No. 77966-0
(Thurston County Superior Court No. 05-2-01205-3)

IN THE

Supreme Court of the State of Washington

SAN JUAN COUNTY, a political subdivision of the State of Washington, **CITY OF KENT,** a political subdivision of the State of Washington, **CITY OF AUBURN,** a political subdivision of the State of Washington, and **CITY OF SEATTLE,** a political subdivision of the State of Washington, *ex rel.* the **STATE OF WASHINGTON**,

Appellees,

v.

NO NEW GAS TAX, a Washington Political Action Committee, and **JEFFREY DAVIS**, an individual and Treasurer of No New Gas Tax,

Appellants.

BRIEF OF *AMICI CURIAE* CENTER FOR COMPETITIVE POLITICS, CATO INSTITUTE, AND BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF APPELLANTS

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May 9, 2006

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Appellees,

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NO NEW GAS TAX, a Washington Political Action Committee, and **JEFFREY DAVIS**, an individual and Treasurer of No New Gas Tax,

Appellants.

INTEREST OF *AMICI*

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. Over the last decade, well over $100 million has been spent to produce ideological studies promoting campaign finance regulation. Those studies have gone largely unchallenged, and dominated the policy debate. CCP is concerned that a politicized research

agenda has hampered both the public and judicial understanding of the actual effects of campaign finance laws on political competition, equality, and corruption. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because it addresses the further collapse of constitutional protections for political speech and association relating to elections, which lies at the very heart of the First Amendment.

The Building Industry Association of Washington (BIAW) has over 12,041 members who are involved in construction and homebuilding projects statewide. Construction is highly a regulated industry and BIAW represents its members' interests to promote affordable housing statewide

through reasonable rules, regulations, and enforcement. BIAW's members are politically active directly through contributions to political campaigns, and indirectly through political action committees (PAC's) such as the Washington Affordable Housing Committee, Changepac 2004, and Walking for WA, formed pursuant to disclosure laws of RCW 42.17 and administrative rules contained in WAC Title 390. BIAW and its members often engage in direct advocacy regarding ballot measures and have a direct interest in this case.

ISSUES TO BE ADDRESSED BY *AMICI*

Amici will address their arguments to the second assignment of error concerning whether the decision below is contrary to the First Amendment to the U.S. Constitution and to the third assignment of error concerning Washington's statutory press exemption to the extent that the construction of such exemption is influenced by a proper understanding of the First Amendment.

STATEMENT OF CASE

The facts and background of the case are set out and contested by the parties and need not be elaborated upon by *amici*. *Amici* instead will simply highlight particular facts pertinent to their arguments.

In granting the Municipalities' motion to dismiss the counterclaims, the Superior Court ignored the chilling effect of the

preliminary injunction, reaffirmed its earlier legal holding construing the definition of "contribution" in Former RCW 42.17.020(14)(a) (2004) to include the speech by radio hosts Wilbur and Carlson as "on-air in-kind contributions," determined that disclosure regulations for such "contributions" were permitted under well-established state and federal law," and dismissed the prospect that additional campaign finance restrictions would or could be triggered by its contribution determination. October 26, 2005 Opinion, at 6-7.[1]

ARGUMENT

The First Amendment to the U.S. Constitution, as applied to the States through the Fourteenth Amendment, prohibits any law "abridging the freedom of speech, or of the press." U.S. CONST., Amend. I. It is well-established that individuals and the organized media have the same rights under the Speech and Press Clauses and that the Press Clause does not confer any special rights on the organized media. *Dun & Bradstreet Inc.* v. *Greenhouse Builders, Inc.*, 472 U.S. 749, 773 (1985) (White, J., concurring). The Press Clause thus does not identify a special *class of persons* entitled to different protection, but rather specifies and ensures the

[1] It is important to keep in mind what is not at issue: This case does not involve the contributions, in-kind or otherwise, of the *corporate* entity – Fisher Broadcasting – that owned the radio stations. In modifying its preliminary injunction order, the Superior Court expressly revised its findings to specify that the contribution was made by the hosts, Wilbur and Carlson, and not by the company. Any special considerations relevant to corporate or union influence in politics thus are not relevant to this case.

protection of a particular *class of means of communication* – the press – with special characteristics that are especially effective at reaching a large audience and guarantees the same protection for those means of communication as provided for ordinary individual speech.

When evaluating laws regulating or restricting speech in the press, therefore, courts must consider whether such regulation would be permissible for any form of individual speech and whether the restriction at issue is being applied solely because it is disseminated through the mass media of the "press." If the regulation draws its force from the *means* of communication used, and would violate the Constitution if applied to individual speech, then its application to mass-disseminated speech violates the Press Clause.

In this case the court below applied the FCPA to the pure speech of individuals communicated through the press facilities of a radio station. Such speech was deemed a "contribution" in part because the medium of communication – a radio broadcast – had a supposed market value by which the resulting speech could be "monetized" and hence treated as a financial or other measurable contribution rather than as simple speech *per se*. Such monetizing of pure speech because of its means of communication violates the Press Clause of the First Amendment by imposing restrictive justifications for the regulation of money, not

applicable to ordinary individual speech, onto speech made through the press simply because of the different characteristics – broad, effective reach and the potential for market pricing – inherent to such channels.

