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December 23, 2024

Ms. Wanda Brown  
Federal Election Commission  
Office of Complaints Examination  
& Legal Administration  
1050 First Street, NE  
Washington, DC 20463**Re: MUR 8343 (Harris for President, *et al.*)**

Dear Ms. Brown:

We write on behalf of Respondent Harris for President (“Committee”) and Keana Spencer in her official capacity as Treasurer (together, “Respondents”) in response to the Complaint filed by Donald J. Trump for President 2024, Inc., and designated as MUR 8343.

The Complaint should be dismissed with no further action because it is based in speculation that cannot form the basis for a valid complaint under the Federal Election Campaign Act of 1971, as amended (“the Act”); because it fails to allege sufficient facts to allow Respondents to reply to the allegations; and because the alleged activities, even if factually supported, would be exempt from the Act’s restrictions under the Commission’s media exemption and the First Amendment.

The Complaint alleges that *The Washington Post* purchased advertisements promoting negative news stories about former President Trump but only promoted “relatively neutral” stories about Vice President Harris, and that those purchases met the Commission’s coordinated

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communications test, so amounted to in-kind contributions to the Committee.<sup>1</sup> The entire allegation rests on a single article from the website *Semafor*.<sup>2</sup> The article is entirely unsourced.<sup>3</sup>

The Complaint is both invalid on its face, and wrong as a matter for law. For any and all of the reasons outlined below, the Commission should find no reason to believe a violation of the Act occurred, and dismiss the Complaint.

**I. The Complaint is not valid on its face because it is purely speculative.**

The allegations as to Respondents in the Complaint are based purely on speculation, and what facts are alleged are not sufficient for Respondents to provide a response. Either requires dismissal of the Complaint.

A complaint cannot present mere speculation; it must present facts that if proven would show a violation of the law.<sup>4</sup> It cannot rely on “unwarranted legal conclusions.”<sup>5</sup> Nor can conclusory allegations without supporting evidence shift the burden to Respondents to rebut the claims.<sup>6</sup> And the Commission has expressly determined that a claim that something “must have” happened cannot support a reason to believe finding.<sup>7</sup>

But such speculation and unsupported conclusions about what “must have” happened are all that are present here. The Complaint alleges that *The Washington Post’s* advertising to promote its news coverage is a coordinated communication with, and therefore an in-kind

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<sup>1</sup> Compl. at 1-3. The Complaint also alleges in the alternative that the advertisements were an independent expenditure by *The Washington Post*. *Id.* at 3-5. Because the independent expenditure portion does not allege wrongdoing by Respondents, it is not addressed herein.

<sup>2</sup> *Id.* at 1-3 (citing Max Tani and Josh Billinson, *Washington Post Pays to Boost Stories Critical of Trump as Subscribers Flee*, *Semafor*, Oct. 30, 2024, <https://www.semafor.com/article/10/30/2024/washington-post-pays-to-boost-stories-critical-of-trump-as-subscribers-flee>).

<sup>3</sup> See Max Tani and Josh Billinson, *Washington Post Pays to Boost Stories Critical of Trump as Subscribers Flee*.

<sup>4</sup> See MUR 7868 (Twitter, Inc., *et al.*), Statement of Reasons of Vice Chair Dickerson and Comm’r Trainor at 4 (“At the reason-to-believe stage, we cannot proceed to authorize an investigation based upon ‘[u]nwarranted legal conclusions from asserted facts or mere speculation.’”) (quoting MUR 4960 (Clinton), Statement of Reasons of Comm’rs Mason, Sandstrom, Smith, and Thomas at 2 (Dec. 21, 2000)); see also MUR 7340 (Great America Committee), Response of Donald J. Trump for President, Inc. and Bradley T. Crate, as Treasurer (Apr. 30, 2018) (arguing same).

<sup>5</sup> MUR 4960 (Clinton), Statement of Reasons of Comm’rs Mason, Sandstrom, Smith, and Thomas at 2.

<sup>6</sup> See, e.g., FEC MUR 4850 (Deloitte & Touche, LLP), Statement of Reasons of Chairman Wold and Comm’rs Mason and Thomas at 2 (“The burden of proof does not shift to a respondent merely because a complaint is filed.”).

<sup>7</sup> See MUR 4960 (Clinton), Statement of Reasons of Comm’rs Mason, Sandstrom, Smith, and Thomas at 3.

