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December 17, 2012

Jeff S. Jordan

Federal Election Commission

999 E Street, NW, 6th Floor

Washington DC 20463

Re: Response to Complaint, MUR 6667

Dear Mr. Jordan:

On behalf of House Majority PAC ("HMP"), and Shannon Roche in her official capacity as treasurer, this letter responds to the complaint received on October 31, 2012. The Commission should dismiss the complaint and close the file.

#### FACTUAL BACKGROUND

On October 2, 2012, HMP began airing an independent expenditure advocating the defeat of Bobby Schilling, an incumbent running for reelection in Illinois's 17th congressional district, and for the election of his challenger, Cheri Bustos.<sup>1</sup> The underlying message of the advertisement is that Mr. Schilling broke his promises to middle class families and that Ms. Bustos would fight for policies that help them. This message was crafted by HMP, independently of any candidate or political party committee. HMP drafted the script and on-screen chyrons from scratch, without relying on or incorporating any candidate materials.

TIME	AUDIO	ON-SCREEN CHYRON	VISUAL FOOTAGE	SOURCE OF FOOTAGE
:00	"Didn't take long for Bobby Schilling to turn his back on Illinois families."	"Congressman Schilling"	Schilling talking to supporters.	Publicly available footage of Schilling.
:04	"Less than two years in Congress, Schilling	"Block Middle Class Tax Cuts" +	Man in suit with back to camera.	Stock footage.

<sup>1</sup> See <http://www.youtube.com/watch?v=xWYtpRSTB0>.

	voted six times to block middle class tax cuts."	list of six votes		
:10	"He said he'd fight for Illinois jobs."	"Said He'd Fight for Illinois Jobs"	Same man, with left hand in air.	Stock footage.
:12	"But Schilling voted for tax breaks that would help companies ship our jobs overseas."	"Tax Breaks Help Companies Ship Jobs Overseas"	Same man, with fingers crossed, standing in factory.	Stock footage.
:17	"And they're going."	Two newspaper headlines.	Image of factory.	Stock footage.
:19	"Cheri Bustos"	"Cheri Bustos for Congress"	Bustos talking to constituent.	Obtained from campaign's public YouTube channel <sup>2</sup>
:20	"She's got our back."		Bustos talking to other constituent.	Obtained from campaign's public YouTube channel <sup>3</sup>
:22	"She'll stop tax breaks for outsourcers."	"Stands Up to Corporate Outsourcers"	Bustos in factory.	Obtained from campaign's public YouTube channel <sup>4</sup>
:24	"And fight for the middle class."	"Fights for the Middle Class"	Bustos talking to worker.	Obtained from campaign's public YouTube channel <sup>5</sup>
:26	"House Majority PAC is responsible for the content of this advertising."	"Cheri Bustos Fights for the Middle Class" + legal disclaimer	Bustos walking with farmer.	Obtained from campaign's public YouTube channel <sup>6</sup>

In providing visual accompaniment to this message, HMP relied on several sources. The ad begins with publicly available footage of Congressman Schilling speaking to voters. Four seconds in, the ad uses stock footage of a man in a suit, with his back to the camera, to discuss Congressman Schilling's votes to block middle class tax cuts. It then cuts to footage of that man in a factory and reminds voters that Congressman Schilling voted for tax breaks that would help companies ship jobs overseas.

Roughly nineteen seconds into the ad, HMP begins to advocate for Ms. Bustos as an alternative to Congressman Schilling. As visual background to its message, HMP excerpted footage from a video that Ms. Bustos' campaign had made publicly available on its YouTube channel in August 2012. The Bustos campaign video lasts for two

<sup>2</sup> See [http://www.youtube.com/watch?v=kR\\_iG2F69Ow](http://www.youtube.com/watch?v=kR_iG2F69Ow) (starting at 1:52).

<sup>3</sup> *Id.* (starting at 0:29).

<sup>4</sup> *Id.* (starting at 2:22).

<sup>5</sup> *Id.* (starting at 2:06).

<sup>6</sup> *Id.* (starting at 1:18).

minutes and thirty-eight seconds, and consists of Ms. Bustos interacting with her constituents. HMP used five excerpts from this video, lasting a combined eleven seconds, in its ad. As noted above, the video from which HMP obtained the five excerpts was posted on the campaign's publicly available YouTube channel. The video is available to the public at: [http://www.youtube.com/watch?v=kR\\_iG2F69Ow](http://www.youtube.com/watch?v=kR_iG2F69Ow).

### LEGAL DISCUSSION

The complaint alleges that the ad republished campaign materials, in violation of 11 C.F.R. § 109.23. But as the Commission's regulations and precedents demonstrate, the incidental use of publicly available video excerpts does not constitute "republishing," particularly where, as here, the excerpts do not contain any discernible message of their own, and are used solely to provide background imagery.

The purpose of the republication rule is to "distinguish[] between independent expressions of an individual's views and the use of an individual's resources to aid a candidate in a manner indistinguishable in substance from the direct payment of cash to a candidate."<sup>7</sup> As the Commission has held on many occasions since the Act's inception,<sup>8</sup> not every third party use of candidate campaign materials is "republishing" under the Act. While the "wholesale copying of candidate materials constitutes republication," the "partial use of such materials in connection with one's own protected speech is not legally problematic."<sup>9</sup>

For example, the third party use of a photograph from a candidate's website does not constitute "republishing," according to a majority of the current commissioners. In MUR 5743, Commissioners Weintraub and von Spakovsky rejected the argument that the use of a photograph from a candidate's website in a third party mailer constituted "republishing," concluding that to "treat an incidental republication of a photograph ... as an 'in-kind contribution' makes no intuitive sense."<sup>10</sup> In MUR 5966, Commissioners Hunter, McGahn, and Petersen reached the same conclusion, finding that the use of a photograph from a candidate's website in a third party television ad is not "republishing," absent "some additional content or message" found in the photograph.<sup>11</sup>

Recently, the Commission dismissed two complaints involving allegations that third party groups "republished" candidate videos in their television ads. In MUR 5879, it was

<sup>7</sup> H.R. Conf. Rep. 94-1057, 59, 1976 U.S.C.A.N. 946, 974 (1976).

