

**FEDERAL ELECTION COMMISSION**  
**FIRST GENERAL COUNSEL’S REPORT**

**MUR 7515**

DATE COMPLAINT FILED: Oct. 16, 2018

DATE SUPPLEMENTAL COMPLAINT FILED:

Oct. 24, 2018

DATE OF NOTIFICATIONS: Oct. 22, 2018,

Oct. 31, 2018

DATE OF LAST RESPONSE: Jan. 30, 2019

DATE ACTIVATED: Mar. 1, 2019

EXPIRATION OF SOL: Oct. 18, 2023

ELECTION CYCLE: 2018

**COMPLAINANTS:**

Neal Dikeman

Neil Dikeman for Senate

**RESPONDENTS:**

CNN Broadcasting, Inc.

Beto for Texas and Gwendolyn L. Pulido in her  
official capacity as treasurer**RELEVANT STATUTES  
AND REGULATIONS:**

52 U.S.C. § 30118(a)

11 C.F.R. § 100.73

11 C.F.R. § 100.92

11 C.F.R. § 110.13

11 C.F.R. § 114.4(f)

**INTERNAL REPORTS CHECKED:** None**FEDERAL AGENCIES CHECKED:** None**I. INTRODUCTION**

The Complaint and the Supplemental Complaint (which are referred to collectively as the “Complaint”) filed by Neil Dikeman on behalf of Neil Dikeman for Senate, the principal campaign committee of the Libertarian candidate for the 2018 Senate race in Texas, allege that CNN Broadcasting, Inc. (“CNN”) made, and Beto for Texas and Gwendolyn Pulido in her official capacity as treasurer (the “Committee”) received, a prohibited in-kind corporate

1 contribution when CNN aired a “town hall” interview with Beto O’Rourke, the 2018 Democratic  
2 candidate for Senate. CNN and the Committee respond that the press exemption contained in the  
3 Federal Election Campaign Act of 1971, as amended (the “Act”), covers the broadcast of the  
4 O’Rourke town hall and therefore CNN’s airing of the town hall did not result in a contribution  
5 to the Committee.

6 We conclude that the press exemption covers the O’Rourke town hall and recommend  
7 that the Commission find no reason to believe that CNN and the Committee violated 52 U.S.C.  
8 § 30118(a).

## 9 **II. FACTUAL BACKGROUND**

10 On October 18, 2018, CNN broadcast a one-hour-long town hall interview with  
11 O’Rourke in McAllen, Texas, that was moderated by CNN Chief Political Correspondent Dana  
12 Bash and featured audience members posing questions to O’Rourke.<sup>1</sup> CNN held the O’Rourke  
13 town hall after negotiations between CNN, the O’Rourke campaign, and the campaign of Senator  
14 Ted Cruz, the Republican candidate, failed to produce an agreement between the two candidates  
15 to participate in a CNN-sponsored debate.<sup>2</sup> Although accounts differ as to the timing, CNN, the  
16 Committee, and the Cruz campaign all agree that after the candidates did not accept invitations to  
17 a debate, CNN offered to host separate town halls for O’Rourke and Cruz, and that CNN  
18 ultimately did not sponsor a debate between the Texas Senate candidates.<sup>3</sup> Instead, CNN aired

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<sup>1</sup> See Addendum to Compl. at 1 (Oct. 31, 2018).

<sup>2</sup> See Compl. at 5-6 (Oct. 16, 2018) (citing Anna Tinsley, *Ted Cruz declines, so challenger Beto O’Rourke gets an hour on national TV by himself*, FORT WORTH STAR TELEGRAM, (Oct. 9, 2018), <https://www.star-telegram.com/news/politics-government/article219732670.html>).

<sup>3</sup> See Addendum to Compl. at 11, Appx. 1, Appx. 2, Committee’s Resp. at 2, fn. 11 (Jan. 30, 2019) (citing Brianna Provenzano, *Ted Cruz Declines to Participate in Televised Town Hall After Beto O’Rourke Turns Down Debate*, MIC.COM (Oct. 10, 2018), <https://mic.com/articles/191825/ted-cruz-declines-to-participate-in-televised-town-hall-after-beto-orourke-turns-down-debate#.4SLCjn0FR>); CNN’s Resp. at 2 (Dec. 11, 2018).

