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November 27, 2024

Lisa J. Stevenson
Acting General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

VIA EMAIL: cela@fec.gov**RE: MUR 8301 – Response of Never Surrender, Inc.¹**

Dear Ms. Stevenson:

The Complaint in this matter alleges that X made, and Never Surrender, Inc. (the “Campaign”) accepted, an impermissible corporate contribution when X hosted a live stream conversation between X owner Mr. Elon Musk and President Trump (the “Conversation”).

The Complaint is wrong for at least two independent and adequate reasons. First, the dissemination of the Conversation for free over the internet on one’s own website is protected by the internet exemption. And second, even if it were not, the Conversation is covered by the press exemption.

Because the Conversation is not a contribution under the Federal Election Campaign Act of 1971, as amended (the “Act”), there is no reason to believe a violation occurred and this matter must be dismissed.

I. The Internet Exemption

Commission regulations exclude from the definition of “contribution” and “expenditure” the uncompensated services or use of equipment for “Internet activities” including “[s]ending or forwarding electronic messages; providing a hyperlink or other direct access to another person’s website; blogging; creating, maintaining, or hosting a Web site; paying a nominal fee for the use of another person’s website; and any other form of communication distributed over the Internet.”² This provision also applies “to any corporation that is wholly owned by one or more individuals,

¹ After the Complaint in this matter was filed and following the 2024 general election, Donald J. Trump for President 2024, Inc., converted from an authorized campaign committee and changed its name to Never Surrender, Inc. See FEC Form 1 (Amended Statement of Organization), <https://docquery.fec.gov/cgi-bin/forms/C00828541/1848570/>.

² 11 C.F.R. §§ 100.94, 100.155.

that engages primarily in Internet activities, and that does not derive a substantial portion of its revenues from sources other than income from its Internet activities.”³

Commission regulations also exclude uncompensated internet activity from the definition of “coordinated communications.”

Under Commission regulations, in order to be a “coordinated communication”—and thus an in-kind contribution to a candidate—a communication must satisfy each prong of a three-part test: It must be paid for by a third party, it must satisfy one of five content standards, and there must be certain coordinating conduct.⁴ The five communications that satisfy the “content” standard are electioneering communications, public communications that republish campaign materials, public communications that expressly advocate the election or defeat of federal candidates, public communications that reference candidates or parties within certain windows, and public communications that are the functional equivalent of express advocacy.⁵

Electioneering communications are limited to “broadcast, cable, or satellite communication[s].”⁶ An internet live stream like the one at issue here is not an electioneering communication.” Thus, to be a coordinated communication, it must be a “public communication.”

The term “public communication” does not include “communications over the internet, except for communications placed or promoted for a fee on another person's website, digital device, application, or advertising platform.”⁷

X is an internet platform. The Complaint alleges that X made the communication in question, thus, it is not “another person’s website.” Moreover, there is no allegation that any third party paid X to host the Conversation between President Trump and Mr. Musk. Thus, what we are left with is a live stream that was transmitted over the internet on a company’s own website. This is classic internet exemption activity.

The use of X resources to host the Conversation does not change this analysis. Unlike in *Campaign Legal Center v. FEC*, the use of resources in this matter are not “only tangentially related to an eventual internet message or post.”⁸ Rather, they are directly related to the creation and dissemination of the Conversation. As Chairman Cooksey explained, “[p]roperly interpreted, the internet exemption provides that unpaid internet communications, as well as the input costs of producing and disseminating those communications, are not public communications or

³ 11 C.F.R. §§ 100.94(d), 100.155(d).

⁴ 11 C.F.R. § 109.21.

⁵ 11 C.F.R. § 109.21(c).

⁶ See 52 U.S.C. 30104(f)(3); 11 C.F.R. § 100.29.

⁷ 11 C.F.R. § 100.26.

⁸ 106 F.4th 1175, 1179 (D.C. Cir. 2024).

coordinated expenditures.”⁹ Any costs incurred by X concerning the Conversation would be core input costs for producing and disseminating an exempt communication. They would not transform an otherwise exempt communication into a “contribution.”

The Conversation is an uncompensated internet communication hosted on the company’s own website. Thus, it falls squarely within the scope of the internet exemption and is not a contribution.

