

**FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463**

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FIRST GENERAL COUNSEL'S REPORT

MUR: 6870

DATE COMPLAINT FILED: September 12, 2014

DATE OF NOTIFICATION: September 17, 2014

DATE OF LAST RESPONSE: November 5, 2014

DATE ACTIVATED: January 29, 2015

EXPIRATION OF SOL:

March 28, 2019 (earliest)

April 7, 2019 (latest)

16 COMPLAINANT: American Democracy Legal Fund

Thom Tillis Committee and Collin McMichael in his official capacity as treasurer

RELEVANT STATUTES AND REGULATIONS:

52 U.S.C. § 30104(b)

52 U.S.C. § 30116(a)

52 U.S.C. § 30116(f)

52 U.S.C. § 30118(a)

11 C.F.R. § 109.21(b)

11 C.F.R. § 109.23(a)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

1. INTRODUCTION

36 This matter concerns allegations that American Crossroads made an illegal and excessive
37 in-kind contribution to the Thom Tillis Committee (“Committee”), the principal campaign
38 committee of Congressional candidate Thom Tillis. Specifically, the Complaint alleges that
39 American Crossroads financed the dissemination, distribution, or republication of campaign

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended (the “Act”), was transferred from Title 2 to new Title 52 of the United States Code.

MUR 6870 (American Crossroads, *et al.*)
First General Counsel's Report

1 materials prepared by the Committee, and in doing so made a contribution pursuant to 11 C.F.R.
2 § 109.23(a), which in turn resulted in American Crossroads making an illegal and excessive
3 contribution in violation of the Act.² The available information indicates that American
4 Crossroads aired an advertisement that used video footage created by the Committee, and its use
5 of that video footage, even “in part,” constitutes an in-kind contribution to the Committee.

1 Accordingly, we recommend that the Commission find reason to believe that American
2 Crossroads and Caleb Crosby in his official capacity as treasurer violated 52 U.S.C. §§ 30116(a),
3 30118(a) and 30104(b). We also recommend that the Commission enter into pre-probable cause
4 conciliation with American Crossroads.

2 The available information also indicates that American Crossroads obtained the video
3 footage to create the subject television advertisement from a publicly available source and not in
4 coordination with the Committee. We therefore recommend that the Commission find no reason
5 to believe that the Thom Tillis Committee and Collin McMichael in his official capacity as
6 treasurer violated 52 U.S.C. §§ 30116(f) and 30118(a).

15 II. FACTS

16 American Crossroads registered with the Commission as an independent expenditure-
17 only political committee (“IEOPC”) on August 10, 2010.³ As an IEOPC, American Crossroads
18 may solicit and accept contributions from corporations, individuals, and other federal political

2 52 U.S.C. § 30116(a).

3 See Form 1, Statement of Organization (Aug. 10, 2010). American Crossroads represented that it intends to raise funds in unlimited amounts, but will not use those funds to make contributions to federal candidates or committees, whether direct, in-kind, or via coordinated communications. See Letter from Margee Clancy, Treasurer, American Crossroads (Aug. 9, 2010).

MUR 6870 (American Crossroads, *et al.*)
First General Counsel's Report

1 committees in excess of the Act's limits.⁴ During the 2014 election cycle, American Crossroads
2 made independent expenditures totaling \$21,655,232.01.

3 North Carolina House Speaker Thom Tillis was a candidate for the 2014 U.S. Senate
4 election in that state.⁵ The Republican primary election, in which Tillis faced eight opponents,
5 was held on May 6, 2014.⁶ American Crossroads spent \$1,881,035 on radio and television
1 advertisements in support of Thom Tillis's campaign.⁷

0 The first television advertisement of American Crossroads promoting Tillis, entitled
1 "Guts," began airing in markets covering Charlotte and Raleigh on April 1, 2014.⁸ Disclosure
2 reports filed with the Commission indicate that American Crossroads made expenditures totaling
3 \$293,313 to produce and air the 30-second advertisement.⁹ "Guts" contains footage that was
4 originally part of a video entitled "Tillis Montage 2" that was created by the Tillis campaign and
5 made publicly available on Tillis's YouTube channel in February 2014.¹⁰ American Crossroads
6 states that it downloaded and used footage from "Tillis Montage 2," which it terms "so-called B-

⁴ See Advisory Op. 2010-11 (Commonsense Ten).