1 the O'Rourke town hall and promoted the event alongside two CNN-sponsored debates: one  
2 between the candidates for the Florida gubernatorial race and the other between the candidates  
3 for the Florida U.S. Senate race.<sup>4</sup>

4 After CNN announced its decision to abandon its plans for a debate between Cruz and  
5 O'Rourke and proceed instead with a town hall interview of O'Rourke, Dikeman contacted CNN  
6 and the Committee and asked to be included in a debate.<sup>5</sup> Shortly thereafter, Dikeman filed his  
7 first complaint, which he would supplement with an addendum after CNN aired its town hall  
8 interview with O'Rourke.

9 Dikeman alleges that 11 C.F.R. § 100.73(b) requires all news stories to be part of a  
10 "general pattern of campaign-related news accounts that give reasonably equal coverage to all  
11 opposing candidates."<sup>6</sup> As such, Dikeman argues that CNN's coverage of the Texas senatorial  
12 race was inherently unequal because it only featured one of three Texas senatorial candidates.<sup>7</sup>  
13 As a result, the Complaint concludes that this inequity resulted in a prohibited contribution from  
14 CNN to the Committee. Dikeman also contends that the O'Rourke interview was a prohibited  
15 corporate contribution to the Committee in the form of broadcast time because it falls "outside of  
16 [CNN's] general pattern of reporting campaign related news."<sup>8</sup>

17 In a Supplement to the Complaint, Dikeman asserts nearly identical legal arguments but  
18 provides additional factual information concerning CNN's role in hosting and organizing the

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<sup>4</sup> Compl. at 3, 6.

<sup>5</sup> *Id.* at 7; *see also* Addendum to Compl. at Appx. 3.

<sup>6</sup> Compl. at 2.

<sup>7</sup> *Id.*

<sup>8</sup> *See* Addendum to Compl. at 9.

1 O'Rourke interview and controlling the audience ticket access.<sup>9</sup> Dikeman also acknowledges  
2 that CNN did not air the initially contemplated debate.<sup>10</sup>

3 In its Response, CNN contends that the O'Rourke town hall qualified for the press  
4 exemption, stressing that "a media organization's interview of a candidate, in any format, is  
5 wholly exempt from regulation under the Act and Commission regulations, and the First  
6 Amendment."<sup>11</sup> CNN asserts that it has "interviewed thousands of candidates for public office  
7 in a wide variety of formats" and refers to a list of its town hall debates and interviews, which  
8 includes several individuals who were not presidential candidates.<sup>12</sup> CNN acknowledges that it  
9 had considered hosting a debate between Cruz and O'Rourke, but ultimately did not do so.<sup>13</sup>  
10 CNN also notes that it had not considered including Dikeman in any contemplated debate  
11 because he was not "registering in the polls recognized as reliable by CNN's news  
12 department."<sup>14</sup>

13 Similarly, the Committee's Response asserts that the press exemption covers the  
14 O'Rourke town hall and that the town hall provided "the type of in-depth media coverage of a  
15 candidate's policies and positions that constitutes core political speech protected by the First

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<sup>9</sup> Addendum to Compl. at 10.

<sup>10</sup> See Addendum to Compl. at 6. Dikeman also attaches a letter from Cruz's campaign to CNN declining the town hall interview, discussing earlier plans for a debate, and expressing an interest in CNN returning to a debate "featuring the only two candidates registering in the polls" as well as a letter from CNN to Dikeman in which CNN referred to its "relevant objective criteria," stressed that Dikeman was not registering in any recognized polls, and explained why CNN's planned O'Rourke town hall interview fell within the press exemption. See Addendum to Compl. at Appx. 2, Appx. 3.

<sup>11</sup> CNN's Resp. at 1.