Furthermore, given that the "contribution" at issue in this case was pure speech by advocates for a ballot proposition rather than for a candidate for office, the State lacks a compelling interest for regulating such speech as a contribution. There is no possibility of corruption or undue influence of elected officials, there is no possibility of misleading the public as to the identities of the supporters due to the usual dissociation between typical contributions and the resulting speech, and there is no lack of information concerning the supporters themselves given the inherently self-revealing nature of the speech.

Because of these serious First Amendment problems with the decision below, this Court should at a minimum construe the FCPA's press exemption, Former RCW 42.17.020(14)(b)(iv), to cover the speech at issue in this case, thereby avoiding the constitutional question. Should the Court nonetheless conclude that the press exemption does not apply, it should find the application of the FCPA's definition of "contribution" to the speech in this case to be unconstitutional.

I. REGULATION OF THE PURE SPEECH IN THIS CASE AS A "CONTRIBUTION" VIOLATES THE FIRST AMENDMENT.

The speech held to be a "contribution" in this case was pure advocacy by two individual radio-talk-show hosts disseminated on their regularly scheduled radio show. That speech is no different from any other form of direct issue-advocacy seeking to encourage the public to act for a change in government policy.

The speech here was regulated under a Washington law designed to control monetary and other non-speech influences on political campaigns and that defines a "contribution" as including a "gift" or "donation" of "anything of value," an "expenditure made by a person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a political committee, or their agents," and "[t]he financing by a person of the dissemination, distribution, or republication, in whole or in part, of … political advertising prepared by a candidate, a political committee, or its authorized agent." Former RCW 42.17.020(14)(a).[2]

The FCPA exempts from the definition of "contribution" a "news item, feature, commentary, or editorial in a regularly scheduled news

[2] The current version of the statute merely renumbers the subsection from 14(a) to 15(a) and adds the phrase "or electioneering communications" after "political advertising." RCW 42.17.020(15)(a) (2006). That change is not relevant to the present case.

medium that is of primary interest to the general public, that is in a news medium controlled by a person whose business is that news medium, and that is not controlled by a candidate or a political committee." Former RCW 42.17.020(14)(b) (unchanged in the current version).

The critical issue in this case is how the court below *defined* a "contribution" to include the speech at issue. Regardless of the particular requirement of the FCPA for which that definition is used, the definition itself remains the pertinent legal determination. Because the definition is applied uniformly throughout the FCPA for a variety of regulations including and in addition to the disclosure requirements, it is disingenuous for the Municipalities to focus solely on the limited disclosure claim issue when the definition necessarily has broader applicability.[3]

[3] While the res judicata or collateral estoppel effect of the preliminary injunction itself if uncertain, the effect of the ruling on the motion to dismiss is more troubling. In the order dismissing the counterclaims, the Superior Court expressly endorsed its earlier determination that the speech here was a "contribution." That ruling is not preliminary and would presumably bind parties and their privies. Should the State or its agencies later seek fines or other enforcement action against Wilbur and Carlson, for example, one can certainly expect an argument that those two are privies to NNGT and that they should be estopped on the definition of contributions. And even were there no formal estoppel effect, the decision below certainly would be used as a cudgel even against non-parties to the proceedings, much as the Municipalities have used an earlier non-binding advisory ruling by the Public Disclosure Commission involving *Fisher* to attack a failure to report by *NNGT*, which was not a party to the previous request for an advisory ruling. Respondents' Br. at 23, 34, 36-38.

A. PURE SPEECH CANNOT BE MONETIZED AND TREATED LIKE CONTRIBUTIONS OF MONEY OR NON-SPEECH THINGS OF VALUE.

The primary conceptual problem with the Municipalities' claims and with the decision below is that they improperly "monetize" pure, fully protected, political speech. By recharacterizing such speech as money, they seek to apply regulations predicated on a supposed *difference* between speech and financial or other contributions that are attenuated from any speech that results. The U.S. Supreme Court has allowed some regulation of contributions and certain expenditures precisely because such expenditures were a step removed from actual speech and because the injection of money or the like were thought to pose unique threats of corruption or undue influence public officials whose successful campaigns may have depended on such money. *See, e.g.*, *McConnell* v. *FEC*, 540 U.S. 93 (2003); *Buckley* v. *Valeo*, 424 U.S. 1 (1976). But, other than in the context of the activities of corporations and labor unions – which raise unique issues due to their organization and funding structure – the Supreme Court has never condoned the regulation under campaign *finance* laws of pure speech by individuals, not *purchased* by third parties, simply because such speech had *value* or was disseminated through a medium for which there was a market enabling the monetization of such value.

Indeed, that approach would be completely contrary to the Supreme Court's justifications for allowing contributions to be regulated in the first place – the notion that monetary or in-kind contributions are attenuated from the resulting speech, are not necessarily visible as to their source, and hence pose a unique risk of corrupting office-holders.