⁵ On June 11, 2013, Tillis filed a Statement of Candidacy and his primary campaign committee filed a Statement of Organization with the Commission. See Form 2, Statement of Candidacy (June 11, 2013); Form 1, Statement of Organization (June 11, 2013).

⁶ Tillis won the primary election and subsequently defeated then-Senator Kay Hagen in the general election. See Election Results, North Carolina State Board of Elections, <http://www.ncsbe.gov/ncsbe/Election-Results>.

⁷ American Crossroads did not make expenditures in support of, or in opposition to, any other federal candidates running in North Carolina during the 2014 election cycle. See <https://www.opensecrets.org/pacs/indexpend.php?strID=C00487363&cycle=2014>.

⁸ See *American Crossroads Launches TV Ad Supporting Speaker Thom Tillis for Senate in North Carolina*, AM. CROSSROADS (Apr. 1, 2014), <http://www.americancrossroads.org/2014/04/american-crossroads-launches-tv-ad-supporting-speaker-thom-tillis-for-senate-in-north-carolina/>.

⁹ Compl. 1-2. On March 28, 2014, American Crossroads disbursed \$276,823 to the Main Street Media Group LLC for TV/Media placement and \$16,490, on April 1, 2014, to Chatham Light Media LLC for TV/Media production. See American Crossroads 24/48 Hour Report of Independent Expenditures (Apr. 1, 2014).

¹⁰ Compl. at 2; American Crossroads Resp. at 2.

MUR 6870 (American Crossroads, *et al.*)
First General Counsel's Report

1 roll footage,” in “Guts.”¹¹ The video footage taken from “Tillis Montage 2” runs for about nine
2 of the advertisement’s 30 seconds and includes video and still shots of the candidate and the
3 candidate with his wife. The remaining footage in “Guts” includes two seconds of public
4 television footage showing Speaker Tillis at a podium downloaded from YouTube along with
5 video and graphics created by American Crossroads.¹² American Crossroads states that it
1 6 created all the audio content included in the advertisement.¹³ We are aware of no information to
5
0 7 the contrary.

4 8 III. ANALYSIS

8 9 A. There Is Reason to Believe that American Crossroads Republished 2 10 Candidate Campaign Materials

5 11 Under the Act, “the financing by any person of the dissemination, distribution, or
3 12 republication, in whole or in part, of any broadcast or any written, graphic, or other form of
9 13 campaign materials prepared by the candidate, his campaign committees, or their authorized
14 15 agents shall be considered to be an expenditure.”¹⁴ The republication of campaign materials
16 prepared by a candidate’s authorized committee is also “considered a[n in-kind] contribution for
17 the purposes of contribution limitations and reporting responsibilities of the person making the

¹¹ The Complaint alleges that American Crossroads used video footage from two Tillis campaign advertisements — “Let’s Clean Up Her Mess” and “Paper Route” — in addition to “Tillis Montage 2” in creating “Guts.” Compl. at 2. The two Tillis advertisements and “Tillis Montage 2” contain similar video footage and still shots of the candidate (and the candidate and his wife) in various settings. A comparison of the Tillis advertisements and “Tillis Montage 2” with “Guts” confirms American Crossroads’s statement that it used video footage from “Tillis Montage 2” and not the two Tillis campaign advertisements in creating “Guts.” American Crossroads Resp. at 2.

¹² American Crossroads Resp. at 2-3.

¹³ *Id.* at 3.

¹⁴ 52 U.S.C. § 30116(a)(7)(B)(iii).

