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**BY OVERNIGHT AND ELECTRONIC MAIL**

Jeff S. Jordan, Esq.  
Assistant General Counsel  
Complaints Examination & Legal Administration  
Federal Election Commission  
1050 First Street, N.E.  
Washington, D.C. 20463

**Re: MUR 7515**

Dear Mr. Jordan:

We write on behalf of Beto for Texas and Gwendolyn Pulido in her official capacity as treasurer (collectively, “Respondents”) in response to the complaint in MUR 7515 (the “Complaint”). The Complaint makes an entirely baseless allegation that Respondents accepted a prohibited corporate in-kind contribution when Beto O’Rourke participated in a televised Cable News Network (“CNN”) townhall after his opponent, Ted Cruz, decided at the last minute not to appear for what was planned as a townhall-style debate. The Complaint, however, fails to recognize that the Commission has determined that CNN and its parent company, Turner Broadcasting System, Inc. (“Turner”), qualify for the “press exemption” and may produce and air programs about federal candidates without making a contribution to any of the featured candidates. The townhall program at issue in the Complaint clearly fell within the “press exemption,” and thus was not a contribution to Respondents as a matter of law. Moreover, the townhall provided the type of in-depth media coverage of a candidate’s policies and positions that constitutes core political speech protected by the First Amendment.

The Commission may find “reason to believe” only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”), or Federal Election Commission (“FEC” or “Commission”) regulations.<sup>1</sup> Because the townhall was covered by the “press exemption,” which is codified in the Act and the Commission’s regulations,<sup>2</sup> the townhall was not a contribution to Respondents, and the Complaint fails to allege any facts that, if true, would constitute a violation of the Act. The Complaint in this matter is meritless. Thus, the Commission must find no reason to believe that Respondents accepted a prohibited contribution from CNN or Turner and should

<sup>1</sup> 52 U.S.C. § 30109(a)(2).

<sup>2</sup> *Id.* § 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

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close the file without taking any further action.<sup>3</sup> To do otherwise would represent a severe interference with our nation's free press and the substantial First Amendment protections afforded to press entities when they are providing in-depth coverage of topical political news and elections.<sup>4</sup>

### FACTUAL BACKGROUND

Beto O'Rourke was the Democratic candidate for Texas's contested Senate seat during the 2018 election cycle.<sup>5</sup> His principal campaign committee was Beto for Texas and Gwendolyn Pulido served as treasurer.<sup>6</sup> Ted Cruz was O'Rourke's Republican opponent in the 2018 general election.<sup>7</sup> Complainant Neal Dikeman was the Libertarian candidate for the same Senate seat.<sup>8</sup>

CNN, which is a cable news broadcaster owned by Turner Broadcasting System, Inc.,<sup>9</sup> planned to stage and televise an hour-long townhall-style debate featuring both O'Rourke and Cruz on October 18, 2018.<sup>10</sup> On or about October 9, however—after both candidates had agreed to appear and preparations for the event were already underway—Cruz withdrew from the townhall.<sup>11</sup> CNN decided to proceed with the event as planned, with just O'Rourke in attendance.<sup>12</sup> Dana Bash moderated the townhall,<sup>13</sup> and Bash and audience participants asked O'Rourke a series of questions that resulted in a substantive and in-depth discussion of O'Rourke's policy positions on immigration, healthcare, drug-related issues, and other topics.<sup>14</sup>

### LEGAL ANALYSIS

The Act and Commission regulations exclude from the definitions of "contribution" and "expenditure" the cost incurred in covering or carrying a news story, commentary, or editorial by

<sup>3</sup> See 52 U.S.C. § 30109(a)(2).

<sup>4</sup> See *Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210, 1214 (1981).

<sup>5</sup> Robert O'Rourke, FEC Form 2, Statement of Candidacy (amended July 9, 2018), <http://docquery.fec.gov/pdf/627/201807090200479627/201807090200479627.pdf>.