The hazard of monetizing speech so that the lesser hurdles for regulating money can be applied to pure speech itself is that of the classic slippery slope. Indeed, the result here seems to land the court at the very bottom of that slope. Prior iterations of campaign finance law were defended precisely because proponents argued there was something different between monetary contributions and direct speech, rendering such monetary contributions both less valuable and more dangerous under the First Amendment. But once open and public political speech itself is deemed equivalent to monetary contributions, the footholds on the slippery slope created by past decisions all but vanish, and all political speech becomes equally regulable. In fact, nothing in the decision below logically distinguishes from the speech regulated here a myriad other forms of advocacy that may provide value to a political committee by furthering its cause. Editorial commentary, direct endorsements, favorable analysis of the issue subject to vote, and even interviews with some or all of the competing parties all serve to generate publicity, to persuade, and to

influence the outcome of an election. Each of those examples is thus a thing of "value" provided to a political committee and thus could be categorized as an in-kind contribution under the reasoning below.[4]

Such a conception of the First Amendment is an abomination and should not be condoned by this Court. Whatever constitutional latitude the State has in regulating the donation of money, goods, or services to political campaigns, it should not be extended to pure-speech advocacy simply because such advocacy has "value" that can be monetized. Rather, it is the essential predicate of the First Amendment that speech – whether disseminated through the press or otherwise – is *different* and *more valuable* than non-speech activities. The decision below treats speech the same as such lesser non-speech activities and thereby contradicts that essential predicate and violates the First Amendment.

[4] The fact that there is a *statutory* exemption for certain press activities does not change the *constitutional* deficiency of the theory below, which provides no reason to *require* such an exemption given that the press has no greater rights than anyone else. Indeed, if the speech here can be regulated consistent with the First Amendment, then there is no reason why the identical speech made from a soapbox, rather than a radio booth, could not be regulated notwithstanding the First Amendment. That certain statutory defenses and limitations currently might protect such speech does nothing to change the constitutional analysis or remedy the error of such analysis.

B. THE STATE LACKS ANY COMPELLING INTEREST TO REGULATE THE SPEECH IN THIS CASE, REGARDLESS OF HOW CATEGORIZED.

Wholly apart from whether the State may properly categorize pure speech as a contribution consistent with the First Amendment, the State lacks any compelling interest in regulating the speech in this case because it does not concern candidates or campaigns for office, the "contribution" is not attenuated from the apparent source of the resulting speech itself, the speech has no possibility whatsoever of misleading the public regarding who supports the ballot proposition, and the speech has no possibility of unduly influencing office-holders or otherwise "corrupting" government.

The decision below and the Municipalities identified several government interests that they suggest support disclosure and reporting requirements for the speech at issue here. The Superior Court, for example, quotes at length from the Declaration of Policy for the FCPA, listing a variety of good-government concerns underlying the FCPA. Oct. 26, 2005 Opinion, at 5-6 (citing RCW 42.17.010). But from that list of policy concerns, items (2), (3), (4), (6), (8), and (10) each relate to financial dealings relating to candidates and elected officials, and have no application at all to ballot measures.[5] That leaves only items (1), (5), and

[5] Items (7) and (9) from the list were not cited by the district court at all.

(11) from the list of policy concerns that might even conceivably apply to this case. Those items declare:

> (1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided.
>
> * * *
>
> (5) That public confidence in government at all levels is essential and must be promoted by all possible means.
>
> * * *
>
> (11) That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.

RCW 42.17.010. But there is nothing to suggest that the speech here implicates those concerns either in that no "secrecy" is involved, public confidence in *government* cannot be affected, and the public *has* full access to all the relevant information from the speech itself.

Both the court below and the Municipalities cite to this Court's decision in *Fritz* v. *Gorton*, 83 Wn.2d 275, 309, 517 P.2d 911 (1974), *app. dismissed*, 417 U.S. 902 (1974), for the propositions that disclosure provides the public with information on "'the sources and magnitude of financial and persuasional influences upon the government.'" Resp. Br. at 30-31 (quoting *Fritz*). But the only influence in this case is the

persuasiveness of the speech to the public; and all information relating to such persuasiveness is already apparent from the face of the speech.

The Municipalities' further reliance on *California Pro-Life Council, Inc.* v. *Getman*, 328 F.3d 1088 (9th Cir. 2003), is likewise unavailing. *Getman* involved a challenge by a non-profit corporation to a California law requiring the reporting of various contributions and expenditures relating to a ballot measure. That case, however, involved speech by the corporation and financial contributions received by the corporation, not in-kind contributions of pure speech by individual political supporters. Although the court remanded for further consideration of the alleged state interests at stake, the court noted that strict scrutiny would apply such that those interests must be compelling and the law narrowly tailored to meet those interests. 328 F.3d at 1101.

In determining that California's rule was not *per se* unconstitutional and that California *might* be able to show a compelling interest in disclosure, the court relied upon a variety of cases all dealing with corporate speech and the disclosure of expenditures by, and *financial* contributions to, such corporate speakers. *Id*. at 1102. In the one case discussed in *Getman* that *did* involve direct individual speech concerning a ballot measure, the Ninth Circuit noted the Supreme Court's rejection of

an "inform[ed] electorate" interest and expressly distinguished that case from one involving expenditures or contributions of "money." *Id*. at 1103-04 (discussing and distinguishing *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995)).

