



ASHBY

July 1, 2022

VIA E-MAIL TO CELA@FEC.GOV

Federal Election Commission
Office of Complaints Examination
and Legal Administration
1050 First Street, NE
Washington, DC 20463

Attn: Christal Dennis, Paralegal

MUR 7998: Response of JD Vance for Senate Inc.

To Whom It May Concern:

On behalf of JD Vance for Senate Inc. and its treasurer, Lisa Lisker, I submit this response to John Berman's manifesto on the Rooker-Feldman doctrine, which the Office of Complaints Examination and Legal Administration generously construed as a complaint and docketed in MUR 7998.

Introduction

Over the course of its ten single-spaced pages, Mr. Berman's complaint veers wildly from topic to topic—his own campaign for the Republican nomination for United States Senator from Ohio, policing practice in Minnesota, allegations of extortion and embezzlement of money by lawyers from trust funds, "stupidity, ignorance, and corruption" in domestic policy, "phony" state court judges, the unavailability of electronic filing privileges for non-lawyers, his personal travails with the legal system which included witnessing the invention of "a time-warp machine," and the U.S. Supreme Court's Rooker-Feldman doctrine regarding federal district court review of state court decisions, to highlight just a few. The complaint makes just one allegation against the Vance Committee, however—an allegation of coordination with Fox News which is, by its own terms, based "inferences." For this reason, and also because Fox News' reporting on the Ohio U.S. Senate campaign is exempt from the Act's definition of contribution and expenditure, the Commission should dismiss the complaint and close its file in this matter.



Facts

On or about October 14, 2021, Fox published an article on FoxNews.com entitled “Vance hauls in \$1.75M,” containing news reporting on candidate fundraising in the Ohio GOP U.S. Senate contest. Compl. at 6. The article’s headline apparently caused the complainant some distress, and the complaint details the lengths to which he went over a period of three weeks to have Fox change it, which included conducting his own fact-finding and contacting Fox, the Commission, and even the Courier Newspaper in Findlay, Ohio. Compl. at 7.

Initially, the complainant claims, his efforts were successful, as Fox changed the headline at issue to read “Vance hauls in over \$1 million.” Compl. at 7. But over the course of the next week, the complainant continued to reload the article in his web browser, until eventually he found that his success was short-lived. Fox, the complainant alleges, reverted the headline to its original report of \$1.75 million. Id.

According to the complainant, it is an “inference,” “a reasonable factual conclusion,” “[a] reasonable factual inference” and “reasonably app[arent]” that Fox and the Vance Committee coordinated the wording of the headline at issue. Compl. at 9. Although, the complainant concedes, his accusation is “*not* necessarily true” and “not necessarily the case, but it appears that way.” Id. (emphasis in original).

Analysis

1. The Commission lacks subject matter jurisdiction over the complaint because the news story at issue was published by a media entity that is entitled to the media exemption.

“[A]ny news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication,” is exempt from the Act’s definition of contribution and expenditure, “unless such facilities are owned or controlled by any political party, political committee or candidate.” 52 U.S.C. § 30101(9)(b) (emphasis added); see also 11 C.F.R. §§ 100.72 (extending the exemption to contributions as well as expenditures), 100.132 (extending the exemption to websites, Internet and electronic publications). This provision is known as “the media exemption.”

When determining whether an entity is entitled to the media exemption, the Commission and courts ask first whether the entity is controlled by a candidate, party or political committee, and then whether it is acting as a media entity in conducting the activity. FEC v. Phillips Publishing, Inc., 517 F. Supp. 1308, 1313 (D.D.C. 1981); Readers Digest Ass’n, Inc. v. FEC, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981); see also FEC AO 2010-08 (Citizens United) (Commission applies Readers Digest test when determining entitlement to media exemption). “If the press entity is not owned or controlled by any political party, political committee, or candidate, and if it is acting as a press entity with respect to the conduct in question, the Commission lacks subject matter jurisdiction over the complaint.” MUR 6242, Factual & Legal Analysis at 5 (citing Readers Digest, 517 F. Supp. at 1313).



In this MUR, the complaint quotes the news article at issue, which states that the Vance Committee “shar[ed] their fundraising figures” with Fox. Compl. at 6. The complainant clearly suspects that the Vance Committee engaged with Fox journalists and foiled his efforts to correct what he regarded as a “typo” in Fox’s headline. Compl. at 9. This, the complaint postulates, amounts to “the appearance of candidate control of a news entity.” Id.¹ This allegation is absurd, and falls far short of the bar established for candidate control of a media entity by numerous of the Commission’s prior matters. See, e.g., MUR 6242, Factual & Legal Analysis at 6 (“Commission decisions on past MURs involving radio talk show hosts who later become candidates have never found that a host/candidate ‘owned or controlled’ **the entity** for purposes of the press exemption on the basis that the host/candidate had a role in determining **program content**.” (emphasis added)); MUR 4689, Statement of Reasons of Comm’rs Wold, Elliott, Mason & Sandstrom at 1-2 (declining to find reason to believe that candidate controlled a media **entity** which permitted the candidate to guest host radio broadcasts without restriction as to **content**).

