# EVAN MCMULLIN

### FOR PRESIDENT --

February 9, 2017

Federal Election Commission
Office of Complaints Examination and Legal Administration
Attn: Mary Both deBeau, Paralegal
999 E Street, NW
Washington, DC 20463

Re: MUR 7206 - Response on behalf of McMullin for President Committee, Inc., Jeffrey Carson, Treasurer, to the Complaint Filed by Robert Breeze

Dear Ms. deBeau:

On behalf of McMullin for President Committee, Inc. ("Committee"), Jeffrey Carson, Treasurer, I hereby respond to the Complaint in MUR 7206, filed by Mr. Robert Breeze. The Complaint alleges KSL' and Deseret News ("media outlets") made unreported contributions and expenditures on behalf of the Committee through "fake news" coverage disproportionate to the coverage of other "independent and small party candidates." Complaint at I. As explained herein, the challenged coverage was legitimate press activity over which the Federal Election Commission ("Commission") lacks jurisdiction. Even assuming, arguendo, jurisdiction exists over this matter, I respectfully urge dismissal of this conjecture through the Commission's prosecutorial discretion. Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

#### I. Factual Background

Evan McMullin ran as a presidential candidate in the 2016 General Election. In relevant part, he was born in Utah, graduated college in Utah, had his strongest base of support in Utah, and headquartered his campaign in Utah (as well as Washington D.C.). His campaign garnered national media attention and significant attention in Utah, including from the media outlets.

Among 66 Utah polls, McMullin was the only candidate to ever lead in the state polls aside from the two major party candidates. See FiveThirthyEight.com, Who Will Win Utah? https://projects.fivethirtyeight.com/2016-election-forecast/utah/ (last visited Jan. 8, 2017). He ultimately received 21.54% of the popular vote in Utah, the highest vote recipient after the two major party candidates. By comparison, the next two highest vote recipients, Gary Johnson and

The Utah Division of Corporations and Commercial Code's business search reflects multiple active radio and television broadcast entities with "KSL" in their names. The analysis herein applies with equal force to all of these entities, as they appear to share management.

Jill Stein, received 3.5% and 0.83%, respectively. See Utah Lt. Governor's Office, Utah Election Preliminary Results, https://electionresults.utah.gov/elections/ federal (last visited Jan. 8, 2017).

#### II. Press Exemption Precludes Jurisdiction Over Claims

The Commission lacks jurisdiction over the Complaint's allegations because the media outlets' editorial decisions fall within the "press exemption" (also referred to as the "media exemption"). As such, the Commission should dismiss this Complaint for lack of jurisdiction.

The Federal Election Campaign Act of 1971, as amended ("Act"), regulates contributions and expenditures, and the reporting thereof. Under the Commission's rules, any broadcasting station or newspaper's costs incurred in covering or carrying a news story, commentary, or editorial do not constitute contributions or expenditures unless the media outlet is owned or controlled by any political party, political committee, or candidate. 11 C.F.R. §§ 100.73, 100.32. This press exemption is based on the First Amendment's foundational Free Press Clause, which protects the press's right to comment on political matters. Indeed, the press exemption is so robust that even allegations of coordination—otherwise a hallmark for contribution and expenditure reporting—"are of no import when applying the press exemption." MURs 5540 & 5545 (CBS, Kerry/Edwards 2004), Statement of Reasons of Vice Chairman Michael Toner, Commissioners David Mason and Bradley Smith at 3. (Attachment 1) "It is not for [the Commission] to determine what is a 'legitimate news story'" when considering the press exemption. Id. at 2.

The Commission's investigation and enforcement against press entities may proceed only after determining that the exemption does not apply to the challenged activity. MUR 6952 (Fox News Network, LLC), Statement of Reasons of Chairman Matthew Petersen, Commissioners Caroline Hunter and Lee Goodman at 7. (Attachment 2) The determination involves a two-step inquiry:

- (1) Is the press entity owned or operated by a political party, political committee, or candidate; and
- (2) Is the organization operating as a press entity in taking the action complained of?

Id. (citing Fed. Election Com. v. Phillips Pub., Inc., 517 F. Supp. 1308, 1313 (D.D.C. 1981) and Reader's Digest Asso. v. Fed. Election Com., 509 F. Supp. 1214, 1214 (S.D.N.Y. 1981)).

With respect to the first question, the Complaint neither provides facts nor even asserts that the media outlets are owned or operated by entities not entitled to the press exemption. Rather, the Complaint focuses on the latter question. It alleges that the coverage of McMullin "does not constitute a bona fide news story" because the media outlets' management promoted McMullin out of opposition to another candidate, not due to newsworthiness. Complaint at 2. Mr. Breeze props up his allegations with ad hominem attacks and internet search results about coverage for Johnson and Stein. *Id.* 

As to the second question, the media outlets acted as press entities in determining the most fitting balance of coverage among McMullin and other non-major party candidates for their particular audiences. "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 256 (1974); see also Columbia Broad. Sys. v. Democratic Nat'l Cmte, 412 U.S. 94, 117 (1973). Moreover, to the extent—if any—that media outlets management favored a particular candidate, "the press exemption applies regardless of whether the news story, commentary, or editorial contains express advocacy. Media entities routinely endorse candidates, and the media exemption protects their right to do so." Fed. Election Comm'n., Internet Communications, 71 Fed. Reg. 18,589, 18,609 (Apr. 12, 2006).

Thus, the press exemption leaves the Commission without jurisdiction over this matter.

#### III. Prosecutorial Discretion Disfavors Further Investigation

While the Commission cannot reach the substantive allegations of the Complaint without jurisdiction as explained above, the Commission's own criteria for exercising prosecutorial discretion would weigh against further investigation here.

The criteria include:

(1) the gravity of the alleged violation, taking into account both the type of activity and the amount in violation; (2) the apparent impact the alleged violation may have had on the electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in potential violations and other developments in law.

In a comparable matter involving a complaint that two newspapers published articles supporting one candidate and refused to cover and interview the opposing candidate, the Commission's Acting General Counsel found the matter a low priority under these criteria and recommended dismissal. The Commission unanimously agreed. MUR 6901 (Buck for Colorado), Certification. (Attachment 3)

With respect to Mr. Brecze's Complaint, the press exemption is clearly applicable and presents no grave issue. Moreover, the Complaint does not assert that the media outlets' coverage had any specific impact on the electoral process. To the extent such coverage could have had any impact, it did not sway the ultimate outcome in favor of McMullin or to the detriment of the allegedly opposed candidate. Expending further resources investigating this matter would be fruitless.

Thank you in advance for your consideration of this matter. If you have any questions, please contact me by telephone at (650) 243-1088 or by email at jeff@evoltconsulting.com.

Kind regards,

Jeffrey Carson, Treasurer

McMullin for President Committee, Inc.

PO Box 41387

Arlington, VA 22204

Attachments

#### **VERIFICATION**

Jeffrey Carson, first being duly sworn, states that he is the Treasurer of the McMullin for President Committee, Inc., and that the facts recited in the foregoing letter addressed to Mary Beth deBeau, Paralegal, Federal Election Commission, are true and correct according to his best knowledge, information, and belief.