The Ninth Circuit also recognized that the only conceivable interest in the ballot-measure context was "informational," and described that interest as relating to voter knowledge regarding "'where political money comes from,'" knowing who "backs or opposes a given initiative," and "knowing who is lobbying for their vote." *Id*. at 1105-06; *id*. at 1106 (law provides "information from those who *for hire* attempt to influence legislation or who collect or spend *funds* for that purpose") (emphasis added).[6] But none of those versions of the informational interest applies in the context of direct speech, not for hire, by political supporters themselves. The voters in such a case know precisely "who" backs the initiative – here Wilbur and Carlson. They were speaking for themselves, not as paid mouthpieces for an undisclosed third party, and there is simply

[6] The Municipalities' reliance, Resp. Br. at 29, upon the U.S. Supreme Court's treatment of expenditures and contributions for "electioneering communications" in *McConnell* v. *FEC*, 540 U.S. 93, 104 (2003), is particularly off base given that the entire point of *McConnell*, and of the very definition of electioneering communications, is that it was not genuinely related to issues, but rather to candidates, and hence had a potential corrupting effect. In the context of an initiative campaign, however, there are no candidates at all, and the entire predicate for *McConnell* and the treatment of electioneering communications is absent. Nothing in *McConnell* suggests the speech here could be regulated in the manner that electioneering communications are regulated.

no issue of them having masked some other interest from the electorate. Indeed, given that the informational interest was insufficient in *McIntyre* to require disclosure of *anonymous* direct speech, that interest *a fortiori* is inadequate here where the public is fully informed as to the identity and interests of the speakers by the very speech at issue itself.

Any informational interest that the State might have in requiring disclosure of financial or non-speech contributions in support of ballot initiatives simply does not apply in this case. Because the open and public speech held to be a contribution was effectively self-disclosing, the State's interest certainly cannot be deemed compelling, and the requirement of further disclosure is not narrowly tailored to accomplish anything meaningful or to justify the added burdens of formal disclosure.

II. THE FEC'S TREATMENT OF THE FEDERAL PRESS EXEMPTION ILLUSTRATES THE FIRST AMENDMENT INTERESTS AT STAKE.

The grave First Amendment problems with applying campaign finance laws to the speech at issue in this case are one reason why both Washington State and the federal government contain press exemptions in their campaign finance laws. Washington's press exemption provides that a "contribution" does *not* include a "news item, feature, commentary, or editorial in a regularly scheduled news medium that is of primary interest to the general public, that is in a news medium controlled by a person

whose business is that news medium, and that is not controlled by a candidate or a political committee." Former RCW 42.17.020(14)(b)(iv). Both parties agree that the exemption is analogous to the federal exemption for press activities, though they disagree on the implications of the analogy.

The parties both discuss the FEC's decision of *In the Matter of the Honorable Robert K. Dornan*, MUR 4689 (FEC, Feb. 14, 2000), drawing different lessons therefrom. *Amici* agree with appellants that the proper lesson to be drawn from *Dornan* is the need to construe the press exemption in such a manner as protects the important First Amendment interests at stake. Rather than discuss *Dornan* further, however, *amici* note that a later case from the FEC confirms such lessons.

The FEC decision of *In the Matter of Dave Ross, et al.*, MUR 5555 (FEC Mar. 17, 2006), applies *Dornan* to the activities of another radio-host/candidate and again confirms the applicability of the press exemption. The General Counsel's report, adopted by the FEC as its opinion, noted that, as in this case, the "media entity" – a radio station – at issue was not "owned or controlled" by any political party, committee, or candidate, and that the entity did not alter the format, distribution, or other aspects of its programs and hence was "acting within its legitimate press function."

Ross, at 5-6.[7] The exception was held to apply regardless whether the speech at issue contained "express advocacy," "endorse[d] candidates," or "provided references to other sources for additional information." *Id.* at 9. Indeed, *Ross* determined that the exception applied even where the speech might otherwise be deemed a "coordinated contribution." *Id*. at 12.[8]

A further Statement of Reasons by three of the six Commissioners pointed out that the media exception is even easier to meet than might have been suggested by *Dornan* and "does not require any content analysis of the radio shows." Statement of Reasons of Chairman Michael E. Toner and Commissioners David M. Mason and Hans A. von Spakovsky, *In the Matter of Dave Ross, et al.*, MUR 5555 (FEC Mar. 17, 2006), at 4.

Just as the FEC has applied the press exemption in a manner respecting First Amendment interests, even where the charges were leveled against the media entity itself, not merely the individual hosts as here, so should this Court construe Washington's media exemption to

[7] That the specific content of the *commentary* was controlled by the hosts both in *Ross* and in the present case (even assuming they are agents or principals of the committee) is irrelevant insofar as they are allotted discretion over that time in the normal course of their roles as radio commentators and they are never charged for such time. But even if the particular program could be said to be controlled by agents for the committee, that is a far cry from showing that the *medium* itself is controlled by them.

[8] Wilbur and Carlson's relationship to NNGT, whatever it was, thus has no relevance here.

protect important First Amendment values and to avoid having to reach the constitutional issue.

The attempt by the Superior Court and the Municipalities to distinguish the speech here because some of the speech involved a fundraising solicitation wholly misses the mark. As appellants have explained, much of the speech required to be reported as a contribution was not fundraising, but instead simple direct advocacy in support of the ballot measure and for petition-gathering efforts. The notion that such speech is anything but pure issue advocacy is absurd. And even fundraising speech does not lose its status as protected advocacy by the mere request for money. *See Riley* v. *National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988).

Labeling the speech here "political advertising" does not change the analysis. As an initial matter, there is no meaningful difference between political advertising and political advocacy or editorializing, and hence even political advertising is fully protected. Furthermore, nothing in the law defines political advertising itself as a "contribution." Rather, it is "*[t]he financing* by a person of the dissemination … of political advertising prepared by a … political committee" that is a contribution, and there was no "financing" involved in this case, just direct speech.

