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November 14, 2011

Anthony Herman
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Advisory Opinion Request 2011-23 (American Crossroads)

Dear Mr. Herman:

We write on behalf of the Brennan Center for Justice at N.Y.U. School of Law[1] to comment on Advisory Opinion Request 2011-23, submitted by American Crossroads.

American Crossroads seeks an advisory opinion from the Commission concluding that advertisements which are "fully coordinated with incumbent Members of Congress facing re-election in 2012"—insofar as the candidates shape the advertisements' scripts and appear in them—are nonetheless not "coordinated" under the Commission's regulations.[2] This is absurd.[3]

Constitutional law, federal statutes, and common sense dictate that American Crossroads' proposal must be decisively rejected. If the proposed advertisements do not constitute "coordinated communications" under the Commission's regulations, they must be deemed in-kind contributions to the candidates under the Commission's coordination rule, which provides that "[a]ny expenditure that is coordinated [with a candidate] . . . but that is not made for a coordinated communication . . . is . . . an in-kind contribution to . . . the candidate."[4] No other result can be reconciled with the clear statutory mandate under which the Commission's rules are authorized—or with the constitutional precedents that have defined coordinated expenditures as conceptually distinct from wholly independent speech.

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[1] The Brennan Center is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The Center's Money and Politics project works to reduce the real and perceived influence of special interest money on our democratic values.

[2] American Crossroads, FEC Advisory Opinion Request 2011-23 (Oct. 28, 2011).

[3] *Cf.* Shays v. FEC, 528 F.3d 914, 926 (D.C. Cir. 2008).

[4] 11 C.F.R. § 109.20.

The advertisements American Crossroads proposes to produce would be in-kind contributions—as useful to the supported candidates as cash donations[5]—and therefore subject to statutory limits designed to curb corruption and the appearance of corruption. As an organization registered with the Commission as an independent expenditure-only committee under Advisory Opinion 2010-11, American Crossroads may not make candidate contributions—and thus it must not be permitted to engage in the conduct outlined in its request. The Commission should state so clearly in an advisory opinion.

Under Clear Supreme Court Precedent, Coordinated Communications Raise the Same Corruption Concerns as Direct Contributions.

In the U.S. Supreme Court's foundational campaign finance opinion, *Buckley v. Valeo*, the Court upheld the constitutionality of limits on contributions to candidates because such limits serve the compelling interest of preventing corruption and the appearance of corruption.[6] Contribution limits have been a hallmark of our electoral process since *Buckley* was decided.

At the same time it upheld contribution limits, the Supreme Court struck down limits on expenditures made wholly independently of candidates.[7] The Court did so based on the conclusion that when outside groups or individuals spend money in campaigns without any consultation with candidates, "[t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."[8] Hence, according to the Court, there was little risk of corruption resulting from expenditures made entirely without candidate input.

The Court made clear that the absence of any cooperation between the candidate and the outside spender was critical to the conclusion that limiting such expenditures did not further the anti-corruption interest. The rule the Court rejected attempted to "limit[] expenditures for express advocacy of candidates *made totally independently of the candidate and his campaign*."[9] In a footnote, the Court elaborated:

> The House Report speaks of independent expenditures as *costs "incurred without the request or consent of a candidate or his agent."* The Senate report . . . provides an example . . . "(A) person might purchase billboard advertisements endorsing a candidate. *If he does so completely on his own, and not at the request or suggestion of the candidate or his agent*[,] that would constitute an 'independent expenditure' . . . . However, if the advertisement was *placed in cooperation with the candidate's campaign organization*, then the amount would constitute a gift by the supporter and an expenditure by the candidate just as

[5] *See generally* McConnell v. FEC, 540 U.S. 93, 221 (2003).

[6] *See* Buckley v. Valeo, 424 U.S. 1, 26-29 (1976) (per curiam).

[7] *Id.* at 50.

[8] *Id.* at 47.

