FEDERAL ELECTION COMMISSION
Washington, DC 20463

VIA ELECTRONIC AND CERTIFIED MAIL
RETURN RECEIPT REQUESTED

February 15, 2023

John Berman
P.O. Box 831
Richland, WA 99352

RE: MUR 7998

Dear Mr. Berman:

On February 7, 2023, the Federal Election Commission reviewed the allegations in your complaint received May 16, 2022, and on the basis of the information provided in the complaint, and information provided by respondents, decided to exercise its prosecutorial discretion to dismiss the allegations in this matter. Accordingly, on February 7, 2023, the Commission closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016), effective September 1, 2016. A copy of the General Counsel's Report, which more fully explains the Commission's finding, is enclosed.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 52 U.S.C. § 30109(a)(8).

Sincerely,

Lisa J. Stevenson
Acting General Counsel

Roy Q. Luckett

BY: Roy Q. Luckett
Acting Assistant General Counsel

Enclosure
General Counsel's Report

BEFORE THE FEDERAL ELECTION COMMISSION

ENFORCEMENT PRIORITY SYSTEM
DISMISSAL REPORT

MUR 7998

Respondents: Fox News Network, LLC
JD Vance for Senate Inc. and Lisa Lisker in her official capacity as treasurer
Protect Ohio Values PAC (POV PAC) and Vicki J. Hoffmann in her official capacity as treasurer
Ohioans for JD and Lisa Lisker in her official capacity as treasurer

Complaint Receipt Date: May 16, 2022
Response Dates: June 10, 2022; July 1, 2022; July 15, 2022

Alleged Statutory and Regulatory Violations: 52 U.S.C. § 30118(a)
11 C.F.R. § 114.2(b), (d)

The Complaint suggests that Fox News Network, LLC ("Fox News") made and JD Vance for Senate Inc. and Lisa Lisker in her official capacity as treasurer (the "Committee") knowingly accepted or received prohibited in-kind corporate contributions in violation of the Federal Election Campaign Act of 1971, as amended (the "Act"). Specifically, the Complaint focuses on a Fox News online article on the fundraising of JD Vance, the Committee's authorizing candidate, during his 2022 race for U.S. Senate in Ohio.[1] The Complaint contends that the story inflated the amount of money Vance raised, and that the incorrect number likely resulted from communications between Vance and Fox News and was ultimately published without independent verification.[2] As a result,

[1] JD Vance for Senate Inc., Amended Statement of Organization at 2 (Nov. 28, 2022); *see* Compl. at 1, 6-9 (May 16, 2022); *see* Paul Steinhauser, *Ohio Senate Candidate JD Vance Hauls in $1.75 Million During First 3 Months of his GOP Campaign*, FOX NEWS (Oct. 14, 2021), https://www.foxnews.com/politics/jd-vance-ohio-senate-campaign-fundraising (cited by Compl. at 6).

[2] Compl. at 6-7, 9.

the Complaint alleges that Vance controlled Fox News.[3] Accordingly, the Complaint argues that Fox News could not exempt its costs related to covering or carrying the story, and potentially its coverage of Vance more generally, from regulation as contributions or expenditures under the Act and the Commission's regulations.[4] The Complaint also suggests, without elaboration, that Protect Ohio Values PAC (POV PAC) and Vicki J. Hoffmann in her official capacity as treasurer ("POV"), a hybrid PAC, and Ohioans for JD and Lisa Lisker in her official capacity as treasurer ("Ohioans for JD"), a joint fundraising committee, may have had a role in controlling distribution of stories on Fox News.[5]

In response, Fox News contends that it is not owned or controlled by any political party, committee, or candidate, and that its news stories are covered by the media exemption to the regulation of contributions and expenditures.[6] Fox News further contends that, even if its reporter communicated with the Committee about a story, talking with campaign representatives is a "common journalistic practice and entirely consistent with the [Act's] media exemption."[7] The Committee also contends that Vance did not control Fox News and, further, that the Complaint offers no evidence indicating that the fundraising story would qualify as a coordinated communication under the Act.[8] Finally, POV and Ohioans for JD argue that the Complaint provides no specific information on how they are alleged to have violated the Act.[9]

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3 *Id.* at 9.

4 *See id.* at 1, 6-9.