<sup>6</sup> Beto for Texas, FEC Form 1, Statement of Organization (amended July 9, 2018), <http://docquery.fec.gov/pdf/632/201807090200479632/201807090200479632.pdf>.

<sup>7</sup> Rafeal Edward Cruz, FEC Form 2, Statement of Candidacy (amended Oct. 15, 2018), <http://docquery.fec.gov/pdf/061/201810159125136061/201810159125136061.pdf>.

<sup>8</sup> Compl. at 1, 4, 7 (Oct. 16, 2018).

<sup>9</sup> *About Us*, TURNER, <https://www.turner.com/about-us> (last visited Dec. 17, 2018).

<sup>10</sup> Madlin Mekelburg, *Beto CNN Town Hall: O'Rourke Regrets Using 'Lyn' Ted, Rules Out Presidential Run*, EL PASO TIMES (Oct. 18, 2018), <https://www.elpasotimes.com/story/news/politics/elections/2018/10/18/beto-orourke-ted-cruz-texas-senate-race-cnn-town-hall-debate-2020-president-lyin-ted/1689390002/>.

<sup>11</sup> Brlanna Provenzano, *Ted Cruz Declines to Participate in Televised Town Hall After Beto O'Rourke Turns Down Debate* (Oct. 10, 2018), <https://mic.com/articles/191825/ted-cruz-declines-to-participate-in-televised-town-hall-after-beto-orourke-turns-down-debate#.6XUoQ9OQC>.

<sup>12</sup> See Rachel Ventresca, *CNN to Host Prime-Time Political Events Ahead of Midterm Elections*, CNN (Oct. 11, 2018), <https://www.cnn.com/2018/10/09/politics/cnn-midterm-debates-town-hall/index.html>.

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

<sup>14</sup> Mekelburg, *supra* note 10.

any broadcasting station, unless the broadcasting station is owned or controlled by a political party, political committee, or candidate.<sup>15</sup> This allowance is known as the “press exemption.”<sup>16</sup>

When applying the press exemption, the Commission conducts a three-step analysis. First, the Commission asks whether the entity engaging in the challenged activity is a press or media entity.<sup>17</sup> While the Act does not define “press entity,” the Commission traditionally grants “press entity” status to any organization that produces and disseminates new stories, commentaries, and/or editorials on a regular basis.<sup>18</sup> Second, the Commission determines whether the press entity is owned or controlled by a political party, political committee, or candidate.<sup>19</sup> The Commission has already recognized in past matters that both Turner and CNN are press entities that regularly broadcast news and commentaries, and that they are not owned or operated by any candidate, political party, or political committee.<sup>20</sup> Therefore, CNN and Turner easily satisfy the first two criteria of the press exemption.

As to the final prong of the test, the Commission examines whether the press entity was acting within its “legitimate press function” when it produced and disseminated the challenged materials.<sup>21</sup> An entity is acting within its legitimate press function when it (1) makes its materials available to the general public and (2) the materials are comparable in form to those ordinarily issued by the entity.<sup>22</sup>

With regard to the townhall, there can be no question that CNN and Turner were acting within their legitimate press functions. CNN broadcast the townhall on cable television,<sup>23</sup> which means it was available to the general public. CNN also aired the town hall on its existing channels, used one of its regular news correspondents as the moderator, and maintained control over the format of the townhall and the questions.<sup>24</sup> These characteristics make the townhall comparable in form to CNN’s other news programs. The fact that only one candidate appeared at the townhall is immaterial to this analysis.<sup>25</sup>

<sup>15</sup> 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

<sup>16</sup> Advisory Op. 2010-08 (Citizens United) at 3 (“AO 2010-08”).

<sup>17</sup> *Id.* at 4.

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

<sup>19</sup> *Id.* at 6.

<sup>20</sup> See Factual & Legal Analysis (“F&LA”) at 1, 4, MUR 7231 (CNN) (concluding that CNN meets the first two factors of the “press exemption” inquiry); Advisory Op. 1982-44 (DNC/RNC) (concluding the same for Turner).