Jeffrey Carson

State of Virginian
County of Adjustan

Subscribed and sworn to before me this

of feb., 20)

**Notary Public** 

My Commission expires:

[seal]

JUAN C. LAZU
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES OCT. 31, 2017
COMMISSION # 311931





## FEDERAL ELECTION COMMISSION WASHINGTON, D.C. 20463

### SENSITIVE

#### BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	).	•
·	)	
CBS Broadcasting, Inc.	)	
Kerry-Edwards 2004, Inc., and	)	MURs 5540 & 5545
Robert Farmer, in his offici	ial)	
Capacity as Treasurer	)	
	)	•

### STATEMENT OF REASONS OF VICE CHAIRMAN MICHAEL E. TONER AND COMMISSIONERS DAVID M. MASON AND BRADLEY A. SMITH

On June 7, 2005, by a vote of 6-0 the Commission accepted the Office of General Counsel's ("OGC") recommendation to find no reason to believe that CBS Broadcasting, Inc., Kerry-Edwards 2004, Inc. ("Campaign"), and Robert Farmer, in his official capacity as Treasurer, and the remaining respondents violated the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act") in connection with the September 8, 2004 broadcast of 60 Minutes Wednesday ("Broadcast"). We voted to find no reason to believe in these matters because, even if the allegations in the complaint are true, the activities in question are protected by the Act's media exemption and require the complaints to be dismissed.

#### Analysis and Conclusions

These matters arose out of complaints filed by the Center for Individual Freedom ("Complainant") alleging that the broadcast of a 60 Minutes Wednesday news story about President Bush's Texas Air National Guard Service was a prohibited electioneering communication under 2 U.S.C. § 434(f), that the electioneering communication was coordinated with the Kerry-Edwards campaign and was therefore a prohibited corporate contribution under 2 U.S.C. § 441b(a) and (c), that the electioneering communication should have been reported by CBS as a contribution and the Kerry-Edwards campaign as an expenditure under 2 U.S.C. § 434(f), and that the broadcast constituted an independent expenditure and a prohibited corporate contribution. Both complaints alleged that the broadcast was not entitled to the press exemption found at § 431(9)(B)(i) because CBS failed to thoroughly verify its news sources and improperly coordinated with the Kerry-Edwards campaign, and the broadcast did not fit the definition of a news story,



commentary, or editorial under 11 CFR §100.73 because it expressly advocated the defeat of President Bush.

FECA prohibits corporations from making contributions or expenditures from their general treasury funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b. Notwithstanding this prohibition, FECA's media exemption excludes from the definition of expenditure "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, newspaper, magazine or other periodical publication." 2 U.S.C. § 431(9)(B)(i). See also 11 C.F.R. §§ 100.73 and 100.132. Additionally, any communication "appearing in a news story, commentary, or editorial distributed though the facilities of any broadcast station" is excluded from the definition of an electioneering communication. 2 U.S.C. § 434(f)(3)(B).

Federal courts, when considering whether an entity is within the Act's media exemption, have held that several factors must be present: the entity engaged in the activity must be a press entity; the press entity must not be owned or controlled by a political party or candidate; and the press entity must be acting as a press entity in conducting the activity at issue (i.e., the entity must be acting within its legitimate press function). See Reader's Digest Ass'n v. Fed. Election Comm'n, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), Fed. Election Comm'n v. Phillips Publ'g, Inc., 517 F. Supp. 1308, 1312-12 (D.D.C. 1981).

In the present case, the complaint alleged that CBS and the Kerry-Edwards campaign had been in contact a few days before the broadcast aired, and that representatives of CBS News arranged a meeting between the key source of the story and a representative of the Kerry-Edwards campaign. Complaint at 4. The complaint also alleged that because "the broadcast segment lacked all of the hallmarks of a legitimate 'news story' and responsible journalism," the press exemption should not apply. Complaint at 10.

It is not for this agency to determine what is a "legitimate news story" or who is a "responsible journalist." In reviewing the allegations in these complaints, the Commission's inquiry is limited to determining whether a "press entity charged with a violation is owned or controlled by a party or candidate and whether the distribution complained of was of the type exempted by the statute... No inquiry may be addressed to sources of information, research, motivation, connection with the campaign, etc. Indeed all such investigation is permanently harred by the statute unless it is shown that the press exemption is not applicable." Reader's Digest, 509 F. Supp. at 1214-15. See also MUR 3624 Walter H. Shapiro (concluding that pro-Bush/Quayle broadcast by Rush Limbaugh fell within the media exemption even though the broadcast was arguably biased).

The initial inquiries as to whether CES is owned or controlled by a party or a candidate and whether the airing of the 60 Minutes Wednesday broadcast was within the press exemption require no further investigation. CES is not owned by a political party, committee or candidate and is in the business of discominating news stories, commentary, and editorials to the public. First General Counsel's Report at 5. Additionally, 60



Minutes is one of CBS's regularly scheduled programs and the Brief deast appeared on a regularly scheduled 60 Minutes program. Id. Also significant is the fact that the Broadcast appeared to be similar in form and was distributed in the same manner as other 60 Minutes news stories. Id. at 6. Contra Fed. Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 250 (1986) (noting that the publication at issue was not "comparable to any single issue of the newsletter [since] it was not published through the facilities of the regular newsletter... was not distributed to the newsletter's regular audience... [and did not have a] volume and issue number identifying it as one in a continuing series of issues").

Allegations of coordination are of no import when applying the press exemption. What a press entity says in broadcasts, news stories and editorials is absolutely protected under the press exemption, regardless of whether any activities occurred that might otherwise constitute coordination under Commission regulations.

For all the foregoing reasons, we voted in favor of the General Counsel's recommendation to find no reason to believe and close the files.

July 11, 2005

Michael E. Toner, Vice Chairman

David M. Mason, Commissioner

Bradley A. Smith, Commissioner



### FEDERAL ELECTION COMMISSION WASHINGTON, D.C. 20463

#### BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	MUR 6952
Fox News Network, LLC	)	

## STATEMENT OF REASONS OF CHAIRMAN MATTHEW S. PETERSEN AND COMMISSIONERS CAROLINE C. HUNTER AND LEE E. GOODMAN

In May of 2015, Fox News Network, LLC ("Fox News"), announced that it would host a debate on August 6, 2015, featuring Republican candidates seeking their party's presidential nomination. As the summer of 2015 unfolded, a large field of more than a dozen diverse Republican candidates garnered significant public interest. To give the American people an opportunity to hear from as many candidates as was practical, Fox News decided to sponsor two debates rather than one. One debate would feature the top ten polling candidates and for the second, the so-called "undercard debate," Fox News ultimately chose to invite any candidate who was merely identified as a candidate in national polls, without requiring minimum poll numbers. Invitations based on these criteria resulted in two debates featuring a total of seventeen candidates.

Astonishingly, the Office of General Counsel concluded that Fox News made a prohibited corporate contribution to the candidates in violation of the Federal Election Campaign Act, as amended (the "Act"), by opening participation in its debates to a broader set of candidates than it initially contemplated. Two of our fellow commissioners agreed. They also agreed with the Office of General Counsel's recommendation that the Commission should penalize Fox News, while the remaining commissioner agreed that Fox News was subject to regulation but voted to disraiss the matter in an exercise of "discretion." Both of these alternatives, however, presume that the Commission may punish a press entity based on who it chooses to question in a debate and how it questions them.

This matter thus forces the Commission to confront a legal issue it has carefully avoided for 35 years. That is, we must now reconcile the core freedom of the press under the First Amendment to the Constitution, as well as the Act's corresponding jurisdictional limitation upon the Commission, with the Commission's assertion of the power to dictate whom press entities

See First General Counsel's Report at 8 (recommending that the Commission find reason to believe Fox News violated 52 U.S.C. § 30118(a)); Amended Certification § 1 (May 24, 2016) (Commissioners Ravel and Walther voted to find reason to believe Fox News violated 52 U.S.C. § 30118(a) and approve the factual and legal analysis proposed by the Office of General Counsel); Amended Certification § 2 (May 24, 2016) (Commissioner Weintraub voted to dismiss this matter as an exercise of prosecutorial discretion).

