

# GIBSON DUNN

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November 15, 2024

## VIA ELECTRONIC MAIL

Wanda D. Brown  
Assistant General Counsel  
Complaints Examination & Legal Administration  
Federal Election Commission  
1050 First Street, NE  
Washington, DC 20463

Re: MUR 8328 – Response to Complaint Against National Public Radio, Inc. for Alleged Violations of 11 C.F.R. § 100.73

Dear Ms. Brown:

We write this letter on behalf of National Public Radio, Inc. (“NPR” or the “Organization”), in response to the complaint (the “Complaint”) filed in the above-captioned matter and dated October 10, 2024. Alexander Tomescu, the United States Justice Foundation, and Policy Issues Institute (“Complainants”) filed the Complaint, claiming that NPR, through its news coverage, engaged in express advocacy in support of the Democratic nominee for President of the United States and, therefore, was allegedly not acting as a bona fide news organization. Complainants further allege that NPR is not entitled to the well-established “press exemption.”<sup>1</sup> See 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132. The Complainants are incorrect.

These allegations are factually and legally baseless. Moreover, the Commission previously addressed a similar, unfounded complaint made against NPR in 2017. The Commission dismissed that complaint in short order, concluding that NPR’s activities fall well-within the press exemption. MUR 7230 (NPR) (June 2, 2017). The FEC specifically held that (i) NPR is not owned or operated by a political party, political committee, or candidate and (ii) NPR’s dissemination of news is a legitimate press function. *Id.* at 3.

Here, the Complainants have failed to put forward any compelling—or even colorable—reason to disturb the Commission’s prior conclusions. Under a straightforward application of the Commission’s longstanding legal framework, no further investigation is warranted.

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<sup>1</sup> The Commission uses “press exemption” and “media exemption” synonymously. See Advisory Opinion 2019-05 at 3 n.4 (System73).

# GIBSON DUNN

Wanda D. Brown  
November 15, 2024  
Page 2

**CONFIDENTIAL**

## Legal Standard

FECA defines the term “contribution” and “expenditure” to mean any gift of money or “anything of value” made in connection with a federal election. 52 U.S.C. § 30118(b). Importantly, Commission regulations exempt bona fide media organizations from FECA’s coverage (the “press exemption”). Under the press exemption, “any 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” is exempt from FECA’s definitions of “contribution” and “expenditure.” See 11 C.F.R. §§ 100.73, 100.132.

To determine whether an entity is covered by the press exemption, the Commission applies a two-step framework. First, the Commission considers whether the entity engaging in the activity is a “press or media entity” within the meaning of FECA. See, e.g., Advisory Opinion 2011-11 at 6 (Colbert). In determining whether an organization is properly considered a “press entity,” the Commission focuses “on whether the entity produces, on a regular basis, a program that disseminates news stories, editorials, and/or commentary.” See, e.g., Advisory Opinions 2010-08 at 5 (Citizens United); 2007-20 at 4 (XM Radio). Second, the Commission considers (1) whether such entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the press entity is acting as a press entity in conducting the activity at issue (i.e., whether the entity is acting in its “legitimate press function”). See *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); see also Advisory Opinion 2016-01 (Ethiq).

## NPR Is A Press Entity.

There can be no reasonable debate as to whether NPR is a press entity. The Commission concluded that it was in 2017. MUR 7230. That remains the case today.

NPR produces and distributes news content that reaches an audience of 41 million listeners and readers across platforms each week. It provides coverage of critical news stories from a variety of contexts, including politics, music, culture, science, and world events. NPR’s editorial content is distributed through, for example, radio broadcast by its Member stations, smart speakers, NPR.org, social media, newsletters and on NPR apps and podcasts.<sup>2</sup> The vast majority of NPR’s budget is therefore “devoted to the production and distribution” of its news coverage. Advisory Opinion 2010-08 at 5 (Citizens United) (“given that Citizens United produces documentaries on a regular basis, the Commission concludes it is a press entity”). Accordingly, NPR fits comfortably

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<sup>2</sup> NPR, “About NPR,” (accessed Nov. 15, 2024), <https://www.npr.org/about>.

# GIBSON DUNN

Wanda D. Brown  
November 15, 2024  
Page 3

**CONFIDENTIAL**

within the Commission’s “broad interpretation” of a press entity. *Id.*; *see also* 2005-16 (Fired Up!).

Critically, the Complainants fail to argue that NPR is not a press entity. *See* Complaint at 4 (“NPR fails to operate like a *typical* news organization.”) (emphasis added). And they provide no examples of entities that were deemed not to qualify as a press or media entity. Indeed, the fact that Complainants can criticize the substance of NPR’s coverage of the 2024 election, which they are welcome to do, is paradigmatic evidence that NPR regularly disseminates news coverage. *See, e.g.*, Advisory Opinion 2019-05 at 4–5 (System73).

