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November 26, 2018

Federal Election Commission  
Office of Complaints Examination  
and Legal Administration  
attn: Kathryn Ross, Paralegal  
1050 First Street, NE  
Washington, DC 20002

Re: MUR 7517

Dear Ms. Ross,

This response is submitted by the undersigned counsel on behalf of Representative Brian Mast, Mast for Congress, and Paul Kilgore, in his capacity as Treasurer of Mast for Congress, in connection with MUR 7517. The Complainant, End Citizens United, is one of a handful of left-wing organizations, some of which are explicitly partisan and some of which pretend to be non-partisan, that target Republican and conservative candidates and organizations with a steady barrage of complaints designed for media consumption and fundraising programs.

## **Background**

In this matter, the Complainant alleges the Respondents "failed to comply with the Commission's disclaimer requirements for a television advertisement that they have approved and sponsored." Complaint at 1. The Complainant claims that the photograph used was part of "an apparent attempt to avoid linking Mast to the advertisement," and an effort to "to obscure the source of the advertisement." *Id.* at 2. This allegation is demonstrably false and simply not credible. (The Complainant does not claim that it had any difficulty in determining against whom to file this Complaint.) There was no possibility whatsoever that any viewer would not know who paid for and approved the advertisement.

The advertisement at issue included the following written disclaimer at the end, in a box: "Approved by Brian Mast. Paid for by Mast for Congress." This written disclaimer appeared in white text against a black screen. In voice-over, the candidate stated, "*I'm Brian Mast and I approved this message,*" while the written disclaimer appeared on screen. A photograph of Brian Mast appeared to the left of the written disclaimer during the approximately five seconds the written disclaimer was visible.

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The Complainant challenges only the size of the photographic image and claims that the advertisement included no "clearly identifiable image of Mr. Mast." *Id.* The advertisement at issue fully complied with the requirements of the Act. Nevertheless, the Respondent acted on its own to revise the advertisement almost immediately. The first version of the advertisement aired for less than one day before it was replaced with a second version on October 4. This second version included a full-screen image of the candidate. (Both versions of the advertisement are included in an enclosed USB drive.) End Citizens United filed this petty nuisance complaint five days *after* the first version of the advertisement was replaced.

### **MUR 6782**

This matter is virtually identical to MUR 6782 (Mark Pryor for U.S. Senate), which the Commission unanimously dismissed. In MUR 6782, the complainant alleged that "the postage-stamp sized image of Mark Pryor at the end of the two ads in question is not the clearly identifiable image or full screen-view of the candidate that is required by law." As is the case here, the complaint was filed after the respondent had already replaced the advertisement with a version that contained a larger photographic image. The General Counsel's Report explained that "[t]he advertisements' disclaimers as originally aired ... include ... a photographic image of Pryor which appears to be twice the height of the written disclaimer." MUR 6783, General Counsel's Report at 4-5. The General Counsel concluded:

It appears that the original televised advertisements contained sufficient information to clearly identify who paid for the communications, as well as an apparently adequate spoken message of approval by the candidate. Moreover, the Committee took immediate action to remedy any *alleged* disclaimer violation by increasing the candidate's photographic image to a full screen view on new advertisements.

*Id.* at 5 (emphasis added). The General Counsel recommended dismissing the complaint as an exercise of prosecutorial discretion and the Commission voted 6-0 to approve that recommendation. The same result was reached in MUR 6016 (Ose for Congress) and MUR 6116 (Tim Cunha for Congress). Thus, in three prior matters involving the same alleged violation, the Commission has declined to find a violation and instead dismissed the complaint.

### **Requirements of the Act**

According to the Complaint, the television advertisement at issue:

does not include a full-screen image of Mast delivering the required disclaimer or a clearly recognizable image of Mast during the delivery of the statement. Instead, it shows a fuzzy, indistinct postage stamp-sized image of an individual against an American flag backdrop that is barely recognizable.

Complaint at 2.

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The Complainant's characterization of the image featured in the advertisement is incorrect. The image is very clearly a photograph of Brian Mast, there is nothing "fuzzy" or "indistinct" about the photograph, and if the Complainant believes the individual "is barely recognizable," that can only be because the Complainant does not know what Brian Mast looks like. The image is "clearly identifiable" on any normal sized television screen.

The Act's stand-by-your-ad provision requires the candidate's statement to be "conveyed by ... (I) an unobscured, full-screen view of the candidate making the statement, or (II) *the candidate in voice-over, accompanied by a clearly identifiable photographic or similar image of the candidate.*" 52 U.S.C. § 30120(d)(1)(B)(i) (emphasis added). The image that appears in the advertisement is "a clearly identifiable photographic ... image of the candidate" that plainly satisfies the requirements of the Act.

Commission regulations reiterate the "clearly identifiable photographic or similar image of the candidate" standard and also add a safe harbor: "A photographic or similar image of the candidate shall be considered clearly identified if it is at least eighty (80) percent of the vertical screen height." 11 C.F.R. § 110.11(c)(3)(ii)(B). The Explanation and Justification accompanying the Commission's final rule expressly refers to the 80% standard as a "safe harbor provision." A safe harbor is not a requirement; the requirement is expressed in the Act and in the regulation that repeats the statutory language verbatim. The Commission also observed:

[T]he Commission notes that although Congress specifically required a full-screen view when the candidate is shown making the statement, Congress did not require a full-screen view for the still picture. The Commission views this as an *intentional distinction* that contemplated an alternative to the full-screen view.

Final Rule on Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,966 (Dec. 13, 2002) (emphasis added). The Commission characterized a "a still picture of the candidate" that "occupies at least 80% of the vertical screen height" as "a meaningful alternative to the full-screen requirement." That may be, but the statute only requires "a clearly identifiable photographic or similar image of the candidate" and contains no sizing requirement whatsoever.

### Conclusion

As explained above, the first version of the advertisement contained "a clearly identifiable photographic ... image of the candidate" that complied with the plain language of the Act. Even if the Commission were to conclude otherwise, the first version of the advertisement aired for less than one day before the Respondent voluntarily replaced it with a second version that included a full-screen image of the candidate during the stand-by-your-ad portion. In three prior matters involving virtually identical facts, the Commission has exercised its prosecutorial

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**Enclosure**