Amended Certification § 1 (May 24, 2016) (Commissioners Ravel and Walther voted to authorize conciliation on the terms proposed by the Office of General Counsel); Amended Certification § 2 (May 24, 2016) (Commissioner Webstreub voted to dismiss this matter as an exercise of prosecutorial discretion).

MUR 6952 (Fox News Network, LLC) Statement of Reasons Page 2 of 16

invite to candidate debates they host, moderate, and televise, and how they conduct those debates.

Only once in its history has the Commission threatened a press entity for hosting a candidate debate. In 1980, the Commission informed the Nashua Telegraph that it found reason to believe the newspaper was about to make a corporate contribution by hosting a debate three days later and that the Commission had authorized its counsel to seek an injunction to stop that debate. As a result, then-candidate Ronald Reagan's campaign committee paid for the debate. When the moderator tried to cut off Reagan's microphone, Reagan famously refused by saying to great effect and applause, "I am paying for this microphone."

But soon after that incident, two seminal court decisions in the early 1980's explicated press rights and the Federal Communications Commission determined that hosting candidate debates is news coverage. Since then, the Commission has not asserted that press entities violated the Act by hosting candidate debates, much less threatened to punish a press entity for doing so. Indeed, the issue was seemingly resolved in 2002, when a hipartisan majority of commissioners announced that a press entity's spensorship of a candidate debate was categorically a press function that could not be regulated by the Commission.

Nevertheless, in a drastic turn, several of our celleagues and the Office of General Counsel would have this agency regulate and punish newsroom decisions as a matter of campaign finance regulation in defiance of the Constitution and the plain letter of the Act. Our colleagues' position, and that of the Office of General Counsel, is all the more baffling because Fox News chose to let every candidate who was the subject of national polls into its debates instead of limiting the field to a favored subset—for a total of seventuen participants—precluding any determination that it favored a select few and thereby made a prohibited corporate contribution.

The last time this issue was presented, ever two years ago, our colleagues voted against recognizing the press exemption, but argued they were merely disposing of the matter on a

See Ltr. to Telegraph Publishing Company (Feb. 20, 1980), MURs 1167, 1168, 1170 (Nashua Telegraph) (informing newspaper's publisher that the Commission found reason to believe it violated the Act's prohibition against making corporate expenditures, instructing it to answer several questions by the following day, and warning that the Commission had already authorized its counsel to seek an injunction to stop the newspaper's debate between candidates Ronald Reagan and George Bush scheduled to take place in three days because respondent did not invite other qualified candidates).

See http://www.cbsnews.com/videos/reneld-reagen-at-1980-gop-debate-i-am-paying-for-this-microphone/

See Roaders Digest Ass'n. Inc v. FEG, 509 F.Supp. 1210,1214 (S.D.N.Y. 1981); FEC v. Phillips Publishing, Inc., 517 F.Supp. 1308, 1313 (D.D.C. 1981).

See Regarding Petitions of Henry Geller and the National Association of Broadcasters and the Radio-Television News Directors Association to Change Commission Interpretation of Cartain Subsections of the Communications Act ("Geller Order"), 43 Fed. Reg. 53166, 53166-71 (Nov. 25, 1933). MUR 5224 (WZB-TV and Boston Globe), Statement of Reasons of Chairman David Mason, Vice Chairman Karl Sandstrom, Commissioner Bradley Smith and Commissioner Michael Toner at 2.

MUR 5224 (WZB-TV and Boston Globe), Statement of Reasons of Chairman David Mason, Vice Chairman Karl Sandstrom, Commissioner Bradley Smith and Commissioner Michael Toper at 2.

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narrow legal basis—compliance with the debate regulation. Although we expressed misgivings then about the doctrinal importance of the press exemption, we acquiesced to a dismissal on the narrower grounds of the debate regulation. Given the Office of General Counsel's recommendation and our colleagues' votes in this matter, this compromise is no longer tenable. The Commission's debate regulation cannot be used to impose government restrictions on newsroom decisions and to punish, and even censor, American press organizations. We can no longer agree to avoid addressing freedom of the press. As we have been warning in matter after matter, our colleagues' desire to use this agency's authority to regulate and punish the press and media warrants more robust scrutiny and a civil public debate. 10

As explained below, we declined to support our colleague's motion to approve the recommendations of the Office of General Counsel to punish Fox News for hosting these debates because Fox News's sponeorship of these debates was squarely within its press function and thus protected from the Commission's regulation under the press exemption and the free press clause of the First Amendment. Further, Fox News in fact complied with the Commission's debate regulation, which the Commission has previously concluded satisfies the press exemption when the debate sponsor is a press entity.

#### I. BACKGROUND

Fox News, a limited liability company ("LLC") registered with the State of New York, is a broadcaster that owns and operates two national cable television networks — the Fox News Channel and the Fox Business Network — and is a subsidiary of Twenty-First Century Fox, Inc. In January 2015, the Republican National Committee announced plans for twelve Republican presidential debates to be hosted by various news organizations throughout 2015 and 2016. Pox News was selected to organize; moderate, and televise the first debate, which was to

MUR 6703 (V/CVB-TV), Statement of Russons of Vice Chairman Los E. Gondman and Commissioners Caroline C. Hunter and Matthew S. Peterson; Les E. Gondman, The Feds Flirs With Reining in TV Talk: A TV Station Invites Two Candidates to Debate. Hos It Made on Illegal Contribution to Their Campaigns?, WALL STREET JOURNAL (Feb. 4, 2014).

MUR 6703 (WCVB-TV), Certification § 1 (Nov. 19, 2013); MUR 6703 (WCVB-TV), Statement of Reasons of Vice Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Poterson.

See MUR 6779 (Joel Gibert; Highwey 61 Entertainment, LLC); MUR 6703 (WCVB-TV & Hearst Stations); MUR 6320 (Sean Hannity); AO 2010-25 (RG Entertainment); see also Statement of Commissioner Steven T. Walther, AO 2010-08 (Citizens United) ("In light of the Citizen United decision, it would be my hope that the Commission will revisit the breadth of the Act's press exemption, and its policy underpinnings, as part of our rulemaking proceeding."); Audio Recording of Commission Open Meeting Held on July 23, 2014, at 24:00-25:50, AO 2014-06 (Paul Ryan for Congress) (statement by Commissioner Weistraub that a 1987 advisory opinion of the Commission concluded that "books don't appear to be covered by the media exemption. What we call the media exemption, oddly amough, decre't use the word 'media' and down't use the word 'press' . . . . . I don't know why Congress wrote the word 'periodical publication' in there but they did and we are constrained in interpreting that particular provision to interpret that particular provision and the words that it uses.").

Resp. of D; Company Orienteev of FOX News Network, ULC, http://www.bloomborg.com/research/stocks/ private/snapshot.asp?privcup.ld=4245059 (last visited Mar. 29, 2016).

Resp. at 2.