1 expenditure,”¹⁵ because the person financing the communication “has provided something of
2 value to the candidate [or] authorized committee.”¹⁶

3 The Commission created an exemption for grassroots activity on the internet that allows
4 individuals to republish campaign materials available on the internet without making a
5 contribution or expenditure.¹⁷ The exception, however, does not exempt from the definition of
6 “contribution” any “public communication” that involves the republication of such materials.¹⁸
7 For example, a contribution would result “if an individual downloaded a campaign poster from
8 the Internet and then paid to have the poster appear as an advertisement in the New York
9 Times.”¹⁹

10 In this matter, American Crossroads republished materials created by the Tillis campaign
11 when it aired the “Guts” advertisement, a public communication. American Crossroads’ 30-
12 second communication contains about nine seconds of video images obtained from the Tillis

¹⁵ 11 C.F.R. § 109.23(a).

¹⁶ See Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 442 (Jan. 3, 2003) (explanation and justification) (“Coordinated and Independent Expenditures E&J”). As the Commission there explained, “Congress has addressed republication of campaign material through [52 U.S.C. § 30116(a)(7)(B)(iii)] in a context where the candidate/author generally views the republication of his or her campaign materials, *even in part*, as a benefit” and “can be reasonably construed only as for the purpose of influencing an election.” *Id.* at 443 (emphasis added); *see also* Coordinated Communications, 71 Fed. Reg. 33,190, 33,191 (Jun. 8, 2006) (explanation and justification), (“Coordination E&J”) (communications “that disseminate, distribute, or republish campaign materials, no matter when such communications are made, can be reasonably construed only as for the purpose of influencing an election.”).

¹⁷ See 11 C.F.R. §§ 100.94, 100.155 (uncompensated internet activity does not result in a contribution or expenditure); Internet Communications, 71 Fed. Reg. 18,589, 18,604 (Apr. 12, 2006) (explanation and justification).

¹⁸ A “public communication” is defined as a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank, or any other form of general political advertising. 11 C.F.R. § 100.26.

¹⁹ See 71 Fed. Reg. at 18,604.

MUR 6870 (American Crossroads, *et al.*)
First General Counsel's Report

1 YouTube channel. By republishing this footage, American Crossroads made an in-kind
2 contribution to the Thom Tillis Committee.²⁰

3 American Crossroads nevertheless contends that its use of footage from "Tillis Montage
4 2" does not constitute an in-kind contribution to the Tillis campaign "either as a result of
5 republication or through any other theory."²¹ The Respondent asserts that "Tillis Montage 2"
6 consists of generic "background video footage" containing "no discernible message"²² and "in no
7 way supplants American Crossroads' 'own message' which is conveyed through American
8 Crossroads' 'own text, graphics, audio, and narration.'"²³ American Crossroads also states that
9 the video footage at issue was obtained from public sources and that such independent use of a
10 candidate's B-roll footage made available to the public is commonplace and has not been
11 deemed unlawful on at least four previous occasions by the Commission.²⁴ Finally, American
12 Crossroads suggests that its incidental use of Tillis campaign material is not an excessive or
13 prohibited contribution because "any republication was *de minimis* in value."²⁵

²⁰ See 11 C.F.R. § 109.23(a).

²¹ American Crossroads Resp. at 2.

²² *Id.* (quoting Statement of Reasons, Comm'r's Hunter, McGahn and Petersen at 8, MUR 5879 (Democratic Congressional Campaign Comm.)).

²³ *Id.* (quoting Statement of Reasons, Comm'r's Hunter, McGahn and Petersen at 4, MUR 6347 (American Crossroads.)).

²⁴ American Crossroads Resp. at 2-3. The Response cites several examples of the practice, including what it characterizes as the use of B-roll footage by South Alliance for Clean Energy, allegedly obtained from candidate Kay Hagen's campaign website in a March 2014 advertisement. The Response also cites MURs 5879 (Democratic Congressional Campaign Comm.), 6357 (American Crossroads), 6617 (Vilsack for Iowa), and 6667 (Friends of Cheri Bustos) for the proposition that the Commission has previously dismissed cases involving the "independent" use of a campaign committee's B-roll footage available to the public. *Id.* at 5-8. In each, the Commission could not agree by a sufficient margin whether to find reason to believe and consequently closed the file.