<sup>12</sup> *Id.* at 1-2, fn. 1.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.*

1 Amendment.”<sup>15</sup> The Committee contends that after Cruz withdrew from the debate, CNN  
2 “proceeded with the event as planned” by instead interviewing O’Rourke using the same town  
3 hall format as the proposed debate to ask a series of questions “that resulted in a substantive and  
4 in-depth discussion of O’Rourke’s policy positions on immigration, healthcare, drug-related  
5 issues, and other topics.”<sup>16</sup>

### 6 **III. LEGAL ANALYSIS**

7 The Act prohibits any corporation from making contributions or expenditures in  
8 connection with a federal election.<sup>17</sup> The Act also bars political committees from knowingly  
9 accepting corporate contributions.<sup>18</sup> “Contribution” includes “any gift, subscription, loan,  
10 advance, or deposit of money or anything of value”<sup>19</sup> and “expenditure” includes “any purchase,  
11 payment, distribution, loan, advance, deposit, or gift of money or anything of value.”<sup>20</sup>

12 The Act exempts from the definition of “contribution” and “expenditure” “[a]ny cost  
13 incurred in covering or carrying a news story, commentary, or editorial by any broadcasting  
14 station . . . unless the facility is owned or controlled by any political party, political committee,  
15 or candidate.”<sup>21</sup> This exemption is called the “press exemption” or “media exemption.”<sup>22</sup> A

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<sup>15</sup> Committee’s Resp. at 3-5.

<sup>16</sup> *Id.* at 2.

<sup>17</sup> 52 U.S.C. § 30118(a).

<sup>18</sup> *Id.* §§ 30116(f); 30118(a).

<sup>19</sup> *Id.* § 30101(8)(A)(i).

<sup>20</sup> *Id.* § 30101(9)(A)(i).

<sup>21</sup> 11 C.F.R. §§ 100.73, 100.132; see also 52 U.S.C. § 30101(9)(B)(i).

<sup>22</sup> Advisory Op. 2010-08 (Citizens United) at 3 (“AO 2010-08”).

1 communication subject to this exemption is also exempt from the Act's disclosure, disclaimer,  
2 and reporting requirements.”<sup>23</sup>

3 To assess whether the press exemption applies to a communication, the Commission uses  
4 a two-part test.<sup>24</sup> First, it asks whether the entity engaging in the activity is a “press entity” as  
5 described by the Act and regulations.<sup>25</sup> Second, if the entity is a press entity, the exemption will  
6 apply so long as it: (1) is not owned or controlled by a political party, political committee, or  
7 candidate; and (2) is acting within its “legitimate press function” in conducting the activity.<sup>26</sup>  
8 When determining whether the entity was functioning within the scope of a legitimate press  
9 entity at the time of the alleged violation, the Commission considers two factors: (1) whether the  
10 entity's materials are available to the general public; and (2) whether they are comparable in  
11 form to those ordinarily issued by the entity.<sup>27</sup>

12 In the context of a debate, the Commission's regulations specifically note that media  
13 entities may “cover or carry” debates “as press entities.”<sup>28</sup> When a media entity *stages* a debate,  
14 however, the Commission's regulations require the staging organization to comply with the same

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<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.* at 4; Advisory Op. 2005-16 (Fired Up!) at 4 (“AO 2005-16”).

<sup>25</sup> AO 2010-08 at 4; AO 2005-16 at 4. The Commission has explained that to determine when the term “press entity” applies, it “has focused on whether the entity in question produces on a regular basis a program that disseminates news stories, commentary, and/or editorials.” AO 2010-08 at 7.

<sup>26</sup> *See Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1214-15 (S.D.N.Y. 1981).

<sup>27</sup> *See id.* at 1215; Factual & Legal Analysis at 4, MUR 7231(CNN, *et al.*) (“F&LA”), Advisory Op. 2016-01 (Ethiq).

<sup>28</sup> *See* 11 C.F.R. § 110.13(a)(2).