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be held on August 6, 2015, at the Quicken Loans Arena in Cleveland, Ohio. <sup>13</sup> Fox News' Executive Vice President of News (Editorial) Michael Clemente announced that Fox News would select candidates to participate in its debate according to certain criteria that would require, among other things, that a candidate place in the top ten of an average of the five most recent national polls, as recognized by Fox News, leading up to August 4, 2015 at 5:00 p.m. <sup>16</sup>

On June 11, 2015, Fox News announced that it would expand the opportunity for candidate participation by staging and broadcasting an additional debate on August 6, 2015. This additional debate would be open to Republican presidential candidates who did not poll among the top ten, and therefore did not qualify for the main debate, but who received the support of at least 1% of poll respondents in an average of the five most recent national polls, as recognized by Fox News, leading up to August 4, 2015 at 5:00 p.m. 15

On July 27, 2015, 10 days before the debate was to be held and eight days before the previously announced criteria for the undercard debate would operate to choose the participants, Fox News announced it would further expand the eligibility criteria for the second-tier debate. Specifically, Fox News announced it would include in the second-tier debate all candidates whose names were "consistently... offered to respondents in major national polls (as recognized by Fox News) leading up to August 4." Mr. Clemente stated Fox News changed its criterion "[d]ue to the overwhelming interest" in the debate and "a concerted effort to include and accommodate the new 16 Republican candidate field." 18

In addition to the ten candidates who satisfied the criteria for the top-tier debate, seven additional candidates' names were included in the five most recent national polls recognized by Fox, as of August 4, 2015. Fox News therefore included these seven candidates in the second-tier debate. 15

<sup>1</sup>d.; see Press Release, Fox News And Facebook Partner To Host First Republican Presidential Primary Debate of 2016 Election (May 2015), http://pross.foxnews.com/2015/05/fox-news-and-facebook-partner-to-host-first-republican-presidential-primary-debate-of-2016-election/ (Resp. Attach. A).

Compl. at 2; Resp. at 2.

Resp. at 2.

<sup>16</sup> id.

<sup>17</sup> Id. at 3.

In full, the relevant portion of Clemente's reported statement was: "Due to the overwhelming interest in the FOX News Facebook Debate Event Night on August 6th and in a concerted effort to include and accommodate the now 16 Republican candidate field—the largest in modern political history—FOX News is expanding participation in the 5 PM/ET debate to all declared candidates whose names are consistently being offered to Fox News in major national polls, as recognized by Fox News." Mike Allen, Fox Lowers Threshold For Early Debate, POLITICO (July 28, 2015), http://www.politico.com/ story/2015/07/fox-republican-debate-lowers-threshold-120748#ixzz3rselFYto [beveinsfler "POLITICO Article"] [etteched to Response as Amechment B).

<sup>19</sup> Rosp. at 2-4.

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Complainant was a candidate for the Republican presidential nomination in 2016.<sup>20</sup> The Complaint alleges Fox News violated the Commission's regulations governing candidate debates by excluding him from the debate it organized, moderated, and televised on August 6, 2015.<sup>21</sup> Specifically, the Complaint alleges that Fox News failed to apply pre-established and objective candidate selection criteria in violation of 11 C.F.R. § 110.13(c), focusing on what the Complaint terms as Fox News's "last minute" switch in the selection criteria.<sup>22</sup> The Complaint challenges Fox News's right to make a "last minute" change to debate participation criteria ten days before the scheduled debate, which would include candidates whose names were "consistently" offered to respondents in national polls, and argues that "consistently" is not an objective standard, as required under the Commission's debate regulation.<sup>23</sup> The Complaint asserts that Fox News "does not provide any enlightenment or even any guidance to the candidates and their organizations on how it, as the sole arbiter, will define 'consistently'; nor does it give even a hint about which 'major national polls' it ... will use to test eligibility."<sup>24</sup>

In addition, the Complaint asserts that Fox News was prohibited from selecting the candidates that it deemed newsworthy to participate in a debate that it televised as news programming. The Complaint points to the statement by Clemente—that "[w]e made a concerted effort to include and accommodate the now 16 Republican candidate field"—to argue that Fox News illegally selected 16 candidates, excluding him. 25 Finally, the Complaint argues that Fox News was legally required to use a Republican National Committee online straw poll—which it argues is "a solid reflection of "real" COP candidates [that] objectively draws the line between serious and inconsequential candidates"—a choice that would have included the Complainant in the debate as the 18th candidate, but no additional candidates. 26

Fox News denies it selected candidates illegally and asserts that it modified its original selection criteria to expand, not selectively restrict, the opportunity for more candidates to participate in the dehate.<sup>27</sup> Fox News maintains that its amended criteria were established in

See Mark Everson, Statement of Candidacy (Mar. 10, 2015); Compl. at 1. On November 5, 2015, Everson ended his campaign. See https://web.archive.org/web/201603/3000657/http://markforanierica.com/ (last visited Mar. 29, 2015).

<sup>&</sup>lt;sup>21</sup> Compl. at 1, 3.

Id. at 3-7. The Complaint also states that Fox News structured the debate in violation of 11 C.F.R. § 110.13(b)(2), see Compl. at 5-6, which forbids conducting the debate in a manner which promotes or advances one candidate over another. See it C.F.R. § 110.13(b)(2); Corporate and Labor Organization Activity; Express Advacacy and Coordination With Condidates, 60 Fed. Rog. 64260, 54262 (Dec. 14, 1995). The content of the Complaint's allegations, however, is confined to Fox News' participant selection criteria rather than the debate structure. Accordingly, there is no reason to believe that Fox News violated 11 C.F.R. § 110.13(b)(2).

Compl. st 4.

<sup>34</sup> Id. at 5.

<sup>25</sup> Id. nt 5-6

<sup>26 .</sup> Id. at 6.

<sup>27</sup> Rose, at 1-3.

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advance of the debate (ten days) and complied with Commission debate regulations.<sup>28</sup> Citing Commission precedent and federal court decisions, Fox News posits that the criteria it applied "are consistent with the FEC regulations governing such events," which does not require that criteria be numerical.<sup>29</sup> Fox News also invokes the press exemption and argues its sponsorship and broadcast of a debate is outside the Commission's regulatory jurisdiction.<sup>30</sup>

#### II. LEGAL ANALYSIS

The Act prohibits corporations from making contributions to federal candidates. The Expenditures accordinated with caudidates or their campaigns are considered in-kind contributions. 52 U.S.C. § 30116(a)(7)(B). Accordingly, unless exempted, payments by a corporate debate spouser to conduct a candidate debate may result in an in-kind contribution from the sponsor. There are two exemptions applicable to Fox News' hosting of the August 6, 2015 debate: the Act's press exemption and the exemption provided by the Commission's debate regulation. As explained below, Fox News satisfied both of these provisions.

A. The Fox News Debates Are Protected from Regulation by the Constitutional Freedom of the Press and the Ask's Fress Exemption

The First Amendment to the Constitution provides that "Congress shall make no law... abridging the freedom of the press." The Supreme Court has emphasized "the special and constitutionally recognized role of [the press] in infoffming and educating the public, offering criticism, and providing a forum for discussion and delicate." It has also explained that "the press serves... as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve," and how the suppression of press rights "muzzles one of the very agencies the Frances of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."

Congress incorporated the freedom of the press in the Act and codified its intent to not abridge that freedom. Specifically, Congress evaluded from the Act's definition of expenditure "any news story, commentary, or editorial distributed through the facilities of any breakcasting station . . . unless such facilities are owned or controlled by any political party, political

<sup>&</sup>lt;sup>29</sup> /a, at 2-5.

<sup>29</sup> Id. at 2.

<sup>&</sup>lt;sup>30</sup> /d. at 5.

<sup>52</sup> U.S.C. § 30118(a). An LLC that elects to be treated as a corporation by the IRS is considered a corporation under Commission regulations, See 11 C.F.R. § 110.1(2)(3). Publicly available information suggests that Fox News has elected to be treated as a corporation. See Dun & Bradstreet Business Information Report for Fox News Network, LLC at 6 ("On Aug. 21, 2014, this business was replassified as a corporation.") (accessed Nov. 17, 2015).