<sup>21</sup> AO 2010-08 at 5.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> *Beto O’Rourke Town Hall on CNN: How to Watch on TV or Live Stream*, HEAVY (Oct. 18, 2018), <https://heavy.com/news/2018/10/beto-town-hall-cnn-watch-tv-online-live-stream/>.

<sup>24</sup> See *id.*; see also Ventresca, *supra* note 12.

<sup>25</sup> Because the townhall was not a debate, the debate regulation—with its requirement for equal treatment of the candidates—did not apply. See 11 C.F.R. § 110.13(b)(2). Moreover, even if CNN had hosted a debate with Cruz in attendance, the regulation would not have required CNN to invite Dikeman, who was polling at about 2 percent. See

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Indeed, CNN's event is materially indistinguishable from conduct approved in Advisory Opinion 1996-16. There, Bloomberg, L.P. ("Bloomberg") planned to invite presidential candidates to participate in hour-long moderated townhall meetings, which multiple Bloomberg platforms would then cover as news stories.<sup>26</sup> Bloomberg stated that the candidates would appear one-at-a-time in a studio and answer questions submitted in real time via email and webcam.<sup>27</sup> Bloomberg subscribers could watch the townhalls live from certain locations or listen to the townhalls via a toll-free telephone number, and other press entities could air footage of the townhalls.<sup>28</sup>

Based on these facts, the Commission concluded that the townhalls would be covered by the press exemption, explaining:

In essence, Bloomberg proposes to create and cover a news event in much the same way as a newspaper would arrange, report, and comment on its own staff interview with a political candidate or cover a press conference. Much like the presentation of more traditional news stories and news programs, the means of presentation are controlled by the press entity. This is a discrete, structured forum with a moderator, a set format, and a time limit.<sup>29</sup>

Just like Bloomberg, CNN invited multiple candidates to participate in its Texas townhall.<sup>30</sup> CNN also created a structure for the event, had the same hour-long time limit as Bloomberg, used a moderator, and maintained control over the program.<sup>31</sup> The CNN townhall was therefore virtually identical to Bloomberg's proposed townhalls. And notably, the Commission did not condition application of the press exemption on Bloomberg inviting *and* convincing *all* presidential candidates to appear at the townhalls; rather, it was sufficient that Bloomberg *offered* the opportunity to more than one candidate, which is exactly what CNN did.<sup>32</sup> CNN was not required to invite every candidate competing for Texas's Senate seat to appear for its event, nor could it compel any candidate's presence. Complainant Neal Dikeman was polling at about 2 percent prior to the election and had no realistic chance of winning the Senate seat.<sup>33</sup> The Bloomberg townhall

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*id.* § 110.13(c) (stating that a staging organization may use pre-established objective criteria to invite less than all of the candidates to a debate); F&LA at 22, 32, MURs 6869R & 6942R (Commission on Presidential Debates) (upholding the Commission on Presidential Debates' 15 percent polling threshold for inclusion in the general election presidential debates); Amy Furr, *Poll: Ted Cruz Takes Lead in Senate Race Against Beto O'Rourke*, TOWNHALL (June 26, 2018), <https://townhall.com/tipsheet/amyfurr/2018/06/26/poll-ted-cruz-takes-lead-in-senate-race-against-democrat-beto-orourke-n2494598> (providing O'Rourke's, Cruz's, and Dikeman's polling numbers).

<sup>26</sup> Advisory Op. 1996-16 (Bloomberg, L.P.) at 2 ("AO 1996-16").

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 3-4.

<sup>30</sup> Ventresca, *supra* note 12.

<sup>31</sup> *See id.*

<sup>32</sup> AO 1996-16 at 2-4.