Former RCW 42.17.020(14)(a)(iii) (emphasis added).[9] Direct political advertising by the a speaker himself, not financed by some third party, is not a contribution under a properly reading of the law informed and limited by First Amendment concerns.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully Submitted,

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May 9, 2006

[9] And the limitation to the financing of such advertising that is "prepared by" a political committee shows that the concern is with undisclosed support of speech that is purportedly by the committee itself, and hence to some degree misleading as to the true sponsor of the speech – the undisclosed person financing it.

APPENDIX

SENSITIVE

JAN 1 0 2006

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 5555
DATE COMPLAINT FILED: October 5, 2004
DATE OF NOTIFICATION: October 13, 2004
LAST RESPONSE RECEIVED: Nov. 21, 2005
DATE ACTIVATED: August 9, 2005

EXPIRATION OF SOL: May 20, 2009

COMPLAINANT: Chris Vance

RESPONDENTS: Dave Ross
Friends of Dave Ross and Philip Lloyd, in his official capacity as treasurer
Entercom Seattle, LLC (d/b/a KIRO-AM)

RELEVANT STATUTES AND REGULATIONS:
2 U.S.C. § 441i(e)(1)(A)
2 U.S.C. § 441b(a)
2 U.S.C. § 431(9)(B)(i)
2 U.S.C. § 434 (f)(3)(B)(i)
11 C.F.R. § 109.21
11 C.F.R. § 100.73
11 C.F.R. § 100.132
11 C.F.R. § 100.29(c)(2)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

Dave Ross, host of a talk show on radio station KIRO-AM in Seattle, Washington, was a candidate for U.S. Representative from the 8th Congressional District of Washington in 2004. The complaint in this matter alleges that in a variety of ways, KIRO-AM knowingly and willfully made, and Ross and his campaign committee knowingly and willfully accepted, illegal corporate in-kind contributions. Because we conclude that the media exemption applies, we

recommend that the Commission find no reason to believe that any of the respondents violated the Act in connection with the allegations in MUR 5555, and close the file.

II. FACTS

Dave Ross is a radio talk show host in Seattle, Washington. Ross has hosted "The Dave Ross Show" (the "Show") on KIRO-AM (the "station") since 1987.[1] The Show airs in Washington's 8th Congressional District five days a week for three hours a day, and on it Ross "discusses news, current events, politics, entertainment, technology, and a range of other subjects." *See* Response of Dave Ross and Friends of Dave Ross ("Ross Response") at 4; *see also* Response of Entercom and KIRO-AM ("KIRO Response") at 2. In addition to broadcasting his own show, Ross occasionally provides short commentaries while substituting for Charles Osgood on "The Osgood File" on CBS News Radio, which is carried by approximately 240 stations nationwide, including KIRO-AM. *Id.*

Complainant alleges that Dave Ross effectively received free air time on his own show to promote his candidacy, and that the radio station illegally contributed to his campaign by providing him with that air time and continuing to promote the Show throughout the 2004 campaign season. Specifically, complainant asserts the following:

- On May 5, 2004, during the Show, Ross first discussed on the air the possibility of his running for Washington's 8th Congressional District seat.
- Between May 5 and May 20, 2004, a guest host on the Show allegedly asked listeners whether Ross should run for Congress, and an online survey on the same topic ran on the station's web site.

[1] Because Entercom Seattle, LLC ("Entercom") owns and operates KIRO-AM, OGC also notified Entercom of the complaint.

- On May 20, 2004, Ross announced his decision to run for Congress, saying that he would stay on the air until July.[2]
- Also on May 20, according to a *Seattle Times* column attached to the complaint, the KIRO-AM web site reportedly "heralded Ross' candidacy with headlines stating 'Dave for Congress (1)' and 'Dave for Congress (2),' and a prominent link to his campaign Web site." *See* Complaint, Ex. 10.
- In June of 2004, Dave Ross became a candidate for Congress from Washington's 8th Congressional District.[3] Ross stayed on the air and continued to host the Show until July 23, 2004, when he began a leave of absence until after the general election in November 2004.
- From July 23, 2004, when Ross stopped hosting his show, through the general election in November, KIRO-AM continued referring to Ross' daily time slot as "The Dave Ross Show," using guest hosts to run it. The station also continued promoting "The Dave Ross Show" on the air and on its web site.
- From August 16 through August 20, Ross gave 19 commentary pieces for CBS News radio, which "may have aired in Washington's 8th Congressional District on CBS

[2] Complainant asserts that Ross announced his candidacy "on his own talk show." *See* Complaint at 1. According to contemporary news reports attached to the Complaint at Ex. 6 & 7, however, Ross announced his candidacy during an event called "Battle of the Talk Show Hosts," broadcast on KIRO-AM in the evening of May 20, 2004. *See Sparks Fly Over Radio Host's Political Bid*, CHI. TRIB., May 23, 2004, at C15; and Warren Cornwall, *Ross Reveals He's Candidate*, SEATTLE TIMES, May 21, 2004, at B1. The station's response states that Ross' announcement was in response to a direct question asked of him by the emcee of the event concerning "rumors" she had heard. *See* KIRO Response at 2. Neither KIRO nor Entercom had prior knowledge that such an exchange would occur. *Id.*

[3] Though complainant and respondents dispute the date Ross officially became a candidate for federal office, it appears from the Committee's disclosure reports that Dave Ross became a candidate under 2 U.S.C. §431(2) and 11 C.F.R. § 100.3(1) on June 2, 2004, when he received contributions aggregating in excess of $5,000.

affiliate KIRO-AM." The station states that "it is believed that KIRO discontinued airing [Ross' CBS] commentaries until after the election." KIRO Response at 4.