5 *Id.* at 1; Protect Ohio Values PAC (POV PAC), Amended Statement of Organization at 5 (Nov. 15, 2021); Ohioans for JD, Statement of Organization at 2 (July 1, 2021).

6 Fox News Resp. at 5-7 (July 15, 2022).

7 *Id.* at 7. Fox News also argues that the Complaint is insufficient on its face because the allegations it makes are purely speculative. *Id.* at 5.

8 Committee Resp. at 2-4 (July 1, 2022).

9 POV Resp. at 1 (June 10, 2022); Ohioans for JD Resp. at 1 (July 1, 2022).

The Act and Commission regulations exclude from the definitions of "contribution" and "expenditure" the costs incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, newspaper, web site, magazine, or other periodical publication, including an internet or electronic publication, unless the facility is owned or controlled by any political party, political committee, or candidate.[10] Costs covered by this so-called press or media exemption are also exempt from the Act's disclosure and reporting requirements.[11]

To assess whether the press exemption applies, the Commission uses a two-part test.[12] The first inquiry is whether the entity engaging in the activity is a press or media entity.[13] Next, the Commission determines the scope of the exemption using the two-part analysis from *Reader's Digest Association v. FEC*: (1) whether the entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the entity is acting within its "legitimate press function" in conducting the activity.[14] An entity otherwise eligible for the press 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."[15]

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[10] 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. § 100.73 (excluding *bona fide* news coverage from the definition of "contribution"); *id.* § 100.132 (same as to the definition of "expenditure").

[11] Advisory Opinion 2011-11 at 6 (Colbert) ("AO 2011-11"); Factual & Legal Analysis ("F&LA") at 5, MUR 7206 (Bonneville Int'l Corp.).

[12] Advisory Opinion 2008-14 at 4 (Melothé, Inc.) ("AO 2008-14"); F&LA at 5-6, MUR 7515 (CNN Broadcasting, Inc., *et al.*).

[13] AO 2008-14 at 4.

[14] *See Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1214-15 (S.D.N.Y. 1981); AO 2011-11 at 6-7. When determining whether the entity was acting within the scope of a legitimate press function at the time of the alleged violation, the Commission considers two factors: (1) whether the entity's materials are available to the general public; and (2) whether they are comparable in form to those ordinarily issued by the entity. F&LA at 4, MUR 7231 (CNN); Advisory Opinion 2016-01 at 3 (Ethiq).

[15] F&LA at 5, MUR 7206 (Bonneville Int'l Corp.) (quotation marks omitted) (quoting Advisory Opinion 2005-16 at 6 (Fired Up)); F&LA at 3, MUR 6579 (ABC News, Inc.).

The record indicates that Fox News is a press entity and is not owned by a political party, political committee, or candidate.[16] As to whether Vance controlled Fox News, the allegation appears to rest on the Complaint's premise that Fox News received and published an incorrect fundraising figure from Vance. But the Complaint offers no information suggesting that Vance, the Committee, POV, or Ohioans for JD had any role in Fox News's decision to use that information, or in any other decisions or operations of Fox News, and a candidate does not control a press entity merely because it publishes statements the candidate makes.[17] Finally, it appears that when Fox News disseminated the article about Vance's fundraising, it was operating within a legitimate press function.

Based on its experience and expertise, the Commission has established an Enforcement 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 apparent applicability of the press exemption, we recommend that the Commission dismiss the Complaint consistent with the Commission's prosecutorial discretion to determine the proper

[16] Fox News Resp. at 2, 6 (stating that Fox News a 24-hour news service that "has been the most watched television news channel for more than 20 consecutive years" and that it is "ultimately owned and controlled by a publicly-traded company, Fox Corporation"); *see* Advisory Opinion 2010-08 at 5 (Citizens United) (stating that to determine whether an entity is a "press entity" the Commission looks to "whether the entity in question produces on a regular basis a program that disseminates news stories, commentary, and/or editorials").

[17] *See* F&LA at 7, MUR 7515 (CNN Broadcasting, Inc., *et al.*) (finding that CNN was covered by the press exemption when it aired a town hall with a single candidate for U.S. Senate).

ordering of its priorities and use of agency resources.[18] We also recommend that the Commission close the file and send the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Associate General Counsel

12/14/2022
Date

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Roy Q. Luckett
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[18] *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).