<sup>33</sup> *See* Furr, *supra* note 25.

advisory opinion does not stand for the proposition that candidates who are unlikely to win must be provided with the same opportunities as the main contenders.<sup>34</sup>

Furthermore, courts and the Commission have rarely found a press entity to be acting outside its legitimate press function, and they have indicated that the press exemption will apply unless a press entity makes an extreme departure from its regular activities. As an example, in *Reader's Digest Ass'n, Inc. v. FEC*, a federal district court stated that a newspaper would be acting outside of its legitimate press function if it hired people to stand on street corners and rented sound trucks to denounce a candidate on Election Day, without attempting to sell newspapers to any listeners.<sup>35</sup> Similarly, the Commission has withheld the protections of the press exemption when a cable television provider inserted express-advocacy fliers into subscribers' cable bills;<sup>36</sup> when a cable television network planned to distribute get-out-the-vote materials at community events and send text messages encouraging people to vote for particular candidates;<sup>37</sup> and when an Internet-based television station planned to provide private briefings to campaign staff and solicit contributions, which the Commission viewed not only as different in format from the station's regular content, but tantamount to "participation in core campaign or electioneering functions."<sup>38</sup>

CNN's townhall was nothing like these examples. CNN produces and broadcasts programs about political news and current events as part of its regular function,<sup>39</sup> and it was doing exactly that when it staged the October 18 townhall. In fall 2018, O'Rourke was the subject of national attention,<sup>40</sup> and people in Texas and across the country wanted to learn more about his policies and ideas. CNN, acting in its capacity as a news broadcaster, provided a forum for the public to learn more about O'Rourke and made its coverage of O'Rourke available on cable. Therefore, this was not an instance of a cable station taking up a new method of communication or functioning like a campaign; rather, CNN was acting as it always does in conveying newsworthy information about a candidate to an interested electorate. The Commission has never withheld the protections of the press exemption when a broadcasting corporation was broadcasting political news.<sup>41</sup>

<sup>34</sup> See AO 1996-16; see also F&LA at 22, 32, MURs 6869R & 6942R.

<sup>35</sup> 509 F. Supp. at 1214.

<sup>36</sup> F&LA at 19-22, MUR 3657 (Multimedia Cablevision).

<sup>37</sup> Advisory Op. 2004-07 (MTV) at 5, 7.

<sup>38</sup> Advisory Op. 2008-14 (Melothé, Inc.) at 5.

<sup>39</sup> About CNN.com, CNN, <https://www.cnn.com/about> (last visited Dec. 18, 2018).

<sup>40</sup> Will Weissert, *O'Rourke Bets National Attention Lifts Him in Texas Race*, NBC CHI. (Sept. 2, 2018), <https://www.nbcchicago.com/news/national-international/ORourke-Hopes-National-Attention-Lifts-Him-in-Texas-Race-492293891.html>.

<sup>41</sup> Turner and CNN were also acting as *bona fide* media entities to the extent that they were motivated by profit. CNN had already begun preparing for the townhall before Cruz dropped out, and CNN and other press entities were reporting on the plans for the event. See, e.g., *Ted Cruz, Beto O'Rourke to Hold 3 Debates*, CBS NEWS (Sept. 14, 2018), <https://www.cbsnews.com/news/ted-cruz-beto-orourke-to-hold-3-debates-texas-senate-race/>. Accordingly, if CNN had canceled the event all together, rather than just featuring O'Rourke, it presumably would have lost money

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### CONCLUSION

The allegations in the Complaint are inadequate to assert a violation of the Act or Commission regulations. The press exemption clearly applies to the townhall at issue in the Complaint, and there is no reasonable basis to conclude that Respondents accepted a prohibited in-kind contribution. Accordingly, the Commission should reject the Complaint's request for an investigation, find no reason to believe that a violation of the Act or Commission regulations has occurred, and immediately dismiss this matter.

Very truly yours,



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Counsel to Respondents

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by failing to recoup the resources it expended on preparing for the event and by losing the wide viewership O'Rourke was bound to draw.