- On September 14, 2004, Dave Ross won the primary election. On September 15, according to a news article in the *Seattle Times*, "'The Dave Ross Show' featured Dave Ross as special guest to discuss his primary victory." *See* Complaint, Ex. 15.

Ross lost the general election on November 2, 2004, and on November 3 he returned to hosting the Show on KIRO-AM.

III. LEGAL ANALYSIS

A. Alleged Corporate Contributions and the Media Exemption

The Federal Election Act of 1971, as amended (the "Act"), prohibits corporations from making contributions or expenditures from their general treasury funds "in connection with" the election of any candidate for Federal office. 2 U.S.C. § 441b(a). The Act defines "contribution" and "expenditure" to include "anything of value" made for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(8) and (9). The term "anything of value" includes in-kind contributions. 11 C.F.R. § 100.52(d)(1). Contributions and expenditures must be disclosed under the Act. 2 U.S.C. §§ 432 and 434.

The Act's media exemption excludes from the definitions of contribution and expenditure "any 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." 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. §§ 100.73 and 100.132.

Any party claiming the media exemption is subject to a two-part test. First, the Commission asks whether the entity engaging in the activity is a media entity within the meaning of the Act and the Commission's regulations. *See* Advisory Opinion 2005-16 (Fired Up) at 5

and other advisory opinions cited therein. Second, the Commission, in determining the exemption's scope, inquires (a) whether the media entity is owned or controlled by a political party, committee, or candidate; and, if not, (b) whether the entity was functioning within the scope of a legitimate media entity at the time of the alleged violation. If the media entity is independent of any political party, committee, or candidate, and if it was acting as a legitimate media entity at the time of the alleged violation, it is exempt from the Act's restrictions on corporate contributions and expenditures, and the Commission's inquiry should end. *See id.*; *see also Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); and *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981). As the Commission noted in a recent Advisory Opinion, "[t]wo considerations in applying this analysis include whether the entity's materials are available to the general public and are comparable in form to those ordinarily issued by the entity." Advisory Opinion 2005-16 (Fired Up) (citing, in part, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986) ("*MCFL*")).[4]

KIRO-AM, a broadcast radio station owned and operated by Entercom Seattle, LLC, whose parent company is Entercom Communications Corporation, one of the largest radio broadcasting companies in the United States, *see* Ross Response at 4; KIRO Response at 1, is the type of media entity covered by the media exemption and is not owned or controlled by a political party, committee or candidate. The sole question in this matter, then, is whether, in the course of the facts and events stated above, the station was acting within its legitimate press function. On this question, MUR 4689 (Dornan) is instructive.

[4] Because we determined the press exemption applies in this matter, we have not analyzed the facts on the basis of three earlier Advisory Opinions addressing similar situations where talk show hosts were also candidates for Federal office. *See* Advisory Opinions 1977-42 (Hechler), 1992-5 (Moran) and 1992-37 (Terry). In all three instances, the Commission determined, on the basis of the requests, that the media forum was not to be provided to the hosts "for the purpose of influencing any election for Federal office," and therefore concluded that the air time would not be "contributions" to them or "expenditures" on their behalf by the broadcasting entities. The media exemption was not a factor in the Commission's analyses.

In 2000, the Commission, by a vote of 4-2, found no reason to believe that Robert Dornan, a Federal candidate who guest hosted several nationally-syndicated radio shows on various broadcasting stations, his campaign committee, or two radio networks violated the Act. *See* MUR 4689. In that matter, Dornan allegedly used radio air time to attack his political opponent and expressly advocate on behalf of his own election.

According to the Statement of Reasons of the four commissioners who voted to find no reason to believe, because the broadcasting stations involved were not owned or controlled by a party or candidate and the entities were acting in their capacities as members of the media in airing the programs -- with no indication that any aspect of the shows were different when Dornan guest-hosted than when the regular host appeared -- the media exemption applied. *See* Statement of Reasons by Commissioners Wold, Elliott, Mason, and Sandstrom in MUR 4689. Since it "appeared that the activities complained of [were] protected by the press exemption," the four commissioners stated that the Commission lacked subject matter jurisdiction in the matter and could not proceed further. Specifically, the Commission was precluded from "inquiring further into the contents of Mr. Dornan's speech." *Id.* at 3.[5]

There appears to be even less indication here than in the Dornan matter that anything about the Show changed after Ross became a candidate and stayed on the air. "The Dave Ross Show" has long been a regular broadcast containing "news stor[ies], commentary, or editorial," as required by 11 C.F.R. § 100.73. Moreover, the Ross Response explicitly states that "[n]either