U.S. Const., Amend, L.

<sup>33</sup> First Nat'l Bank of Baston v. Bellotti, 435 U.S. 765, 781 (1978).

<sup>&</sup>lt;sup>34</sup> Mills v. Alabama, 384 U.S. 214, 219 (1966).

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committee, or candidate."<sup>35</sup> Congress explained that it enacted the press exemption to protect the press's core First Amendment right to comment upon political matters without interference by the federal government:

[I]t is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association. Thus the exclusion assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.<sup>36</sup>

Thus, at bottom, the press exemption is a statutory recognition of the First Amendment's Free Press Clause and the profoundly important role the press plays in the political affairs of our country. The Congress's stated intent to prohibit the Commission from "limit[ing] or burden[ing] in any way" the press's exercise of editorial decisions makes the press exemption a limit upon the Commission's jurisdiction. The Commission can proceed to examine a press entity's activities only if the Commission first determines the exemption does not apply. Thus, if the press exemption applies, "the FEC lacks subject matter jurisdiction and is barred from investigating the subject matter of the complaint."

Courts interpreting the freedom of the press have established a two-step analysis for conducting this threshold inquiry: (1) whether the press entity is owned or operated by a political party, candidate or political committee; and (2) whether the organization is operating as a press entity in taking the action complained of.<sup>40</sup> The Supreme Court has supplied touchstones for determining whether an organization is acting as a press entity, including whether its publication, in this case a televised news program or debate, is published and disseminated in the ordinary course of the publisher's regular press activities.<sup>41</sup>

The Commission has implemented the press exemption in a wide variety of contexts. For example, the Commission has concluded that television stations and represent are exempt from the Act's regulation when they provide free and unfettered airtime or print space to

<sup>2</sup> U.S.C. § 431(9)(8)(i). The Commission has incorporated this exemption into its regulations at 11 C.F.R. § 100.73 (excluding from the definition of contribution news stories and commentary) and 11 C.F.R. § 100.132 (same as to expenditure).

H.R. Rep. No. 93-1239, 93d Congress, 2d Scss. at 4 (1974).

U.S. Const., Atneud. 1 ("Congress shall make no law... abridging the freedom of the pross.");

See Readers Digest Ass'r. Inc v. FEC, 509 F.Supp. 1210,1214 (S.D.N.Y. 1981); MUR 5110 (KBHK Channel 45); MUR 5162 (ABC News); MUR 4689 (Dornan), Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Ellion, David M. Master and Karl J. Sandstrom.

FEC v. Phillips Publishing, Inc., 517 F.Supp. 1303, 1313 (D.D.C. 1981).

Phillips Publishing, 517 F.Supp. at 1313; Readon Cineat, 509 F.Supp. at 1214.

<sup>41</sup> FEC v. Massachusetts Citivens for Life, 479 U.S. 238, 250-51 (1986).

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candidates and political parties to expressly advocate their candidacies and solicit financial contributions, recognizing that this is an exercise of journalistic and editorial discretion.<sup>42</sup>

The Commission has also concluded that press entities engage in a legitimate press function when they sponsor and broadcast debates. Therefore, any payments to sponsor a debate are exempted from the Act's definitions of contributions and expanditures under the press exemption, and press entities' debate sponsorship is outside of the Commission's jurisdiction. In MUR 5224 (Boston Globe), the Commission dismissed a complaint similar to the one at issue here, involving a debate sponsored by Boston television station WBZ-TV and The Boston Globe. In that matter, four Commissioners issued a Statement of Reasons concluding that "a news organization's presentation of a debate is a 'news story' within the meaning of this provision of the FECA [the press exemption]." The Boston Globe Statement of Reasons similarly observed the jurisdictional limit the press exemption imposes upon the Commission when contemplating regulation of a press entity's sponsorship of a debate, noting that the "statutory language of 2 U.S.C. § 431(9)(B) is categorical, and therefore procludes the Commission from creating requirements which a debate must meet in order to qualify for the press exemption."

This conclusion is consistent with that of the Federal Contraunications Commission, which examined the question more than 30 years ago and concluded that debates are protected press activities: 45 More recently, the FCC attressed how it "is prohibited from engaging in activities that might be regarded as consorship of programming content," including any government—imposed requirement that "a particular candidate… be included in a debate."

For News's sponsorship of the debates here was protected by the press exemption and the First Amendment to the Constitution. The undisputed factual record before us establishes that Fox News is a bone fide press organization that acted well within its legitimate press function in organizing, moderating, and televising its second-tier presidential debate on August 6, 2014—because sponsoring a debate is inherently within a press entity's legitimate press

See Advisory Opinion 1998-17 (Daniels Cablevision); Advisory Opinion 1982-44 (Turner Broadcasting and WTBS); MUR 486 (Charles Percy).

MUR 5224 (WZB-TV and Boston Clicke), Statement of Reasons of Chairman David Mason, Vice Chairman Karl Sandstrom, Commissioner Bradley Smith and Commissioner Michael Toner at 2; see also, MUR 6703 (WCVR-TV), Statement of Reasons of Vice Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen.

MUR 5224 (WZB-TV and Boston Globe), Statement of Reasons of Chairman David Mason, Vice Chairman Karl Sandstreen, Commissioner Bradley Smith and Commissioner Michael Toner at 2.

The Federal Communications Commission has determined that debates apparent by broadcasters is news coverage. See Regarding Politions of Henry Goller and the National Association of Broadcasters and the Radio-Television News Directors Association to Change Commission Interpretation of Certain Subsections of the Communications Act ("Geller Ordan"), 48 Fed., Rep. 52165, 53166-71 (Nov. 25, 1997).

In the Matter of Emergency Complaint of Dannis Kucinich v. CNN and Time Warner, Inc., 23 F.C.C.R. 482, 484 (Jan. 12, 2008).

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function.<sup>47</sup> Accordingly, its sponsorship of the debate is protected from Commission regulation by the press exemption.

Nevertheless, to the extent a legitimate press function must be proven, the facts in this regard are overwhelming. Fox News's judgments regarding the debate were made by its news department and announced by its Executive Vice President of News Editorial. Fox News incorporated the debate into its regular course of news coverage and programming, presenting the debate across all of its news platforms, television on Fox News, radio on Fox News Radio, mobile on Fox News Mobile and online at FoxNews.com. Experienced Fox News anchors Bret Baier, Magyn Kelly, and Chris Wallace moderated the main debate while political journalists Bill Hemmer and Martha MacCallust moderated the second-tier debate. Ultimately, Fox News's decision to interview and broadcast 10, or 16, or 17 candidates on one or two debate stages was a wholly legitimate exercise of its editorial and journalistic discretion entitled to the full protection of the press exemption.

Fox News also made the obvious judgment that it could not accommodate the "approximately 130.declared Republican presidential candidates," but nonetheless "endeavored to be inclusive to the extent practicable." Fox News thus made two newsroom judgments to provide the public expanded coverage and information about as broad a field of candidates as practicable. First, it decided to moderate and cover two debates instead of one. This afforded the public an opportunity to hear from more than the 10 candidates selected to participate in the main debate. Second, Fox News decided to expand its selection criteria. Fox News's decision to expand the participation criteria in response to "growing public interest in hearing from a broad array of candidates" and "in a concerted effort to include and accommodate the now 16 Republican candidate field." — that is, to include additional candidates — is wholly consistent with an editorial judgment that 16 candidates were necessorily and viewers would be nefit from hearing from additional candidates. Accordingly, the press exemption plainly exempts Fox News's sponsorship of the August 6, 2015 debate.