²⁵ American Crossroads Resp. at 4-5 (quoting Statement of Reasons, Comm'r's Weintraub, Bauerly, and Walther, MUR 6357; Statement of Reasons, Comm'r's von Spakovsky and Weintraub, MUR 5743 (Sutton)).

1 As to the argument that there is no republication here because the excerpts used are
 2 “background imagery” that did not supplant American Crossroads’ “own message,”²⁶ virtually
 3 any subsequent republication of campaign material by a third party may arguably constitute that
 4 republisher’s “own message.” Thus, to construe the Act and regulations so narrowly could
 5 render republication a nullity. Indeed, in its rulemaking proceedings the Commission expressly
 6 rejected an analogous “fair use” proposal that would have permitted republication of “limited
 7 portions of campaign materials *for analysis and other uses*” — again, reasoning that such an
 8 approach “could swallow the rule.”²⁷

9 The Respondent also asserts that the video footage at issue was obtained from public
 10 sources.²⁸ That argument misses the mark because the republication provision focuses on the
 11 further dissemination of campaign materials generally, wherever obtained.²⁹ Moreover, in the
 12 2003 rulemaking, the Commission specifically rejected a request to adopt a “public domain”
 13 exception to republication, explaining that “virtually all campaign material that could be

²⁶ American Crossroads Resp. at 2 (quoting Statement of Reasons, Comm’rs. Hunter, McGahn and Petersen at 4, MUR 6357 (American Crossroads)). In part, American Crossroads relies for its argument on the Commission’s treatment of republication in MURs 5879 (Democratic Congressional Campaign Comm.) and 6357 (American Crossroads). *See id.* at 4-5. The Commission was equally divided over whether to conciliate in MUR 5879 or to find reason to believe in MUR 6357 on a republication theory. *See Statement of Reasons, Comm’rs. Weintraub, Bauerly and Walther, MUR 6357 (American Crossroads), Statement of Reasons, Comm’rs. Hunter, McGahn and Petersen, MUR 6357 (American Crossroads).* The Respondent also cites the Commission’s treatment of republication in MURs 6617 (Christie Vilsack for Iowa) and 6667 (Friends of Cheri Bustos). *Id.* at 8. Both matters were closed after the Commission split 2-2 on the recommendations to find reason to believe and enter into conciliation with respondents. *See Statement of Reasons, Comm’rs Hunter and Petersen at 1, MURs 6617 (Christine Vilsack for Iowa), 6667 (Friends of Cheri Bustos).*

²⁷ Coordination and Independent Expenditures E&J, 68 Fed. Reg. at 443 (emphasis added).

²⁸ American Crossroads Resp. at 2.

²⁹ *See 52 U.S.C § 30116(a)(7)(b)(iii) (“. . . dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials. . .”)* (emphasis added).

MUR 6870 (American Crossroads, *et al.*)
First General Counsel's Report

1 republished" may be considered in the public domain, and therefore such an exception could
2 "swallow the rule."³⁰

3 Nor do the facts presented here satisfy the regulatory exception for briefly quoted
4 materials. American Crossroads used nine seconds of Tillis' own campaign footage in an
5 advertisement that was only 30 seconds long, about a third of the advertisement. Further, all but
6 two seconds of the footage of candidate Tillis, a core component of the presentation, was sourced
7 entirely from the Committee's previously existing campaign materials. The Commission should
8 read the exception for briefly quoted material consistent with the Act's mandate that circulating a
9 candidate's "written, graphic, or other form of campaign materials" — even "in part" —
10 constitutes a benefit to the campaign and, thus, an actionable republication of campaign
11 materials.³¹ Similarly, the nature of the republished campaign material used in the advertisement
12 here — neither merely a "snippet" nor incidental — does not warrant dismissing this matter
13 under the theory that the republication at issue is *de minimis*.³²

14 For these reasons, we recommend that the Commission find reason to believe that
15 American Crossroads violated 52 U.S.C. §§ 30116(a), 30118(a) and 30104(b) by making an in-
16 kind contribution as a result of republishing campaign materials and by failing to properly
17 disclose the cost of the communication as a contribution.

