads and Ms. Margee Clancy, in her capacity as Treasurer of American Crossroads, in response to the Complaint designated as Matter Under Review 6357.

On August 25, 2010, the FEC received this Complaint against American Crossroads. American Crossroads first became aware of a coming FEC complaint after receiving inquiries on August 19 and 20 from several reporters who were unusually well-briefed on FEC regulations and precedent. One of these inquiries even included a reference to a First General Counsel's Report. After first seeking to generate media coverage, this Complaint was submitted on August 23, accompanied by a press release, under the auspices of the Ohio Democratic Party.

The Complaint is incorrect in its legal conclusions, and the relief requested by the Complainant – while a moot point – is clearly designed to dissuade donors from supporting American Crossroads.

The advertisement at issue was produced entirely independently of Portman for Senate Committee. Any content that American Crossroads did not produce itself was obtained from widely available public domain sources on the Internet, including YouTube. Absolutely no material used in the advertisement at issue was obtained from the Portman for Senate Committee website, or in any other way from the Portman campaign. See Affidavit of Carl Forti at ¶¶ 4-5.

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**1. American Crossroads' Use of Footage Does Not Run Afoul of the Commission's Republication Rules**

**a. Complainant Did Not Obtain Footage From Portman for Senate Committee**

Complainant assumes that American Crossroads obtained certain footage for its advertisement from the Portman for Senate Committee. This is simply incorrect. No material used in the advertisement at issue was obtained from the Portman for Senate Committee. See Affidavit of Carl Forti at ¶¶ 4-5. American Crossroads personnel had no contact with the Portman for Senate Committee. See Affidavit of Carl Forti at ¶ 4. Small portions of the American Crossroads advertisement were obtained from widely available public domain sources on the Internet, including YouTube. See Affidavit of Carl Forti at ¶ 5.

**b. Use of Footage is Protected by the 11 C.F.R. § 109.23(b)(4) Exception**

While American Crossroads maintains that the footage used in its advertisement was not obtained from the Portman for Senate Committee, *even if* the Commission were to determine that the footage in question was in fact originally created at some point by the Portman for Senate Committee *before* it became broadly disseminated across the Internet, *and* the Commission determines that such a use implicates the republication rules, we believe the use of the footage qualifies for the fourth exception to the general republication rule.

The fourth exception set forth at 11 C.F.R. § 109.23(b) applies when "[t]he material used consists of a brief quote of materials that demonstrate a candidate's position as part of a person's expression of its own views." Thus, even if American Crossroads' use of the footage in question were to be classified as a republication, this use is plainly covered by the § 109.23(b)(4) exception.

While the Commission has declined to formally refer to this exception as a "fair use" exception, *see* Final Rule on Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 443 (Jan. 3, 2003), the Commission acknowledged that the exception has the same practical effect. *See id.* ("the Commission believes that such legitimate benefits as would flow from a fair use exception are met through application of 11 CFR 109.23(b)(4)"). As Commissioners Weintraub and von Spakovsky noted in 2007, this exception "appears to contemplate exempting from regulation the incidental use of campaign materials to further one's own independent communication." Statement of Reasons of Commissioners Ellen Weintraub and Hans von Spakovsky in MUR 5743 (Betty Sutton for Congress/EMILY's List). American Crossroads believes this to be an accurate reading of purpose of § 109.23(b)(4), and encourages the full Commission to adopt this view.

**b. Complainant's Reliance on MUR 5743 Is Misplaced**

Complainant cites MUR 5743 in support of its contentions. This reliance, however, is misplaced. MUR 5743 involved EMILY's List's use of still photographs "obtained ... directly from Betty Sutton for Congress' publicly available website." MUR 5743 (Betty Sutton for Congress/EMILY's List), First General Counsel's Report at 6. As explained above, the footage at issue in this matter was *not* obtained from the Portman for Senate Committee.

Second, the nature of the violation in MUR 5743 was never established, which leaves the matter with virtually no precedential value. According to the First General Counsel's Report, "it appears that EMILY's List *may have* made an in-kind contribution to the Betty Sutton for Congress committee by republishing pictures in its direct mailers that were obtained from the Betty Sutton for Congress website" (emphasis added). *Id.* at 8. In other words, the recommendation of the Office of General Counsel does not firmly establish that any actual violation occurred. Additionally, the Office of General Counsel was unable to determine the amount of any violation that "may have" occurred:

However, determining the amount of the excessive contribution is problematic. Indeed, it is not clear that a photograph obtained from a publicly available website without coordination with the candidate or her committee and inserted into EMILY's List own publication would have any more than *de minimis* value.