Instead, the Complaint is replete with baseless assertions that NPR’s election coverage has been orchestrated to favor the Democratic Party’s candidates (Joe Biden, Kamala Harris) and to harm the Republican Party’s candidate (Donald Trump). *E.g.*, Complaint at 3. As a factual matter, NPR rejects those allegations as categorically false. NPR, as an independent, nonprofit news organization, does not—and does not come close to—engaging in express advocacy for or against any candidate for public office. Nonetheless, even if Complainants could substantiate its allegations (which they could not), that would not jeopardize NPR’s status as a press entity. That is because the press exemption protects even those news organizations that, unlike NPR, provide commentary, analysis, and editorials that constitute *express advocacy* for particular candidates. *See* 11 C.F.R. §§ 100.73, 100.132. As the Commission has explained:

an entity otherwise eligible for the press exception 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.

Advisory Opinion 2005-16 at 6 (Fired Up!).

Complainants’ assertion that NPR engages in “express advocacy” as set forth in 52 U.S.C. § 30101(17) is therefore flat wrong. *See* Complaint at 2.

## NPR Is Not Controlled By A Political Party and Operates Well-Within Its Legitimate Press Function.

### **1. NPR Is Not Controlled By A Political Party, Political Committee, or Candidate.**

NPR is in no way controlled by any political party, political committee, or candidate. The second step of the Commission’s press exemption inquiry—determining whether the entity is controlled by a political party, political committee, or candidate—is equally straightforward. The

# GIBSON DUNN

Wanda D. Brown  
November 15, 2024  
Page 4

**CONFIDENTIAL**

Commission has made clear in multiple advisory opinions that “ownership or control” is a high bar. Indeed, the Commission has interpreted “control” to refer to something approaching an ownership interest. *See, e.g.*, Advisory Opinion 2023-10 at 5 (“The Commission assumes this also means that no political party, political committee, or candidate owns or controls any of the entities in Sony’s entire ownership chain, including the ultimate parent corporation.”); Advisory Opinion 2005-16 at 6 (“Fired Up is a for-profit LLC and is not owned or controlled by any political party, political committee, or candidate.”).

Here, no political party, political committee or candidate has an ownership stake in NPR. NPR is an independent, nonprofit media organization. For instance, “NPR’s two largest revenue sources are corporate sponsorships and fees paid by NPR Member organizations to support a suite of programs, tools, and services.” Its “[o]ther sources of revenue include institutional grants, individual contributions and fees paid by users of the Public Radio Satellite System (PRSS; *i.e.* Satellite interconnection and distribution).”<sup>3</sup> Indeed, just two presidential election cycles ago, the Commission concluded that NPR “is not owned or operated by a political party, political committee, or candidate.” MUR 7230 at 3 (NPR). NPR’s ownership structure has not changed since that time.

The Complainants offer the entirely incorrect allegation that “the Democratic Party exercises control over NPR.” Complaint at 4. Nothing could be further from the truth. In an attached report (the “Report”), USJF details political contributions made by several members of NPR’s Board of Directors in their *personal* capacity. *E.g.*, Report at 11, 14, 16–23. Those personal contributions, in Complainants’ view, somehow constitute evidence of the Democratic Party’s “constructive control of the NPR’s Board of Directors.” *Id.* at 9. Setting aside the fact that several of the identified contributions were to *Republican* candidates, neither the Complaint, nor the Report, identify a single political contribution made *by NPR* as an entity. Nor could they. Political contributions made by NPR’s directors or employees in their personal capacity do not in any way provide evidence that NPR is controlled by the Democratic Party or any party. It is not.

Moreover, the political contributions made by NPR’s directors or employees in their personal capacity are protected speech. *See, e.g., McCutcheon v. FEC*, 572 U.S. 185, 197 (2014). It is well-established that individuals have the right to support and contribute to whichever candidates they prefer. *See id.* at 191 (“The right to participate in democracy through political contributions is protected by the First Amendment”). Any investigation into NPR triggered by

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<sup>3</sup> NPR, “Public Radio Finances,” (accessed Nov. 15, 2024), <https://www.npr.org/about-npr/178660742/public-radio-finances>.

# GIBSON DUNN

Wanda D. Brown  
November 15, 2024  
Page 5

CONFIDENTIAL

personal political contributions would infringe on those individuals' ability to participate in the political process and necessarily intrude on their First Amendment freedoms.

## 2. NPR Acted Well-Within Its Legitimate Press Function.

NPR has been and is acting wholly within its legitimate press function. There are two considerations in determining whether an entity is engaging within its legitimate press function: whether (i) the entity's materials are available to the general public and (ii) whether those materials are comparable in form to those ordinarily issued by the entity. *See FEC v. Phillips Pub., Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981) (distribution of newsletters and other materials soliciting subscriptions were "part of the normal functions of a press entity). It is beyond dispute that NPR acted within its legitimate press function here.