³⁰ Coordination and Independent Expenditures E&J, 68 Fed. Reg. at 442-43.

³¹ 52 U.S.C. § 30116(a)(7)(B)(iii); Coordination and Independent Expenditures E&J, 68 Fed. Reg. at 442-43 (acknowledging that Congress concluded that republication even in part provides a benefit to the candidate).

³² Cf. MUR 5996 (Tim Bee) (dismissing republication allegation as *de minimis* where the subject advertisement contained only a republished photograph of a candidate apparently obtained from the public website of the candidate's campaign committee that comprised only two seconds of a 30-second advertisement).

1 **B. There Is No Reason to Believe that the Committee Violated the Act**

2 We recommend that the Commission find no reason to believe that the Committee
3 violated the Act. As the recipient of an alleged republication benefit, the candidate or committee
4 that prepared the original video footage of the candidate “does not receive or accept an in-kind
5 contribution, and is not required to report an expenditure, unless the dissemination, distribution,
6 or republication of campaign materials is a coordinated communication under 11 C.F.R. § 109.21
7 or a party coordinated communication under 11 C.F.R. § 109.37.”³³

8 The available information does not support a finding that the Respondents coordinated
9 the creation or distribution of “Guts” or that the Committee requested that American Crossroads
10 use its video footage to create the advertisement. First, the Committee denies that it coordinated
11 the communication and provided a detailed and comprehensive affidavit signed by Tillis’s
12 campaign manager stating that no one connected with the Tillis campaign communicated with
13 American Crossroads regarding the subject advertisement or requested that American Crossroads
14 republish or disseminate campaign materials.³⁴ Second, American Crossroads contends that it
15 obtained the subject video footage from a publicly available website, and we are aware of no
16 facts to the contrary or that otherwise suggest it coordinated its access or use of that public

³³ 11 C.F.R. § 109.23.

³⁴ Tillis Resp. at 1, 3-4. The Tillis Response also includes a sworn affidavit of the Committee’s campaign manager, Jordan Shaw, who supervised and managed the campaign’s staff and consultants. Shaw denies communicating with American Crossroads or anyone on its behalf regarding any advertising or other communications relating to the Tillis campaign. Based on interviews that Shaw conducted with “all persons” on the Tillis campaign, he states that no one else — including the candidate, the political and financial directors, and the general consultant — communicated with American Crossroads regarding the use of Tillis campaign materials by it or any other third party, and that no one requested that American Crossroads republish or disseminate any campaign materials produced by the Tillis campaign. Aff. of Jordan Paul Shaw ¶¶ 1, 2, 5-10 (Nov. 4, 2014).

1 footage.³⁵ Accordingly, we recommend that the Commission find no reason to believe that the
2 Committee violated 52 U.S.C. §§ 30116(f) or 30118(a).

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15 **V. RECOMMENDATIONS**

16 1. Find reason to believe that American Crossroads and Caleb Crosby in his official
17 capacity as treasurer violated 52 U.S.C. §§ 30116(a), 30118(a) and 30104(b).
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³⁵

American Crossroads Resp. 2, 9.

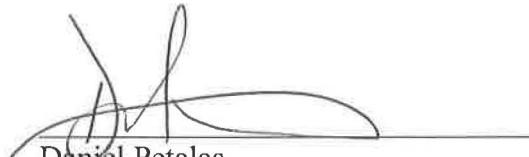
MUR 6870 (American Crossroads, *et al.*)
First General Counsel's Report

- 1 2. Find no reason to believe that Thom Tillis Committee and Collin McMichael in his
- 2 official capacity as treasurer violated 52 U.S.C. §§ 30116(f) or 30118(a) and close the
- 3 file as to them.
- 4
- 5 3. Approve the attached Factual and Legal Analyses.
- 6
- 7 4. Enter into conciliation with American Crossroads and Caleb Crosby in his official
- 8 capacity as treasurer prior to a finding of probable cause to believe.
- 9
- 10 5.

1 11
5 12
0 13 6. Approve the appropriate letters.
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5 18
4 19
6 20 Date



Daniel Petalas
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