[5] The four commissioners also stated there was no evidence that Dornan was invited to be guest host because of any possible future status as a candidate, and that he did not appear to be a candidate when most of the programs aired. *Id.* They further stated that, even if they had determined that the press exemption was not applicable, they would have declined to pursue the matter for reasons of prosecutorial discretion. *Id.* Commissioner Mason, "[w]hile in complete agreement with the joint agreement [he] signed with [his] colleagues," also wrote an Additional Statement of Reasons in the Dornan matter "to emphasize [his] view that this matter . . . did not constitute a close call [because] [t]he media exemption . . . so clearly applies that pursuing this matter would not have been substantially justified." Additional Statement of Reasons by Commissioner Mason in MUR 4689 at 1.

the format, distribution, or other aspects of production of The Dave Ross Show were altered for the period in question of May 5, 2004, through July 23, 2004." Ross Response at 4; *see also* KIRO Response at 3 ("Mr. Ross was not permitted to alter the format of his show in any way to assist in his campaign for office"). Contemporary press articles from *The Seattle Post-Intelligencer* attached to the complaint reported that Ross would not use the Show "for electioneering," and that Ross "promised station management that he would not use his show for campaigning or for discussing issues that would be of unique interest to voters in the 8th District." *See* Complaint at Ex. 9 and 11. There is no information in the complaint or elsewhere suggesting he reneged on this promise. In fact, as noted in the station's response, "in addition to avoiding discussion of his candidacy, Mr. Ross specifically avoided any solicitation of or response to any questions by listeners regarding his candidacy during the call-in portions of the show." KIRO Response at 3. Moreover, "[o]ther on-air personalities were also given strict directives [by the station] prohibiting them from referring to Mr. Ross' campaign on the air." *Id.*

Only twice did Ross refer to his candidacy or potential candidacy on KIRO before taking a leave of absence. On May 5, he stated on the Show that he was considering running, and on May 20, in response to a question posed to him on the "Battle of the Talk Show Hosts" program, he acknowledged that he was running. We have no indication that Ross did anything more on these occasions than make simple statements along these lines, and therefore these incidents do not appear to take either the May 5 "Dave Ross Show" or the May 20 "Battle of the Talk Show Hosts" outside the station's legitimate press function.

As to Ross' guest interview about his primary election victory, the station's response states that the format of the interview was "undertaken in a format that would be used to interview any current candidate for office." KIRO Response at 4. The station points out that it

also interviewed "all of Mr. Ross' potential Republican opponents in the primary," aired a debate between Ross and his Republican opponent, Mr. Reichert, and also hosted Mr. Reichert alone for an interview on October 19, 2004. *Id.* All such events also appear to fall within the legitimate press function of KIRO-AM radio. More generally, we have no indication that the broadcasts of "The Dave Ross Show" as broadcast with guest hosts between July 23 and election day were anything other than regularly scheduled programs of news, editorials or commentary.

Similarly, in the 19 transcripts of Ross' appearances on CBS Radio's "The Osgood File" submitted with the complaint, there is no instance of Ross even mentioning his candidacy, let alone expressly promoting his own campaign or attacking that of another. *See* Complaint, Ex. 13. All of these commentaries appear well within the legitimate press function of CBS and KIRO-AM radio.

The "poll" taken on the air and on the KIRO web site asking whether Ross should become a candidate also appears to fall within the media exemption. *See* Advisory Opinion 2004-7 (advising MTV that online and call-in audience survey would be within its "legitimate press function"). The Show regularly featured discussions about news, politics, and current events. It falls within the range of what qualifies as a "legitimate press activity" for such a show to post on its web site surveys regarding issues in politics, current events, and popular culture. Online surveys regarding current events are, in fact, commonly found posted on any number of radio show web sites,[6] and, again, are well within the shows' legitimate press function. Moreover, although the results of the survey are unknown, it does not appear that any attempt was made to have it be statistically accurate, and there is no allegation or information that Ross

[6] *See, e.g.*, www.rushlimbaugh.com, www.hannity.com, and www.bigeddieradio.com. Indeed, in October 2005, after President Bush's announcement, KIRO-AM's web site (found at www.kiro710.com) featured an online poll asking listeners to "[r]ate the selection of Harriet Miers as the new Supreme Court nominee."

or the Committee requested, authorized, pre-arranged or coordinated the conducting of the poll prior to its being made public, or used its results. *See* 11 C.F.R. § 106.4(b) and (c). The poll, therefore, should not be treated as a "testing the waters" contribution or expenditure. *See* 11 C.F.R. §§ 100.131(a) and 101.3.

Finally, the complaint alleges that KIRO-AM's web site posted "Ross for Congress" headlines and a link to the Ross campaign web site immediately after Ross' announcement of candidacy on May 20, 2004, but provides no further details.[7] We do not have a copy of the station's web site that carried those alleged communications. Because we could not locate a copy of the web site as it stood on May 21, 2004, and complainant did not include one, we can not know what text accompanied the "Dave for Congress" headlines, or whether the accompanying text was anything other than news stories about Ross' declaration of candidacy, itself a newsworthy event. According to the station, "although there were contemporaneous references to Mr. Ross' announcement at that time, KIRO officials ordered their removal immediately after these references were discovered." KIRO Response at 6. To the extent these materials may have contained express advocacy, entities falling within the media exemption may endorse candidates and provide references to other sources for additional information. *See* Advisory Opinion 2005-16 at 6 (Fired Up) (concluding that because the entity is a press entity, and neither it nor its web site is owned or controlled by a political party, committee, or candidate, the cost for covering news stories, commentary and editorials on its web sites – even those lacking objectivity – were covered by the press exemption); *see also* KIRO Response at 6

[7] The complaint includes two unnumbered attachments following Ex. 15, which appear to show a logo for KIRO-AM that resembles a logo that reads "Dave Ross for Congress." The station "categorically denies giving Mr. Ross any permission to use any type of KIRO trade dress in connection with his campaign for office." It states, however, that when it learned of the "similarity" between the station's logo and the campaign logo, "it demanded that the logo be changed," and "it is Entercom's understanding that it was." KIRO Response at 3.