*First*, all of the materials described in the Complaint are available to the general public. The Complainants refer in general terms to NPR's "coverage of the 2024 presidential election," including claiming that NPR's "editorial decisions and the presentation of the news by its employees and agents" constituted "express advocacy in favor of" President Biden and Vice President Harris. Complaint at 3. The Complainants do not contend that the materials described are not available to the general public. Nor could they. NPR's election coverage is not only available to the general public (as evidenced by its weekly audience across platforms of more than 41 million), but also freely accessible through radio broadcast by local public radio stations, or through the Internet, smart speakers, newsletters and on NPR apps and podcasts. *See* Advisory Opinion 2023-10 at 5 (Sony) ("The materials that Sony produces are available to the general public as they are widely distributed via network television stations and major streaming platforms.").

*Second*, the materials described in the Complaint take the same form as NPR's typical materials. For multiple decades, NPR has operated a website, NPR.org, containing news articles, analysis, and commentary—many of which cover ongoing elections, including presidential contests. NPR's broadcasting arm has been distributing content in a similar form for even longer. Since the 1970s, NPR has provided programming to local radio stations across the country, including in-depth and timely coverage of presidential elections. While the Complainants take issue with the *content* of NPR's 2020 and 2024 presidential election coverage, they have not—nor could they—suggest that the *form* of NPR's coverage is any different than other election cycles. That is because NPR distributed its 2020 and 2024 presidential election coverage via the same "form, function, and distribution method" as prior cycles. *See* Advisory Opinion 2023-10 (Sony) (television show *The Good Doctor* "is comparable to materials ordinarily issued by Sony as it is a serial fictional program similar in form, function, and distribution method to the numerous other television shows the company has produced.").

# GIBSON DUNN

Wanda D. Brown  
November 15, 2024  
Page 6

**CONFIDENTIAL**

Notably, USJF's Report does not alter the analysis. The Report criticizes, for example, NPR's airing of interviews with Democratic Congressman Adam Schiff, its coverage of the Hunter Biden laptop scandal, and its publication of stories about Russia and Ukraine (alleging that NPR omitted a "paid for" disclaimer). *E.g.*, Report at 5, 38. While the Complainants are free to criticize NPR's coverage and publications, all of the materials are available to the general public and take the customary form of NPR's coverage.

Accordingly, as with prior presidential elections, NPR conducted "normal, legitimate press functions" during the 2020 and 2024 presidential election cycles. *See Phillips Pub.*, 517 F. Supp. at 1313.

## The Commission Should Dismiss the Complaint With No Further Action.

Under the Commission's framework, it is beyond debate that NPR is a press entity that is not controlled by a political party, political committee, or candidate and that the Organization operated well-within its legitimate press function during the 2020 and 2024 presidential election cycles.

Complainants do not even *attempt* to apply the Commission's framework. They instead criticize the substance of NPR's news coverage, contending, incorrectly, that it favors Democratic candidates over Republican candidates. As noted above, even if those allegations were true (they are not), they would not provide grounds to remove the protections of the press exemption. Complainants nonetheless request that "the Commission commence an investigation" because they speculate that "discovery of documents, such as emails, texts, and written documents" would "offer proof of" their assertions. Complaint at 6.

But Complainants utterly failed to make any showing that NPR has violated FECA or Commission regulations. Any further inquiry is not only unwarranted, but would also waste the Commission's valuable resources and intrude on NPR's own First Amendment rights. *See Phillips Pub.*, 517 F. Supp. at 1314 ("There must be some threshold showing of wrongdoing on the part of respondent if the press exemption is to serve the purpose for which it was intended."); *Reader's Digest Ass'n*, 509 F. Supp. at 1214 (requiring that the Commission restrict its initial inquiry to whether the media exemption applies, in part because "freedom of the press is substantially eroded by investigation of the press, even if legal action is not taken following the investigation"); Advisory Opinion 2023-10 at 3 (Sony) (citing H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. At 4 (1974)) (explaining that the Commission has routinely recognized that "Congress did not intend for the Act to 'limit or burden in any way the First Amendment freedoms of the press and of association.'").

# GIBSON DUNN

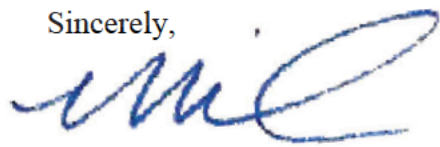
Wanda D. Brown  
November 15, 2024  
Page 7

**CONFIDENTIAL**

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For the reasons discussed above, NPR respectfully requests that the Commission dismiss the Complaint in this matter with no further action and close the file.

Sincerely,

A handwritten signature in blue ink, appearing to read "MBopp", written in a cursive style.

Michael D. Bopp

A handwritten signature in blue ink, appearing to read "Matthew McGill", written in a cursive style.

Matthew D. McGill