*Id.* In the end, the Office of General Counsel recommended that the Commission "exercise its prosecutorial discretion and take no further action in this matter." *Id.* Four Commissioners accepted this result, notwithstanding the unclear rationale. MUR 5743 fails to describe what, if any, violation purportedly occurred, and provides the public with absolutely no information with respect to what the law requires. At best, MUR 5743 stands for the following proposition: using a photograph obtained from a candidate's website as part of an independently-produced communication *may* constitute republication, however, no one knows how to value the violation, but in any event it is likely *de minimis* and not worth pursuing.

Two Commissioners dissented from this absurd result and explained their views in a separate Statement of Reasons. See Statement of Reasons of Commissioners Elhan Weintraub and Hans von Spindovsky in MUR 5743. They concluded:

No admonishment letter should be sent to EMILY's List. The downloading of a photograph from a candidate's website that is open to the world, for incidental use in a larger mailer that is designed, created, and paid for by a political committee as an independent expenditure without any coordination with the candidate, does not constitute

the "dissemination, distribution, or republication of candidate campaign materials." It is not an "in-kind" contribution from the committee to the candidate.

*Id.*

American Crossroads encourages the Commission to formally adopt the views expressed in this Statement of Reasons. Doing so would bring much needed clarity to the issues raised in the Complaint. However, to reiterate, the facts in MUR 5743 are not the facts we have here, because the material in question was *not* obtained from the candidate's website.

**c. MUR 5865 Is Directly On Point, and Supersedes MUR 5743**

Regardless of the Commission's current views on MUR 5743, MUR 5865 (New Trier Democratic Organization) – which was not mentioned in the Complaint – is directly on point and provides answers to the questions raised in this matter.

At issue in MUR 5865 was a flyer produced by the New Trier Democratic Organization that urged recipients to "vote Democrat Dan Seals for Congress" and included a photograph of Dan Seals. MUR 5743, Factual and Legal Analysis at 2. The origin of the photograph was never established, but the Seals campaign disavowed any involvement, and the New Trier Democratic Organization stated that "[t]he source material ... was not obtained from" the Seals campaign. *Id.* at 3. The Factual and Legal Analysis notes that "there are copies of the same photograph in numerous places in the public domain," including ActBlue's website, and no information existed suggesting any coordination between the New Trier Democratic Organization and the Seals campaign. *Id.* at 4-5. The Commission found no reason to believe that any republication violation had occurred.

MUR 5865 plainly established a new approach to republication that appropriately takes into account the wide availability of materials on the Internet. In fact, MUR 5865 appears to implicitly adopt many of the views set forth in the Statement of Reasons of Commissioners Weintraub and von Spakovsky in MUR 5743. Specifically, MUR 5865 very clearly recognizes an Internet-based "public domain" exception to the general republication rule. In MUR 5865, the Commission declared that material possibly originating with a campaign, but which has since spread over the Internet into the "public domain," may be incorporated into independent communications without that use constituting republication. This rule is perfectly consistent with § 109.23(b)(4), and serves as a natural corollary to § 109.23(b)(2).

**2. Complainant's Assertions Regarding Legal Consequences and Relief are Moot**

As demonstrated above, Complainant's legal conclusions are incorrect. American Crossroads did not engage in activity that constitutes an in-kind contribution to the Portman for Senate Committee. Accordingly, American Crossroads has not made any contribution, or otherwise engaged in any activity, that would threaten its status as an "independent expenditure" committee.

The Complaint should be immediately dismissed. In addition, American Crossroads hereby requests that the FEC admonish the Ohio Democratic Party, and its Chairman, Chris Redfern, for filing a frivolous complaint as part of a public relations strategy to chill the legitimate exercise of First Amendment rights by both American Crossroads and its supporters.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Josefiak', with a long horizontal flourish extending to the right.

Thomas J. Josefiak

Michael Bayes

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