1 rules as any other debate staging organization.<sup>29</sup> Although the term “debate” is not defined in  
2 the regulations, the Commission has explained that a “face-to-face appearance or confrontation  
3 by the candidates is an inherent element of a debate.”<sup>30</sup> The debate regulations leave the  
4 structure of the debate to the discretion of the staging organization, provided that the debate  
5 includes at least two candidates, and the organization does not structure the debates to promote  
6 or advance one candidate over another.<sup>31</sup>

7 Commission regulations require debate staging organizations to use “pre-established  
8 objective criteria to determine which candidates may participate in the debate.”<sup>32</sup> As the  
9 Commission noted in promulgating section 110.13(c), to establish that the criteria were set in  
10 advance of selecting the debate participants, “staging organizations must be able to show that  
11 their objective criteria were used to pick the participants, and that the criteria were not designed  
12 to result in the selection of certain pre-chosen participants.”<sup>33</sup>

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<sup>29</sup> See *id.* § 110.13(c) (setting forth candidate-invitation rules “[f]or *all* debates” and “staging organization(s)” (emphasis added)); First Gen. Counsel’s Rpt. at 4-5, MUR 5395 (Dow Jones, *et al.*) (explaining that the Commission analyzes the staging of debates by media entities under the debate regulations, and the coverage or broadcast of debates by such entities under the media exemption) (“First GCR”); First GCR at 6-7, n.21, MUR 6952 (Fox News Network, LLC) (explaining that a press entity staging a debate must be analyzed under the debate staging regulations, and not the press exemption); F&LA at 5-8, MUR 6703 (WCVB-TV, Channel 5); F&LA at 4-10, MUR 6493 (Fox News Channel).

<sup>30</sup> *Corporate and Labor Organization and Express Advocacy and Coordination with Candidates*, 60 Fed. Reg. 64,260, 64,262 (Dec. 14, 1995) (“1995 E&J”) (citing Advisory Op. 1986-37 (National Conservative Foundation)).

<sup>31</sup> 11 C.F.R. § 110.13(b).

<sup>32</sup> 11 C.F.R. § 110.13(c).

<sup>33</sup> 1995 E&J, 60 Fed. Reg. at 64,262.

1           When addressing “town hall” styled interviews, the Commission has found that the  
2 programs are not debates but are programs covered by the press exemption.<sup>34</sup> The Commission  
3 has previously concluded that separately taped interviews aired back-to-back did not constitute a  
4 debate.<sup>35</sup> In situations where a debate was planned but candidates dropped out and a press entity  
5 proceeded with some other type of single candidate programming, the Commission has analyzed  
6 the programming that took the debate’s place under the press exemption.<sup>36</sup>

7           The available information supports the conclusion that CNN did not stage a debate and  
8 therefore the debate regulations did not apply to CNN’s airing of the O’Rourke town hall.  
9 Instead, the record indicates that the press exemption covers CNN’s town hall with O’Rourke.  
10 CNN has been recognized by the Commission as a press entity that produces news stories on a  
11 regular basis.<sup>37</sup> Complainant does not dispute CNN’s status as a press entity<sup>38</sup> and does not  
12 allege that CNN is owned or controlled by a political party, political committee, or federal  
13 candidate.<sup>39</sup>

14           Furthermore, it appears that CNN was acting in its legitimate press function when it aired  
15 the O’Rourke town hall. The town hall was available to the general public and was similar in

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<sup>34</sup> Advisory Op 1996-16 (Bloomberg) at 3 (analyzing a town hall event and concluding that because the means of presentation were controlled by the press entity that the event would be covered by the press exemption).

<sup>35</sup> Advisory Op. 1996-41 (Belo) (holding that a press entity was entitled to the media exemption, and that the debate regulations did not apply, when it separately interviewed candidates and aired their responses back-to-back).

<sup>36</sup> See F&LA at 7, MUR 6131 (Public Television 19, Inc.) (finding that a program that ensued after a cancelled debate, even though it was allegedly described as a debate by the moderator and the press, was activity covered by the press exemption).

<sup>37</sup> F&LA at 4, MUR 7231.

<sup>38</sup> See 11 C.F.R. § 100.73.

<sup>39</sup> See Addendum to Compl. at 4. (“Please note that the complainant . . . does not challenge the legitimacy of CNN as a press entity. . .”).