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contribution to, the Committee.<sup>8</sup> For a communication to be a coordinated communication under Commission regulations, it must be paid for by a person other than the candidate or candidate's authorized committee; meet one of the "content" standards in the coordinated communication regulation; and meet one of the "conduct" standards of the coordinated communication regulation.<sup>9</sup> The Complaint alleges *The Washington Post* paid for the ads; that the ads identify former President Trump and Vice President Harris within 120 days of their election and thus meet the content standard; and that there was material involvement by the Committee in the ads, thus meeting the conduct standard.<sup>10</sup>

The Complaint can point to no facts supporting *any* of these three elements of the test. This is evident in the language of the Complaint itself, which can only refer to *The Washington Post* "reportedly" engaging in this activity, to "reportedly promoted articles," and the "reasonable inferences" it expects the Commission to draw from such speculation.<sup>11</sup> Neither the Complaint, nor the article on which it is based, include examples of the advertisements at issue or how to find the ads or any information about them. Absent such information, the Complaint only speculates that the advertisements were paid for by the newspaper and that they clearly identify former President Trump or Vice President Harris. This alone requires dismissal.

But even assuming the advertisements were paid for by *The Washington Post* and clearly identified Trump or Harris, the claim that the Committee was materially involved in the advertisements and thus satisfied the conduct standard is entirely speculative. The Complaint's "evidence" that the Committee was materially involved in the creation, production, or distribution of advertisements is:

1. A Committee staffer said, "Campaigns are not just responding anymore. Our job is to create the news."<sup>12</sup>
2. Some of the "reportedly promoted" stories have quotes from Vice President Harris, which is proof that the Committee has communicated with *The Washington Post*.<sup>13</sup>
3. The promoted content "mirrors" issues highlighted by the Committee – for example, one article in *The Washington Post* was about how the Committee highlighted that people

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<sup>8</sup> Compl. at 2-3.

<sup>9</sup> See 11 C.F.R. § 109.21.

<sup>10</sup> Compl. at 2-3.

<sup>11</sup> See *id.* at 1-3.

<sup>12</sup> *Id.* at 3 (citing Drew Harwell, *The "Feral 25-Year-Olds" Making Kamala Harris Go Viral on TikTok*, *The Washington Post*, Sept. 13, 2024, <https://www.washingtonpost.com/technology/2024/09/13/harris-tiktok-social-media-team/>).

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

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were leaving Complainant's rallies early, and then a month later the newspaper *similarly* published an article about people leaving Complainant's rallies early.<sup>14</sup>

This "evidence" of coordination barely requires serious response:

1. The Complaint takes the "create the news" excerpt out of context; placed in the actual context of an article about making content "go viral," the clear meaning is that the staffers are working to drive the news stories of the day with their content.
2. In addition, *The Washington Post* is one of the nation's leading newspapers, so of course Vice President Harris and the Committee have communicated with it; no proof is offered that the communications included material involvement in decisions regarding the content, audience, means, mode, outlet, timing, or frequency of the advertisements, as required by the conduct standard.<sup>15</sup> In fact, the very same *Washington Post* articles cited in the Complaint "include multiple quotes with" Trump campaign officials, which similarly would "confirm that there have been communications between *The Washington Post* and the" Trump campaign.<sup>16</sup>
3. Finally, the fact that the Committee effectively communicated its message about people leaving Complainant's rallies early, and that the paper later wrote a story about it, is not evidence of material involvement but evidence of good press strategy; in fact, this was a widely reported story that multiple media outlets covered.<sup>17</sup> This cannot support a complaint.

## **II. The Complaint fails as a matter of due process to allege facts sufficient to allow Respondents to reply.**

Neither the Complaint nor the underlying *Semafor* article include any details about the advertisements, such as their text, visuals, run dates, or otherwise that would allow Respondents to identify them. Respondents are being asked to respond to a Complaint about advertisements, but they do not have access to or a way to identify those advertisements, so cannot respond

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

<sup>15</sup> See 11 C.F.R. § 109.21(d)(2). Moreover, pursuing enforcement based on a campaign's routine communications with the press would chill free speech and raise First Amendment concerns.

<sup>16</sup> Cf. Compl. at 3; see, e.g., Hannah Knowles, *24 hours of Trump: QAnon Tributes, Crude Attacks and Hawking Pieces of His Suit*, *The Washington Post*, Aug. 29, 2024, <https://www.washingtonpost.com/elections/2024/08/29/trump-false-attacks-q-anon-harris-suit/> (quoting Trump campaign spokeswoman Karoline Leavitt).

<sup>17</sup> See, e.g., Michael Gold, *Trump's Crowds Are Dwindling as His Campaign Winds Down*, *N.Y. Times*, Nov. 4, 2024, <https://www.nytimes.com/2024/11/04/us/politics/trump-rally-crowds.html>.

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about them. Requiring a response to such vague allegations would violate the Committee's due process rights.<sup>18</sup>

For both of the above reasons, the Complaint is legally deficient and cannot support a reason to believe finding. The Commission should find no reason to believe and dismiss the Complaint.

