

Marc Erik Elias
PHONE: (202) 434-1609
FAX: (202) 654-9126
EMAIL: MElias@perkinscoie.com

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Perkins
Coie

700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
PHONE: 202.654.6200
FAX: 202.654.6211
www.perkinscoie.com

March 27, 2014

Jeff S. Jordan
Federal Election Commission
999 E Street, NW, 6th Floor
Washington DC 20463

Re: Response to Complaint, MUR 6777

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 February 10, 2014. This complaint is materially indistinguishable from the two "republication" complaints that were filed against HMP last cycle and subsequently dismissed by the Commission. The Commission should dismiss this complaint, too, and close the file.

BACKGROUND

In January 2014, HMP began airing an independent expenditure supporting the re-election of Congresswoman Ann Kirkpatrick.¹ The advertisement praises the Congresswoman for listening to the concerns of her constituents and advocating for policies that benefit her district, irrespective of partisan politics. HMP created, produced, and disseminated the advertisement independently of any candidate or political party committee. The complaint does not dispute any of this.

The complaint instead alleges that HMP impermissibly "republished" campaign materials by incorporating into the background of its advertisement what the complaint refers to as "Campaign Video Footage." This is the exact same allegation that was lodged against HMP for advertisements that it ran in support of congressional candidate Christie Vilsack and now-Congresswoman Cheri Bustos in 2012 – and that the Commission subsequently

¹ See House Majority PAC, *Listens*, YouTube (Jan. 16, 2014), <https://www.youtube.com/watch?v=wlv-YvK7198>.

dismissed.² In each of the three advertisements, HMP used excerpts of Campaign Video Footage to provide background imagery in advertisements that it created, produced, and disseminated independently of any candidate or political party committee. In each advertisement, the Campaign Video Footage was on-screen for less than fifty percent of the advertisement. In each advertisement, HMP drafted the script and on-screen chyrons from scratch, without relying on or incorporating any candidate materials.

DISCUSSION

The complaint alleges that the advertisement 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 Campaign Video Footage 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."³ As the Commission has held on many occasions, not every third party use of candidate campaign materials is "republishing" under the Act.⁴ 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."⁵

For example, the third party use of a photograph from a candidate's website does not constitute "republishing." 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."⁶ In MUR 5966, three additional Commissioners reached the same conclusion, finding that the use of a photograph from a candidate's website in a third party television advertisement is not "republishing," absent "some additional content or message" found in the photograph.⁷

In recent years, the Commission has dismissed several complaints involving allegations

² Statement of Reasons of Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6617 and 6667 (Vilsack, Bustos).

³ H.R. Rep. No. 94-1057, at 59 (1976) (Conf. Rep.).

⁴ See, e.g., MUR 2722 (American Medical Association); MUR 2766 (Auto Dealers and Drivers for Free Trade Political Committee) (rejecting allegations of republication).

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

⁶ Statement of Reasons of Commissioners Hans von Spakovsky and Ellen Weintraub, MUR 5743 (EMILY's List) at 4.

⁷ 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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that third party groups “republished” candidate videos in their television ads. In MUR 5879, it was alleged that a Democratic Congressional Campaign Committee (“DCCC”) advertisement featuring a fifteen-second excerpt of candidate b-roll footage was impermissible “republishing.” In explaining its vote to dismiss the complaint, three Commissioners pointed to several factors. First, the advertisement was independent speech, which communicated the third party sponsor’s own views rather than those of the candidate.⁸ Second, the background footage was silent and “contain[ed] no discernible message” of its own.⁹ 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.”¹⁰ 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 thirty-second advertisement supporting Senate candidate Rob Portman.¹¹

When nearly identical republication complaints were filed against HMP in 2012 for advertisements that it ran in support of congressional candidate Christie Vilsack and now-Congresswoman Cheri Bustos, the Commission again dismissed them, with two Commissioners noting that “[t]hese matters present materially indistinguishable facts” from the DCCC and American Crossroads cases.¹² So, too, does this matter. The excerpts from the Campaign Video Footage used in the pro-Kirkpatrick advertisement were background images that contained no discernible message of their own. They were “incorporated into a communication in which [the respondent] add[ed] its own text, graphics, audio, and narration to create its own message.”¹³ And they appeared on screen for less than half of the advertisement, in a different order than they appeared in the Campaign Video Footage. As a result, the advertisement supporting Congresswoman Kirkpatrick is not “anything close to a carbon copy” of the Campaign Video Footage.¹⁴

Finally, we note that the application of the republication standard to find that HMP has made a contribution to the Kirkpatrick 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*”¹⁵

⁸ Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 5879 at 8.

⁹ *Id.*

¹⁰ *Id.* at 9.

¹¹ Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, MUR 6357 (American Crossroads).

¹² Statement of Reasons of Commissioners of Caroline C. Hunter and Matthew S. Petersen, MUR 6617 and 6667 at 1.

¹³ *Id.* (quoting Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen, MUR 6357).

¹⁴ Statement of Reasons of Chair Hunter and Commissioners McGahn and Petersen, MUR 6357 at 4.

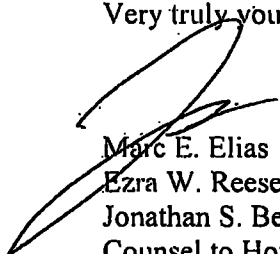
¹⁵ 2 U.S.C. § 441a(a)(7)(B)(iii) (emphasis added).

FEC regulations interpret this statutory provision to treat the "republishing of campaign materials" as an element of the "content prong" resulting in a contribution to the benefiting candidate.¹⁶ 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 advertisement's sponsor and the candidate.

Finding a violation here, after not finding a violation in the previous MURs, would raise serious due process concerns. The Supreme Court has 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."¹⁷ The Commission has consistently dismissed complaints alleging that the mere use of campaign photos or videos as background images was "republishing." The Commissioners who voted to dismiss these complaints "constitute a controlling group" and their Statements of Reasons, which "necessarily state[] the agency's reasons for acting as it did," are afforded the same deference as other agency decisions.¹⁸ HMP relied reasonably on these precedents and engaged in materially indistinguishable conduct. Proceeding "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."¹⁹

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

Very truly yours,



Marc E. Elias
Ezra W. Reese
Jonathan S. Berkon
Counsel to House Majority PAC

¹⁶ 11 C.F.R. §§ 109.21(c)(2), 109.23. See also 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); Statement of Reasons of Commissioners of Caroline C. Hunter and Matthew S. Petersen, MUR 6617 and 6667, n. 4 ("Any conclusion that non-coordinated republication constitutes a contribution (and thus, potentially a prohibited corporate contribution) is problematic under a straightforward reading of the Act's plain language."). The Commission need not resolve the inconsistency here, however, because the advertisement does not constitute the "republishing of campaign materials."

¹⁷ See *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012).

¹⁸ *FEC v. National Republican Senatorial Committee*, 966 F.2d 1471, 1476 (D.C. Cir. 1992)

¹⁹ 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.").