The Federal Communications Coronission has determined that debates sponsored by broadcasters is news coverage. See Regarding Petitions of Figury Geller and the National Association of Broadcasters and the Radio-Television News Directors Association to Change Communication Interpretation of Certain Subsections of the Commun

<sup>48</sup> Resp. at Attachment A.

<sup>49 11</sup> 

<sup>30</sup> Id. at Attachment B.

si *ld.* at 1.

<sup>57 /</sup>d, at 2.

<sup>16.</sup> at 5 (quoting Polatico Article, supra) (emphasis added). Although Clemente mentioned a 16-candidate field, a total of 17 candidates participated in either the top-tier or second-tier debate.

Id. There is a lurking absurdity in our colleague's interpretation of the interplay between the Commission's debate regulation and the Act's press exemption. If, as they would interpret the debate regulation, a news organization makes a prchibited corporate contribution by paying for a program in which it questions 17 candidates

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B. Fox News Complied With the Commission's Debate Regulation and Thus Its Sponsorship of the Debates Is Exempt from Commission Regulation under the Press Exemption

As explained below, the Commission adopted a regulation in 1979 governing the sponsorship of debates by corporations and press organizations. In 1996, the Commission harmonized its debate regulations with the Constitutional freedom of the press and the Act's press exemption by clarifying that the debate regulation serves as a safe harbor, which ensures satisfaction of the test developed by the courts to determine the application of the press exemption. Thus, if a press entity compiles with the Commission's debate regulation, it per se operates within its press function and therefore is exempt from the Commission's regulation. Here, Fox News complied with the Commission's debate regulation when it sponsored the August 6, 2015, debates and therefore it was operating within its legitimate press function and is exempt from the Commission's regulation.

#### 1. The Commission's Debate Regulation

Commission regulations supplement the statutory press exemption with an additional exemption from the definitions of contributions and expenditures for the sponsorship of candidate debates. The purpose of the debate rules was to provide an exception to FECA's corporate contribution ban at 52 U.S.C. § 30118(a) so that non-profit organizations and news media organizations can stage debates without being deemed to have made prohibited contributions to the candidates participating in the debates. 55

Under the debate regulation, funds used or provided "to defray costs incurred in staging candidate debates" per se are not contributions when the debates are conducted "in accordance with the provisions of 11 C.F.R. [§6] 110.13 and 114.4(f)." Sections 110.13 and 114.4(f), respectively, provide in relevant part that a broadcaster (including a cable television operator, programmer or producer) staging a candidate debate has "discretion" regarding how to structure its debate and "must use pre-established objective criteria to determine which candidates may participate in the debate" in order to qualify for the safe harbor protection of the regulation

To qualify as "objective," criteria need not "be stripped of all subjectivity or be judged only in terms of tangible, arithmetical cut-offs. Rather, they must be free of 'content bias,' and not geared to the 'selection of certain pre-chosen participants." In prior matters considering

based on its participation criteria, then how can that same news organization be permitted under the press exemption, as it must, to pay for the staging, filming, and broadcasting costs to interview a single candidate (or 17 candidates individually) of its editorial choosing?

See Notice of Disposition of Petition for Rulemaking, 80 Fed. Reg. 72616 (Nov. 20, 2015).

<sup>56</sup> See 11 C.F.E. § 103.93

MUR 6703 (WCVB-TV), Factors and Legal Analysis at 5.

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#### **ATTACHMENT 2**

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the "objectivity" of debate selection criteria, the Commission and federal courts have not required rigid definitions or mathematical percentages. 58

As Fox News correctly observes here, one federal court has approved the Commission's acceptance of editorial judgments such as "professional opinions of Washington bureau chiefs of major newspapers, news magazine and broadcast networks; the opinions of professional campaign managers and pollsters not amployed by the candidates; the opinions of representative political scientists specializing in electoral politics; a comparison of the level of coverage on front pages of newspapers and exposure on network telecasts; and published views of prominent political commontators." 59

In MURs 4451 and 4473 (Commission on Presidential Debates), the Commission explained in a Statement of Reasons that the debate regulations sought to give debate sponsors wide leeway in deciding what specific criteria to use:

During the [FEC]'s promulgation of § 110.13, the [FEC] considered the staff's recommendation to specify certain catensibly objective selection criteria in the regulations and to expressly preclude the use of "[p]olls or other assessments of a candidate's chances in winning the nomination or election."... The [FEC] unanimously rejected this approach.... Instead, the Commission decided that the use of outside professional judgment in considering candidate potential is primissible. 60

The Commission then noted that obestions "can be raised regarding any candidate assessment criterion," but asking "such questions each and every time a candidate assessment criterion is used ... would render the use of that criterion unworkable." The Commission noted it would look for "specific evidence that a candidate assessment was 'fixed' or arranged in some manner to guarantee a preordained result," but otherwise would not "look behind and investigate every application of a candidate assessment criterion." The Commission-also recently explained that,

As the D.C. Circuit has noted, 11 C F R. § 110.03(a) "does not spell out precisely what the phrase 'objective criteria' means . . . . " \* \* \* The regulation therefore does not "maxist[e] a single set of 'objective criteria' all staging organizations must follow," but rather "[given] the individual organizations leavely to deside what specific criteria to use." \* \* \* As a result, "[f]he authority to determine what the term 'objective criteria' means rests with the agency . . . and to a lesser extent with the courts that review agency action."

Buchanas v. FEC, 112 F. Supp. 2n 58, 73 (D.D.C. 2609), affect in part, No. 00-5337 (D.C. Cir. Sept. 29, 2000) (internal distribut cavitad)

See MURe 4956, 4962, 4963 (Union Leader Corp., et al.). Courts reviewing the Commission's assessment of the objectivity of debate participation criteria have acknowledged the Commission's authority to define which criteria are reasonable.

Rosp. at 4, Euchanan, 112 F. Supp. 2d at 73 n.11.

MURs 4451 and 4473 (Commission on Presidential Debates), Statement of Reasons at 8-

<sup>61</sup> Id. at 9.

<sup>2 !</sup>c.

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"[w]ithin the realm of reasonable criteria," it would give "great latitude" to debate sponsors' criteria for participant selection. 63

Likewise, as the Commission noted in promulgating section 110.13(c), to establish that the criteria were set in advance of selecting the debate participants, staging organizations "must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants." 64

Accordingly, the debate regulation historically has been applied with great flexibility. Since the court decisions in *Phillips Publishing* and *Reader's Diges'* in 1981, the Commission has never found a hone fide press organization failed to comply with the debate regulation

2. Far Press Entities, the Debate Regulation Buttresses the Press Exemption.

From the Commission's beginning, it has struggled doctrinally to analyze presssponsored debates under the Free Fress Clause of the Constitution, the statutory press exemption, and the debate regulation. But eventually, the Commission reasoned these provisions actually complement one another

The Commission's first attentit to craft a debate regulation in Inty 1979 omitted any mention of the press. Members of Congress, the press, and the Frderel Communications Commission ("FCC") reacted to this contission — and the necessary implication that the Commission was prohibiting press entities from sponsoring debates, as they had for decades, <sup>66</sup> Congress then disapproved the regulation. <sup>67</sup> Instead of clarifying that the press was not regulated by the debate exception in its December 1979 version of the regulation, the Commission instead included the point in the scope of the regulation and further ascerted that press sponsorably of debates was not covered by the press exercition. <sup>68</sup> The Courts subsequently decided Philips and Readers Digart, which concluded that the First Amendment shields press entities from the Correctission's condition. Additionally, in 1982 (and again in 1998), the Commission issued advisory epinions confirming the right of the press to provide air

See Voilee of Discontition of Petits. Sociedance ing 30 Fed Reg. at 12006.

Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates, 40 Fed. Reg. at 64262 (or sphasis as soil).

Seq. 8.91. MIR. 6703 (WCVB-TV). The Commission divided 3-3 on a vote to find no reason to believe on the basis that the Commission's jurisdiction was limited under the coses exemption. As a compromise, the Commission then voted 6-0 to find no reason to believe on the basis that WCVB-TV complied with the debate regulation. MIR. 6703 (WCVE-TV) Certification § 1 (Nov. 21, 2013).

Concurring Statement of Commissioner Lee E. Goodman to the Notice of Departion of Petition for Rulemaking on Condition Debatases 6 (Nov. 9, 2015)

<sup>67</sup> le!

<sup>68 /</sup>L. at E-9.

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time to one candidate, alone. <sup>69</sup> And in 1983, the FCC determined that debate sponsorship was bona fide news coverage. <sup>70</sup> These developments forced the Commission to reconcile its debate regulation with the press exemption.

In 1996, the Commission amended the debate regulation. In its Explanation and Justification, the Commission acknowledged its prior advisory opinions that recognized broad press freedom to donate free, unfettered time to condidates and parties, as well as court decisions interpreting the press exemption. The Commission focused on court decisions conditioning the press exemption upon a press organization's dissemination of news and commentary "to fall broadly within the press entity's legitimate press function," and squared the debate regulation with the press exemption by observing that press organizations "can satisfy this standard" by complying with the Commission's debate regulation. Thus, a press entity's compliance with the relatively straightforward requires tents of the debate regulation establishes that it is engaging in legitimate press activity within the Act's press exemption. That is, the debate regulation is effectively a safe harbor for press entities that allows them to efficiently show they engaged in legitimate press activity without entangling the Commission in complicated judgments regarding legitimate press activity. So long as a press organization conforms its debate sponsorship with the regulation, the Commission will recognize the organization's conduct as a per se "legitimate press function" and thus protected from regulation by the Act's press eccurption.

If, however, a press entity ventures beyond the refs harbor of the regulation, its dishursements and activities may nonatheless be exempt from the definition of contribution under the press exerciption, albeit without the pair as protection of the debate regulation. In that instance, the Commission must decide if a precs entity sponsoring a debate nevertheless acted within the bounds of its press function.

3. Fax News' Spansarship of the August 6, 2015 Dehate Complied with the Commission's Dehate Regulation and, In Any Frent, Is Protected by the Press Exemption.

Fox News conducted the second-tier debate in accordance with the Commission's debate regulation. As the Commission explained in 1995 staging organizations must be able to show

For a more complete summary of the tension between the press exemption and the debate regulation, see Concurring Statement of Commissioner Lee E. Goodman to the Notice of Disposition of Petition for Rulemaking on Candidate Debates (Nov. 9, 2015); see also MUP. 5224 (W2B-TV and The Boston Gliebs).

Concurring Statement of Commissioner Lee E. Goodman to the Notice of Disposition of Petition for Rulemaking on Candidate Debetes at 11 (Nov. 9, 2015).

Candidate Debates and News Stories, 61 Fed. Reg. 18049, 18052 (Apr. 24, 1998).

<sup>1</sup>d. (citing Readers Digest, 509 F.Supp. at 1214).

The Commission's Office of General Counsel agrees that the debate regulation is a useful proxy for assessing "legitimate press function," advising the Commission that "use of objective, pre-established selection criteria not designed to result in the selection of pre-choicer condidates ensures that the media entity is acting within its 'legitimate press function' in staging the debate." First Gen. Counsel Rep. at n. 21. But it cannot be the exclusive test for what press activity qualifier as "legitimate press activity" under the press exemption statute and Free Press Clause of the Constitution.

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that their selection criteria determine the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants. Section 110.13 thus requires that debate sponsors "use pre-established objective criteria to determine which candidates may participate in [the] debate." As explained below, the record indicates that Fox News's selection criteria were both pre-established and objective.

Fox News used "pre-established" criteria by announcing its final selection criteria on July 27, 2015, which was eight days before those criteria could be satisfied and would operate to select the field of invitees, and ten days prior to the debate. The criteria resulted in the identification of a total of 17 candidates for the two debates on August 6, including seven for the second-tier debate. That Fox News announced an initial set of criteria for the second-tier debate on June 11, 2015, and a final set of criteria on July 27, 2015, does not mean that it failed to set "pre-established." criteria. The Commission's debate regulation does not require selection criteria to be established a certain number of days before a debate nor does it prohibit changing selection criteria before the selection and invitation of debate participants. The key requirements, satisfied here, are that a debate spensor chooses selection criteria before invitees are selected and that the criteria select the invitees. By finalizing and announcing its selection criteria in advance of determining invitees, and using those criteria to select the invites, Fex News used "pre-pateblished" criteria

Fox News size used "objective" criteria by basing its final selection criteria for the second-tier debate on national polls. "The quality as 'objective,' the criteria need not 'be stripped of all subjectivity or be judged only in terms of tangible, arithmetical out-offs. Rather, it appears that they must be free of 'contant bias,' and not geared to the 'selection of certain prechosen participants."

The objective criteria may be set to "control the number of candidates participating in" a debate if the staging erganization believes there are too many candidates to stage a "meaningful debate."

Fox News suncenced that the recond-tier debate would be open to "those declared Republican presidential candidates whose names were consistently being offered to respondents in major national polic (as ecognized by Fox Nows) leading up to August 4" and who did not qualify for the top-tier debate." Such criteria are sufficiently objective under both federal court

<sup>&</sup>lt;sup>74</sup> 11 C.F.N. § 110.13(c).

The others for New summond before July 27, 2015, were to be explicit to poli results as of Jorgan 4, 2015. Resp. at 2. Accordingly, Fox News's July 27, 2015, criteris over instituted habite the earlier criteria oversted to select candidates to be invited to the debate.

See MIR 6703 (WCVE-TV), Factual and Legal Analysis at 5 ("To establish that the criteria were proestablished, the Commission has stated that, '[s]taging organizations must be able to show that their . . . criteria were used to pick the participants "") (quoting Constrain and Labor Organization Set why Express Advocacy and Coordination with Cardidates 60 Fed. Reg. at \$4252))

<sup>77</sup> Id. (quoting MURs 4956/4962/4963 (Union Leader, et al.), First General Counsel's Report, at 23).

Writes of Lisportion of Petition for Retemaking, 80 Fed. Reg. at 72617; Corporate and Labor Organization Activity; Express Advocacy and Coordination with Condidates, 60 Fed. Reg. at 64262.

<sup>79 -</sup> Resp. at 3.

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and Commission precedent. 80 Moreover, Fox News's debate criteria appear to be "free of any content-bias designed to exclude any particular candidate." There is no evidence that the criteria were not used to choose the participants or that that the criteria were designed to favor particular candidates over others. At the time the final criteria were announced, Fox News expected them to result in the inclusion of all candidates generally acknowledged to be the significant candidates in the Republican primary —which Fox anticipated would number 16 candidates. In fact, the criteria produced 17 invitees.