### III. The Complaint is incorrect as a matter of law.

The Complaint is also incorrect as a matter of law, and for this reason also should be dismissed. Any of *The Washington Post's* advertisements promoting its own articles would be exempt from the definitions of a contribution and expenditure under the Commission's media exemption, and furthermore are protected by basic First Amendment principles.

The Act and Commission regulations exempt from the definition of "contribution" and "expenditure" "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station . . . unless the facility is owned or controlled by any political party, political committee, or candidate."<sup>19</sup> The Commission and courts have previously determined that, "where the underlying product is covered by the press exemption, so are advertisements to promote that underlying product," even if the advertisements would otherwise be subject to Commission regulation.<sup>20</sup> Only where advertisements are promoting activities unrelated to the legitimate press function of the entity are they outside the scope of the exemption.<sup>21</sup>

The Commission applies a two-part test to determine whether this "media exemption" applies.<sup>22</sup> First, it considers whether the entity at issue is a "press entity."<sup>23</sup> Then it applies a two-part analysis from the decision in *Reader's Digest Ass'n v. FEC*.<sup>24</sup> That, in turn, asks whether the entity is owned or controlled by a political party, committee, or candidate; and

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<sup>18</sup> See MUR 7220 (Make America Great Again PAC), Statement of Reasons of Vice Chair Dickerson and Comm'rs Cooksey and Trainor at 5 (Sept. 21, 2021) (due process prohibits Commission from requiring Respondents to respond to claims not properly presented in the complaint).

<sup>19</sup> 11 C.F.R. §§ 100.73, 100.132; see also 52 U.S.C. § 30101(9)(B)(i).

<sup>20</sup> FEC AO 2010-08 (Citizens United) (citing *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981)).

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., FEC AO 2010-08 (Citizens United).

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

<sup>24</sup> *Id.* (citing 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981)).

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whether the entity is acting as a press entity in the activity at issue, sometimes framed as whether the entity is engaged in a “legitimate press function.”<sup>25</sup>

*The Washington Post* is a press entity, and it is not to Respondent’s knowledge owned or controlled by a political party, committee, or candidate. Complainants do not argue otherwise. Nor do Complainants contest that the underlying *The Washington Post* articles are covered by the media exemption. Because the articles are covered by the media exemption, under Commission and court precedent, advertisements promoting those articles are also covered by the exemption.<sup>26</sup> They are not contributions, so cannot be prohibited in-kind contributions to the Committee.

Complainants argue the press exemption does not apply because *The Washington Post* is not acting within the scope of a legitimate press entity in purchasing these advertisements.<sup>27</sup> The Commission’s opinion in AO 2010-08 precludes that argument because the alleged advertisements promote only content that itself is an exercise of the legitimate press function. Moreover, the argument assumes its premise – Complainants argue that the articles are “boosting content to influence the election,” so the paper is acting as a “partisan player in the election process,” and therefore it’s not acting within the scope of a legitimate press entity.<sup>28</sup> But this argument assumes, without any support, that the advertisements were placed to influence the election in the first place.

Furthermore, a more basic First Amendment protection also requires dismissal of this Complaint. At root, the allegation here is that a newspaper printed stories more favorable to Respondents than to Complainants, and Complainants do not like it. But, “since time immemorial, political men and women have sought to shape press coverage through their agents and allies. These discussions with the press are protected by the same First Amendment that defends the press itself.”<sup>29</sup> And the First Amendment’s Press Clause also “applies in full to the distribution of opinion through audience-enhancing channels.”<sup>30</sup> This includes advertisements. If the Committee successfully influenced media coverage, and *The Washington Post* distributed its coverage to enhance its audience, all of that activity was covered by the First Amendment. Therefore, even taking the allegations as true, it is simply not a violation of the Act that Complainants did not like the result of core First Amendment press activity.

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<sup>25</sup> *Id.* (citing *Reader’s Digest Ass’n*, 509 F. Supp. at 1215).

<sup>26</sup> See n.20 *supra* and accompanying text.

<sup>27</sup> Compl. at 5.

<sup>28</sup> *Id.* at 5-6.

<sup>29</sup> FEC MURs 8123 and 8182 (Biden for President), Statement of Reasons of Chair Cooksey and Comm’rs Dickerson and Trainor at 1 (Sept. 6, 2024).

<sup>30</sup> *Id.* at 7.

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The Complaint fails at the most basic level because it is speculative; because it does not contain sufficient facts to warrant a response; and because the activity alleged would be protected by the Commission's media exemption and by the First Amendment itself. For any or all of these reasons, the Commission should find no reason to believe a violation of the Act occurred, and dismiss the Complaint.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'DL' followed by a stylized flourish.

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