[9] *Id.* (emphasis added).

> if there had been a direct contribution enabling the candidate to place the advertisement himself.[10]

The Court specifically addressed the argument that limits on uncoordinated expenditures were necessary to "prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities."[11] The Court noted that "expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse"—but declared limits on these expenditures unnecessary because they were already capped by the contribution limits that applied to candidates:

> *[S]uch controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act.* Section 608(b)'s contribution ceilings rather than § 608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through *prearranged or coordinated expenditures amounting to disguised contributions*. By contrast, section 608(e)(1) [should be struck down because it] limits expenditures for express advocacy of candidates made *totally independently of the candidate and his campaign* . . . .[12]

The Supreme Court underscored that coordinated expenditures are contributions as recently as last year, in *Citizens United v. FEC*. There, the Court struck down prohibitions on certain wholly independent campaign expenditures, emphasizing that the "*absence of prearrangement and coordination of an expenditure with the candidate* . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[13]

As the foregoing makes clear, under controlling constitutional precedent, if expenditures are not "made totally independent of the candidate and his campaign;" "incurred without the request or consent of a candidate or his agent;" and "completely on [the spender's] own, and not at the request or suggestion of the candidate or his agent," then these expenditures raise the same risk of corruption as direct contributions. If advertisements are "fully coordinated" with candidates, involve the candidates in "consultation[s]" about the script, and feature personal appearances by the candidates, they are indistinguishable from contributions—and thus are appropriately regulated as such.[14]

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[10] *Id.* at 46 n.53 (emphasis added) (citations omitted).

[11] *Id.* at 46.

[12] *Id.* at 46-47 (emphasis added) (footnote omitted).

[13] Citizens United v. FEC, 130 S. Ct. 876, 908 (2010) (quoting *Buckley*, 424 U.S. at 47) (emphasis added).

[14] Expenditures on such advertisements are analogous to other expenses the Supreme Court has recognized as contributions subject to limits. The Court explained that the use of one's residence by a candidate or the provision of food and beverages "provides material financial assistance to a candidate. The ultimate effect is the same as if the person had contributed the dollar amount to the candidate . . . ." *Buckley*, 424 U.S. at 36-37. Thus, "[t]reating these expenses as contributions when made to the candidate's campaign or at the direction of the candidate or his staff forecloses an

Federal Law Regulates Coordinated Communications as In-Kind Contributions

Consistent with the constitutional jurisprudence, federal law dictates that the coordinated advertisements at issue must be considered in-kind contributions to candidates. The Federal Election Campaign Act (FECA) defines "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[15] Coordinated advertisements of the sort contemplated by American Crossroads are plainly intended to influence federal elections: they will "feature an incumbent Member of Congress facing re-election in 2012, speaking on camera" about issues that will "be debated and discussed in that Member's upcoming 2012 re-election campaign."[16] Expenditures by non-candidate groups that are coordinated with candidates, like the proposed American Crossroads advertisements, "often will be 'as useful to the candidate as cash,'" and therefore are treated as contributions under FECA.[17]

American Crossroads seeks to avoid having its advertisements deemed campaign contributions by relying on the Commission's "coordinated communications" regulation, 11 C.F.R. § 109.21, but its attempt must fail. Congress directed the Commission to promulgate a "coordinated communications" regulation in the Bipartisan Campaign Reform Act of 2002 (BCRA).[18] In adopting BCRA, Congress recognized the importance of a strong coordination rule, since "[w]ithout a coordination rule, politicians could evade contribution limits and other restrictions by having donors finance campaign activity directly"[19]—precisely what American Crossroads' proposal would accomplish. Congress intended to prohibit such circumvention by ordering the Commission to adopt a regulation providing that coordinated expenditures are contributions. BCRA was intended to erect a "wall against coordination" such that "any individuals or outside groups who want to support Federal candidates won't be able to coordinate their expenditures with candidates. They will have to go at it alone, if they really want to, without the [candidate consultations] that make an ad campaign effective."[20]

While conceding that its proposed advertisements would satisfy the "payment" and "conduct" prongs of the Commission's "coordinated communications" regulation,

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avenue of abuse without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign." *Id.* at 37 (footnote omitted). Similarly, American Crossroads' proposed actions are properly classified as contributions because the organization intends to provide its resources, accrued without any contribution limitations, to candidates in order to allow those candidates to further their campaigns.