For News's decision to invite all candidates whose names were consistently included in national polls responded to "growing public interest in bearing from a broad array of candidates," and not any effect to "cromate or advance" one candidate over another. "82 All criteria necessarily include some candidates while excluding others. The function of an objective standard ensures that the debate sponsor does not select certain candidates for the sole purpose of advantaging their electors' prospects over other candidates. To the extent the Commission has historically expressed concern about designing criteria to result in the selection of pre-chosen candidates, that concern is less compelling where, as here, the debate operator sought not to advantage certain candidates over others by excluding certain candidates, but rather to expand debate participation to every candidate being polled in a demonstrable affort to include as many as candidates as practical. The Commission has already approved of using debate criteria to limit the field of candidates in a debate to ensure that the field of candidates to favor than Fox News's "concerted effort to include and account odate" the entire field of candidates included in netional polls at the time of the August 6, 2015 debate. \*\*

Thus, by announcing its selection criteria before candidates were invited, using those criteria to select the invitees, and besing its selection criteria on whether a candidate's name consistently appeared in major national polls, Fox News used pre-established objective criteria. Consequently, by operation of the Coranission's debate regulation, its payments to sponsor the debate were neither contributions nor expenditures.

Sea Basicana, 112 F. Supp. 2d at 78 n.11 (approving as objective criteria "professional opinions of Washington bureau chiefs of major newspapers, nows magazines and broadcast networks:" "opinions of professional campaign managers and polisters not employed by the candidates;" "opinions of representative political scientists specializing in electoral politics," "the level of coverage on front pages of newspapers and exposure on network telecasts," and "published views of prominent political commentators"); MUR 6703 (WCVB-TV) (approving size of campaign organization, campaign schedula, press coverage, campaign fundraising, and polling as objective criteria); MUR 5650 (University of Arizons) (approving level of campaign activity and significant voter interest as objective criteria); MUR 5395 (Dow Joacs, et al.) (approving active criteria, ability to fundraise, and standing in public polls as objective criteria); MUR 5395 (Dow Joacs, et al.) (approving active criteria) of an opinional ander Corporation et al.) (approving significant candidate and compaign aguaization presence as objective criteria).

MUR 6703 (WCVP-TV) Fachual and Legal Analysis, et 5

<sup>82</sup> Respect 2

Corporate and Labor Organization Activity: Express Advocacy and Coordination with Candidates, 60 Fed.
Reg. at 62262.

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#### III. CONCLUSION

in sum, the Commission lacks jurisdiction to investigate or punish Fox News' activity with respect to the debate. Fox News was engaged in legitimate press activity when it organized, moderated, and televised the August 6 second-tier debate. Moreover, the record reflects that Fox News complied with the Commission's debate regulation and, therefore, Fox News' payments in connection with the debate per se are not contributions or expenditures within the meaning of the Act. Consequently, these is no reason to believe Fox News violated the Act.

The logical extension of our colleagues' conclusion that Fox News made prohibited contributions to the 17 candidates in the debates it appeared would be a return to this agency's threat of an injunction against the Nushna Telegraph in 1980. This is nothing short of censorship of news coverage, and it is wrong.

This matter raises a broader question: If, as the Federal Communications Commission and a bipartisan majority of the Commission previously concluded, a news organization's appensorship of a candidate debate is news coverage, then can the Commission ever lawfully punish a news organization for hosting a candidate debate based only on the Commission's disagreement with the news organization's selection of candidates to participate in the debate or the structure of the debate? We thick not.

Matthew S. Petersen

Chairman

la / 256/ 2016 Dule

Caroline C. Hunter

Commissioner

(\*) 2 5 / Date:

Lee E. Goodman

Commissioner

JAME 25, 201

Date

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#### **ATTACHMENT 3**

#### BEFORE THE FEDER ALELECTION COMMISSION

## ENFORCEMENT PRIORITY SYSTEM 2016 JUN 28 AH 10° 25 DISMISSAL REPORT SENSITIVE

MUR: 6901 Respondents: Buck for Colorado and

Cheryl Klein, Treasurer Response Dates: November 20, 2014 (Times-Call); (the "Committee");

December 31, 2014 (Committee)

EPS Rating:

Kenneth R. Buck;
Denver Post;

Longmont Daily Times-Call (aka "Times-Call")

Alleged Statutory: 52 U.S.C. § 30101(9)(B)(i)

Regulatory Violations 11 C.F.R. §§ 100.73, 100.132

52 U.S.C. § 30120(a)(1)

11 C.F.R. § 110.11(a)-(b)

The Complainant alleges that the 2014 congressional campaign of Kenneth Buck and his Committee aired a radio advertisement on October 15, 2014, entitled "A Great America" that incorrectly identified the proper name of the Committee that had paid for it. Additionally, the Complainant claims that two newspapers, the Denver Post and the Times-Call, published news articles and advertisements by and in support of Buck's campaign, as well as editorials endorsing Buck, but refused to cover and interview Buck's opponents. The Times-Call responds that its coverage of the Buck-Meyers campaign fell within the Commission's "gress exemption" to the Act's definitions of "contribution" and "expenditure." As for the Committee, it acknowledges that it ran a radio advertisement that misidentified the advertisement's payor as "Buck for Congress" instead of the correct name, "Buck for Colorado." Within 24 hours of receiving the complaint, the Committee states that it corrected the advertisement's disclaimer.

in 2014, Congressman Buck, a candidate in Colorado's Fourth Congressional District, defeated Complainant Vic Meyers in the general election.

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#### **ATTACHMENT 3**

EPS Dismissal Report MUR 6901 (Buck for Colorado, et al.) Page 2 of 3

1 The Federal Election Campaign Act of 1971, as amended ("Act") and Commission 2 regulations appear to exempt the news reports and commentary in this matter from the definition of 3 "contribution" and "expenditure." 52 U.S.C. § 30101(9)(B)(i) ("the term 'expenditure' does not 4 include . . . any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, for magazine . . . unless such facilities are owned or controlled by 5 6 any political party, political committee, or candidate); see also 11 C.F.R. §§ 100.73, 100.132 7 (neither a contribution nor an expenditure results from such news stories, commentaries, or editorials).<sup>2</sup> As for the Committee, it admittedly included a disclaimer in its radio advertisements 8 that incorrectly stated its name, as required by the Act and Commission regulations. See 52 U.S.C. 9 10 30120(a)(1); see also 11 C.F.R. § 110.11(a)-(b). However, the Committee asserts that it promptly corrected the "inadvertent" and "minor" error within a day of being notified of it.3 11

Priority System using formal, pre-determined scoring criteria to allocate agency resources and assess whether particular matters warrant further administrative enforcement proceedings. These criteria include: (1) the gravity of the alleged violation, taking into account both the type of activity and the amount in violation; (2) the apparent impact the alleged violation may have had on the electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in potential violations and other developments in the law. This matter is rated as low priority for Commission action after application of these pre-established criteria. Given that low rating and the

Complainant's argument that the news coverage may have been more favorable to Buck than him does not affect this analysis. See Executed and Legal Analysis et 3, MUP 6579 (ABC Nows, Inc.) (Recognizing that an entity otherwise eligible for the media exemption would not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even if the news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office).

It is not clear from the public record how much the advertisements might have cost.

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#### **ATTACHMENT 3**

**EPS Dismissal Report** MUR 6901 (Buck for Colorado, et al.) Page 3 of 3

- other circumstances presented, we recommend that the Commission dismiss the allegations 1
- 2 consistent with the Commission's prosecutorial discretion to determine the proper ordering of its
- priorities and use of agency resources. Heckler v. Chaney, 470 U.S. 821, 831-32 (1985). We also
- recommend that the Commission close the file as to all respondents and send the appropriate letters.

Daniel A. Petolas Acting General Counsel

Kathleen M. Guith Acting Associate General Counsel for Enforcement

6.28.16

Date

Deputy Associate General Counsel

Enforcement

Assistant General Counsel Complaints Examination & Legal Administration

laub Hornzer Attorney

Complaints Examination

& Legal Administration

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