II. The Press Exemption

The Act exempts from the definition of “expenditure” “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.”¹⁰ Commission regulations are more specific, exempting “[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), *website*, newspaper, magazine, or other periodical publication, including *any Internet or electronic publication*” from the definition of “contribution” and “expenditure,” provided the facility is not “owned or controlled by any political party, political committee, or candidate.”¹¹

In Advisory Opinion 2023-10 (Sony Pictures Television, Inc.), the Commission reaffirmed its longstanding framework for analyzing questions under the press exemption, stating:

The Commission has historically conducted a two-step analysis to determine whether the media exemption applies. First, the Commission asks whether the entity engaging in the activity is a press or media entity.[footnote omitted] Second, the Commission applies the two-part analysis presented in *Reader’s Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), which requires it to determine:

(A) Whether the entity is owned or controlled by a political party, political committee, or candidate; and

(B) Whether the entity is acting as a press entity in conducting the activity at issue (*i.e.*, whether the press entity is acting in its “legitimate press function”).[footnote omitted]¹²

⁹ MUR 7146R (Correct the Record, *et al.*) Statement of Chairman Sean J. Cooksey at 7 (Nov. 6, 2024), https://www.fec.gov/files/legal/murs/7146R/7146R_22.pdf.

¹⁰ 52 U.S.C. § 30101(9)(B)(i).

¹¹ 11 C.F.R. § 100.73; 11 C.F.R. § 100.132 (emphasis added).

¹² Advisory Opinion 2023-10 (Sony Pictures Television, Inc.) at 4. *See also* *FEC v. Phillips Publ’g*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981); Advisory Opinions 2007-20 (XM Radio), 2005-19 (Inside Track), 2005-16 (Fired Up!), and 2004-07 (MTV).

As three Commissioners previously concluded, X is a press entity for purposes of the Act's media exemption.¹³ X is “best understood to be operating as a publisher engaged in legitimate media activities” because it is “functionally a free microblogging platform like other user driven news websites,” “[i]t allows hundreds of millions of users to publish original content and to share writing, photos, videos, and weblinks[,]” and it “sells advertising space, curates and summarizes news articles, and hosts live-streamed events.”¹⁴

X is not owned or controlled by any political party, committee, or candidate.

X was acting its “legitimate press function” by hosting the conversation between Mr. Musk and President Trump. As Chairman Cooksey's prior statement—issued nearly three years before Mr. Musk and President Trump's conversation, when X (then known as Twitter) was credibly accused of putting a thumb on the scale for left-wing causes—indicates, “host[ing] live-streamed events” is part of X's press function. Moreover, the ability to host live streamed conversations is not limited. Anyone can, and many users do, use the platform to do so, irrespective of their political ideology.¹⁵

The Complaint suggests that the Conversation is distinguishable because “the owner's hosting a livestream event with a candidate featuring express advocacy is a departure from these usual hosting-and-content-moderation functions.”¹⁶ But it provides no explanation for why this is so. In addition to being the owner, Mr. Musk is also a frequent user of the X platform. His use of the platform to live stream a conversation with President Trump is consistent with the use of the platform by other users. For example, Joe Rogan posted a conversation with President Trump that he recorded for the Joe Rogan Experience Podcast on X where it garnered over 25 million views.¹⁷

X is a press entity for purposes of the Commission's media exemption. It is not owned or controlled by any political party or candidate. And it acted well within the scope of its legitimate press function by hosting a highly informative conversation with the next President of the United States. X is thus entitled to the protections of the press exemption in this matter and has not made a contribution to the Campaign.

¹³ See MURs 7821, 7827 & 7868 (Twitter, Inc.), Supplemental Statement of Reasons of Vice Chair Allen Dickerson and Commissioner James E. “Trey” Trainor III at 5-9 (Sept. 13, 2021), https://www.fec.gov/files/legal/murs/7821/7821_13.pdf; MURs 7821, 7827 & 7868 (Twitter, Inc.), Statement of Reasons of Commissioner Sean J. Cooksey (Sept. 13, 2021), https://www.fec.gov/files/legal/murs/7821/7821_12.pdf.

¹⁴ See MURs 7821, 7827 & 7868 (Twitter, Inc.), Statement of Reasons of Commissioner Sean J. Cooksey at 3 (Sept. 13, 2021), https://www.fec.gov/files/legal/murs/7821/7821_12.pdf.

¹⁵ See *How to create live videos on X*, <https://help.x.com/en/using-x/x-live>.

¹⁶ Compl. at 4.

¹⁷ See <https://x.com/joerogan/status/1851117181964046431>.

III. Conclusion

For at least two independent and adequate reasons, X did not make, and President Trump did not accept a contribution. Accordingly, there is no reason to believe a violation of the Act occurred and the Complaint in this matter must be dismissed.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Gary M. Lawkowski", with a stylized flourish at the end.

Gary M. Lawkowski