<sup>8</sup> See, e.g. MUR 2722 (American Medical Association) & MUR 2766 (Auto Dealers and Drivers for Free Trade Political Committee) (rejecting allegations of republication).

<sup>9</sup> Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, MUR 5879 (DCCC), at 5.

<sup>10</sup> Statement of Reasons of Commissioners Hans von Spakovsky and Ellen Weintraub, MUR 5743 (EMILY's List), at 4.

<sup>11</sup> Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, MUR 5996 (Education Finance Reform Group), at 3.

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alleged that a Democratic Congressional Campaign Committee ("DCCC") ad featuring a 15-second excerpt of publicly available candidate b-roll footage was impermissible "republication." In explaining its vote to dismiss the complaint, three commissioners pointed to several factors. First, the ad was independent speech, which communicated the third party sponsor's own views rather than those of the candidate.<sup>12</sup> Second, the background footage was silent and "contain[ed] no discernible message" of its own.<sup>13</sup> Third, a contrary finding would hamper the ability of third party groups to run positive ads and "could perversely incentivize speakers to resort to the so-called 'negative advertising' that the sponsors of McCain-Feingold sought to discourage."<sup>14</sup> Relying on similar reasoning, three commissioners voted to dismiss a similar complaint against American Crossroads for the use of candidate footage in as much as half of a 30-second ad supporting Senate candidate Rob Portman.<sup>15</sup>

The central principle behind the DCCC and American Crossroads dismissals is that the mere use of footage "to create [one's] own message" is not "republication" under the Act or Commission regulations.<sup>16</sup> HMP's use of excerpts from the Bustos campaign video is materially indistinguishable from the uses made by the DCCC and American Crossroads. HMP obtained the excerpts from publicly available sources. And like the DCCC and American Crossroads ads, the HMP ad is not "anything close to a carbon copy" of the materials it used.<sup>17</sup> In fact, it does not resemble them at all. The HMP ad features a narrator; the Bustos campaign video does not. More than half of the HMP ad criticizes Congressman Schilling's record; the Bustos campaign video does not refer to Congressman Schilling at all. The excerpts from the Bustos campaign video appear on screen for less than half of HMP's ad, in a different order than they appear in the campaign video, and contain no discernible message of their own. They are mere background images, incorporated into "a communication in which [HMP] adds its own text, graphics, audio, and narration to create its own message."<sup>18</sup>

Finally, we note that the application of the republication standard to find that HMP has made a contribution to the Bustos campaign has dubious statutory support. Under the Federal Election Campaign Act, "the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure ...."<sup>19</sup> FEC regulations interpret this statutory provision to treat the "republication of campaign

<sup>12</sup> Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 5879, at 8.

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

<sup>14</sup> *Id.* at 9.

<sup>15</sup> Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, MUR 6357 (American Crossroads).

<sup>16</sup> Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 5879, at 8.

<sup>17</sup> Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 6357, at 4.

<sup>18</sup> *Id.*

<sup>19</sup> 2 U.S.C. § 441a(a)(7)(B)(iii) (emphasis added).

materials" as an element of the "content prong" resulting in a contribution to the benefiting candidate.<sup>20</sup> It is not clear if the underlying statute can bear the weight of this regulatory interpretation where, as here, there is no allegation of coordination between the ad's sponsor and the candidate.

Finding a violation here, after not finding a violation in the DCCC and American Crossroads MURs, would raise serious due process concerns. Just this year, the Supreme Court affirmed that "[w]hen speech is involved," agencies must demonstrate "rigorous adherence" to two related principles: that "regulated parties should know what is required of them so that they may act accordingly" and that "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."<sup>21</sup> Since passage of McCain-Feingold, the Commission has consistently dismissed complaints alleging that the mere use of campaign photos or videos as background images in third party ads was "republication." HMP relied reasonably on these precedents and engaged in materially indistinguishable conduct. As commissioners have noted on other occasions, "[p]roceeding in this case at this time would be unfair to [the respondent] because it would be exceedingly difficult, if not impossible, to explain why the Commission decided to proceed against [respondent] but not to proceed in at least some of the cases cited above. The Commission has an obligation to avoid disparate treatment of persons in similar circumstances."<sup>22</sup>

### CONCLUSION

For the reasons set forth herein, the Commission should dismiss the complaint and close the file.

Very truly yours,

*Marc E. Elias*

Marc E. Elias

Ezra W. Reese

Jonathan S. Berkon

Counsel to House Majority PAC

<sup>20</sup> 11 C.F.R. §§ 109.21(c)(2), 109.23; see Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 6357 at 3, n. 6 (noting the "seeming incongruity" between the Act and regulations on this point). The Commission need not resolve the inconsistency here, however, because the advertisement does not constitute the "republication of campaign materials."

<sup>21</sup> See *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012).

<sup>22</sup> Statement of Reasons of Chairman David M. Mason and Commissioners Darryl R. Wold and Bradley A. Smith, MUR 4994 (NY Senate 2000), at 3. See also Statement of Reasons of Karl J. Sandstrom, MURs 4553, 4671, 4407, 4544, and 4713, at 2 ("The respondents in this matter simply cannot be held to a standard that was not discernible prior to engaging in otherwise protected speech.").