[15] 2 U.S.C. § 431(8)(A)(i).

[16] American Crossroads, FEC Advisory Opinion Request 2011-23, at 3 (Oct. 28, 2011).

[17] *McConnell*, 540 U.S. at 221 (quoting FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 442, 446 (2001)); *see also Buckley*, 424 U.S. at 24 n.25 ("Expenditures by persons and associations that are 'authorized or requested' by the candidate . . . are treated as contributions under the Act.").

[18] Pub. L. No. 107-155, § 214 116 Stat. 81 (2002).

[19] *Shays*, 528 F.3d at 919 (quotation marks and citation omitted).

[20] 147 CONG. REC. S 2923 (daily ed. Mar. 27, 2001) (statement of Sen. Schumer).

American Crossroads suggests that its actions would not satisfy the rule's "content" prong—and therefore would not constitute in-kind contributions. To the extent that the proposed advertisements could be viewed under Section 109.21 as uncoordinated expenditures and not in-kind donations, the regulation would fail utterly to rationally separate election-related advocacy from other activity, and would represent an administrative construction of BCRA that frustrates the policy Congress clearly sought to implement.

In any event, even if the proposed advertisements fall outside the narrow definition of coordinated communication found in § 109.21, they still must be deemed in-kind contributions under the Commission's coordination rule, 11 C.F.R. § 109.20. Under Section 109.20, "*Coordinated* means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee."[21] American Crossroads concedes that the proposed advertisements are "fully coordinated" with the candidates they support. As a result, they are in-kind contributions to those candidates: Section 109.20 provides that "[a]ny expenditure that is coordinated . . . but that is not made for a coordinated communication under 11 CFR § 109.21 . . . is . . . an in-kind contribution to . . . the candidate or political party committee with whom or with which it was coordinated and must be reported as an expenditure made by that candidate or political party committee, unless otherwise exempted . . . ."[22]

The proposed advertisements undoubtedly fall within the ambit of the "coordinated" definition. As the Commission has previously explained

> A "contribution" may take the form of money or "anything of value," including an in-kind contribution, provided to a candidate . . . for the purpose of influencing a Federal election. An expenditure made in coordination with a candidate . . . constitutes an in-kind contribution to that candidate . . . subject to contribution limits and prohibitions and must, subject to certain exceptions, be reported both as a contribution to and as an expenditure by that candidate . . . .[23]

American Crossroads' proposed advertisements, which are "fully coordinated" with the candidates they support, would constitute in-kind contributions to those candidates. To the extent groups wish to cooperate with candidates in furthering their campaigns, they may, of course, do so—consistent with applicable contribution limits designed to avoid corruption and the appearance thereof. But groups, like American Crossroads, that claim status as an independent expenditure-only committee—and therefore are permitted to receive unlimited contributions—may not make contributions through such coordinated activities.

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[21] 11 C.F.R. § 109.20(a).

[22] *Id.* § 109.20(b).

[23] Coordinated Communications, 75 Fed. Reg. 55,947, 55,948 (Sept. 15, 2010).

We strongly encourage the Commission to issue an opinion advising that American Crossroads' proposed actions would constitute in-kind contributions, subject to statutory limits. Advertisements "fully coordinated with incumbent Members of Congress" are, indeed, coordinated. A Commission decision to the contrary would fly in the face of federal law and, more importantly, eviscerate the contribution limits that stand as a vital bulwark against corruption in our democracy.

Respectfully submitted,

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