1 form to other news programs produced by CNN. CNN explains that it produced a number of  
2 town hall styled interviews featuring Republican, Democratic, and independent presidential  
3 candidates, as well as thousands of interviews of candidates for public office in a variety of  
4 different settings and circumstances, and states that the O'Rourke town hall was comparable in  
5 form to other news programs produced by CNN.<sup>40</sup>

6 The Complaint's allegations that the town hall resulted in a prohibited corporate  
7 contribution from CNN to the Committee is premised on its mistaken application of the press  
8 exemption. The Complaint contends that the fact that O'Rourke was the only Texas senatorial  
9 candidate to receive a town hall violates the Act because it constitutes a lack of equal coverage.<sup>41</sup>  
10 However, only press entities who are owned or controlled by a political party, political  
11 committee, or candidate are required "to give reasonably equal coverage to all opposing  
12 candidates" in order to claim the press exemption.<sup>42</sup> Similarly, Complainant's contention that  
13 CNN should have only provided O'Rourke with half the coverage time initially allotted for the  
14 debate with Cruz to comply with the Act and Commission regulations is unavailing. CNN was  
15 entitled to make its own determinations of what content was newsworthy when it elected to  
16 abandon the planned debate and fill the available hour with a town-hall styled program.<sup>43</sup>

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<sup>40</sup> See CNN's Resp. at 1-2, fn. 1; Paul Farhi, *Pick me! A big field of Democratic candidates waits for a turn in CNN's town-hall spotlight*, WASHINGTON POST, Feb. 16, 2019, [https://wapo.st/2N9GYW3?tid=ss\\_mail&utm\\_term=.1ddc60af4aaa](https://wapo.st/2N9GYW3?tid=ss_mail&utm_term=.1ddc60af4aaa).

<sup>41</sup> Addendum to Compl. at 2.

<sup>42</sup> See F&LA at 5-7, MUR 7206 (Bonneville Int'l Corp.); see also 11 C.F.R. §§ 100.73 and 100.132; *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) ("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 official – whether fair or unfair – constitute the exercise of editorial control and judgment.")

<sup>43</sup> See F&LA at 7, MUR 6131.

1 Furthermore, the Commission has long recognized that an entity otherwise eligible for the  
2 exemption “would not lose its eligibility merely because of a lack of objectivity in a news story,  
3 commentary, or editorial, even if the news story, commentary, or editorial expressly advocates  
4 the election or defeat of a clearly identified candidate for federal office.”<sup>44</sup> As a result, the press  
5 exemption applies to CNN’s airing of the O’Rourke town hall.<sup>45</sup> Accordingly, we recommend  
6 that the Commission find no reason to believe that CNN violated 52 U.S.C.  
7 § 30118(a) by making a prohibited corporate contribution in connection with the town hall and  
8 find no reason to believe that the Committee violated 52 U.S.C. §30118(a) by accepting a  
9 prohibited corporate contribution in connection with the town hall.

#### 10 **IV. RECOMMENDATIONS**

- 11 1. Find no reason to believe that CNN Broadcasting, Inc., violated 52 U.S.C. § 30118(a)  
12 by making a prohibited corporate contribution in connection with the town hall;  
13
- 14 2. Find no reason to believe that Beto for Texas and Gwendolyn Pulido in her official  
15 capacity as treasurer violated 52 U.S.C. § 30118(a) by accepting a prohibited  
16 corporate contribution;  
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- 18 3. Approve the attached Factual and Legal Analysis;  
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- 20 4. Approve the appropriate letters;  
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- 22 5. Close the file.  
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<sup>44</sup> F&LA at 5, MUR 7206; *see also* Factual & Legal Analysis at 3, MUR 6579 (ABC News, Inc.); F&LA at 8-9, MUR 6111 (WOSU Public Media) (public radio call-in show that featured some political candidates when excluding others constituted legitimate press activity).

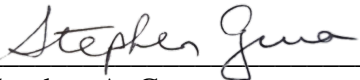
<sup>45</sup> Although CNN suggests that it used objective pre-established criteria to exclude the Libertarian candidate, we do not need to reach this issue since CNN did not end up sponsoring a debate. *See supra* at 8-9; *cf.* F&LA at 4, MUR 6131 (finding no reason to believe that a debate staging organization violated the Act when the incumbent declined the invitation, only one remaining candidate satisfied its criteria, and it canceled the planned debate in favor of a single candidate interview subject to the press exemption).

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5.13.19  
Date

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