The complaint argues that the Commission should find candidate control because—it speculates, without any evidence whatsoever—“the candidate just phoned it in, and the news entity printed it without any independent confirmation.” But Commission precedent forecloses this argument. See MUR 5540, 5545, 5562 & 5570, Statement of Reasons of Comm’r Weintraub at 2 (“Whether particular broadcasts were fair, balanced, or even accurate is irrelevant given the applicability of the press exemption.”); MUR 5569, First Gen’l Counsel’s Rpt. at 7 (citing MURs 4929, 5006, 5090 & 5117, Statement of Reasons of Comm’rs Wold, McDonald, Mason, Sandstrom & Thomas (“Unbalanced news reporting and commentary are included in the activities protected by the media exemption.”)); AO 2005-15 at 6 (“An entity otherwise eligible for the press exception would not lose its eligibility merely because of a lack of objectivity.”).

Where, as here, the media entity in question “is one of the largest . . . broadcasting companies in the United States” and is quite obviously “not owned or controlled by a political party, committee or candidate[,] [t]he sole question . . . is whether, in the course of the facts and events stated . . . the station was acting within its legitimate press function.” MUR 5555, First Gen’l Counsel’s Rpt. at 5. The complaint does not allege that Fox was not acting within its legitimate press function, nor could it, as Fox very clearly was in this case when it published reporting on the campaign for the Republican nomination for United States Senator from Ohio. Therefore, the Commission lacks subject matter jurisdiction over this complaint, should dismiss it and close the file in this matter.

2. Alternatively, the Commission should dismiss the complaint because its presents no evidence for its claims, but instead is based—expressly—on inference.

A “coordinated communication” is one that is paid for by someone other than a candidate or a candidate’s authorized committee, satisfies one of the enumerated “content” standards at 11 C.F.R. § 109.21(c), and satisfies one of the enumerated “conduct” standards at 11 C.F.R. §

¹ Amusingly, it appears that Mr. Berman was himself likely still a candidate for the Republican nomination for United States Senator from Ohio at the time he engaged with Fox journalists to attempt to shape the headline that is now the focus of this matter—at least according to the timing of filing of his various Statements of Candidacy and the Statements of Organization for his authorized campaign committee, Make America Geeky Again, on file with the Commission.



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109.21(d). A coordinated communication is an in-kind contribution to the candidate with whom it was coordinated, 11 C.F.R. § 109.21(b), and is subject to the Act's amount limitations and source prohibitions. 11 C.F.R. § 109.22.

Commission precedent makes clear that mere speculation and inference is not a sufficient basis to find reason to believe that coordination occurred around a communication. For instance, in MUR 5576, a complaint alleged that the New Democrat Network coordinated a television advertisement criticizing unnamed "Republicans" with Tony Knowles for U.S. Senate because it used the Knowles Committee's media buying firm to place its ad. The complaint stated that "it is unclear whether the NDN has produced and distributed these ads at the suggestion or request of . . . or after substantial discussions with the Knowles Committee," but posited that it was "'not possible' that the media buying firm was 'not aware' of various activities of the Knowles Committee and . . . also not 'materially involved' in certain discussions with NDN." MUR 5576, Compl. at 2, First Gen'l Counsel's Rpt. at 5 & fn. 7. The Office of General Counsel stated that "**completely speculative" allegations are "not sufficient to support a reason to believe recommendation.**" MUR 5576, First Gen'l Counsel's Rpt. at 5 & fn. 7 (citing MUR 4960, Statement of Reasons of Comm'r Mason, Sandstrom, Smith & Thomas ("Unwarranted legal conclusions from asserted facts . . . or mere speculation will not be accepted as true.")). The Commission accepted the recommendations of the First General Counsel's Report and found no reason to believe the New Democrat Network coordinated the TV ad at issue.

Similarly, in MUR 7169, complaints alleged "close and ongoing coordination" around fifteen television ads that aired during the 2016 election but did not provide any specific facts to support the allegation. MUR 7169, Compl. at 9, First Gen'l Counsel's Report at 12. On that bare allegation, the Commission accepted the Office of General Counsel's recommendation that there was "no basis" to find reason to believe the ads were coordinated. MUR 7169, First General Counsel Report at 12. Likewise, in MUR 6740, the Commission accepted the Office of General Counsel's recommendation against finding reason to believe based upon "unsupported" and "speculative" allegations that a candidate "may have been coordinating expenditures or communications" with a Super PAC through a common donor.

In this matter, the complaint offers no facts regarding the alleged coordination. Instead, it merely speculates that "[s]ince [Fox News] reverted the number to \$1.75M, a reasonable factual inference is that contact was later made" between Fox and the Vance Committee, and Fox "reverted the number as a result." Compl. at 9. This inference, standing alone as it does, is insufficient to establish reason to believe coordination has occurred. I urge the Commission to dismiss this complaint and close the file in this MUR accordingly.

Sincerely,

Chris Ashby