("[R]eferences to Mr. Ross' announcement . . . were also protected by the press exemption as the KIRO web site was merely an extension of the radio station's regular media operations.")

B. Alleged Electioneering Communications

1. CBS News Radio

The same media exemption analysis discussed above also applies to Ross' appearances on CBS News Radio, possibly broadcast through KIRO-AM, between August 16 and 20, 2004. According to the station's response, it believes that although Ross continued to provide commentaries for CBS after he left the Show on July 23, 2004, KIRO discontinued airing the commentaries until after the general election. *See* KIRO Response at 4. At no time during those broadcasts did Ross mention his candidacy. *See* discussion, *supra*. An electioneering communication occurs where a broadcast, cable, or satellite communication targeted to the relevant electorate clearly identifies a Federal candidate within 30 days of a primary election or 60 days of a general election. *See* 11 C.F.R. § 100.29(a). Although Ross, a candidate, was clearly identified during those broadcasts within 30 days of his September 14, 2004 primary, *see* Complaint, Ex. 13, such communication "appearing in a news story, commentary, or editorial distributed through the facilities of any broadcast station" not owned or controlled by any political party, committee, or candidate is excluded from the definition of "electioneering communication" under 2 U.S.C. § 434(f)(3)(B) and 11 C.F.R. § 100.29(c)(2).

In this case, neither CBS News Radio nor KIRO-AM are owned or controlled by any political party, committee or candidate. Those broadcasts, then, also fall within the legitimate press function of CBS News Radio and KIRO-AM, and qualify for the specific media exemption for electioneering communications.[8]

[8] The complaint did not name CBS News Radio as a respondent. In view of our recommended disposition, we are not recommending that CBS News Radio be generated as a respondent.

2. KIRO-AM

Dave Ross stopped hosting the Show on July 23, 2004, more than 30 days before the primary election on September 9, and more than 60 days before the general election on November 2. As noted, the Show continued to be broadcast with guest hosts under the name "The Dave Ross Show." KIRO-AM also continued advertising the Show on the air after July 23, broadcasting promotions for "The Dave Ross Show" in the 8th Congressional District within 30 days of the primary and within 60 days of the general election. Although motive is not relevant to whether a communication is considered "electioneering," according to the station, it did so "based solely upon business decisions in order to prevent dilution of its most coveted on-air product." KIRO Response at 5.

KIRO's broadcasts of the Show under the name "The Dave Ross Show" within the electioneering communications period qualified for the specific media exemption for electioneering communications just as they qualified for the media exemption from the definition of "expenditure." As for the promotional spots, several courts have recognized the dissemination of publicity to be the "normal business activity of a press entity" deemed to fall within the media exemption of the Act. *See MCFL*, 479 U.S. at 251 (citing *Phillips Publishing*, 517 F.Supp. at 1313; and *Reader's Digest*, 509 F.Supp. 1210). The Commission, too, addressed this issue in an Advisory Opinion to MTV, advising that promotions intended to "publicize [a] program" would fall within its "legitimate press function." Advisory Opinion 2004-7 at 5 (quoting *Reader's Digest*, 509 F. Supp. at 1215 (noting the media exemption applied to magazine's dissemination of promotional materials whose purpose was "to publicize [an] issue of the magazine"); and quoting *Phillips Publishing*, 517 F. Supp. at 1313 (stating that obtaining publicity qualifies as a "normal, legitimate press function[]")). In the same opinion, the Commission reached the

conclusion that "any broadcast, satellite or radio communication that MTV undertakes as part of its press functions is exempt from the definition of electioneering communication." Advisory Opinion 2004-7 at 8.

For the same reasons the Show's broadcasts qualify for the Act's general media exemption, then, the station's continued promotional use of the Show's name also qualifies for the media exemption for what would otherwise be an electioneering communication.

C. Coordinated Communications Allegations

The media exemption, where applicable, also encompasses what otherwise would be deemed a "coordinated communication" between a candidate or committee and a *bona fide* corporate media entity, which might lead to violations of section 441b. *See* 11 C.F.R. §109.21(b); 11 C.F.R. §§ 100.73 and 100.132. Since the media exemption applies to the activity in this case, the alleged coordinated communications do not violate the Act.

D. "Soft Money" Allegations

Federal candidates and their agents, or entities directly or indirectly established, financed, maintained or controlled by, or acting on behalf of one or more candidates, are restricted from soliciting, receiving, directing, transferring, or spending "soft money," *i.e.*, funds that are not subject to the limitations, prohibitions, and reporting requirements of the Act. *See* 2 U.S.C. § 441i(e)(1)(A). Neither Ross nor the Committee appear to be in violation of this provision. Though complainant charges that Ross continuing to broadcast his show resulted in "free corporate air time" for his campaign, because these activities are exempt from the definitions of "contribution" and "expenditure" under the media exemption, 11 C.F.R. §§ 100.73 and 100.132, neither he nor the Committee received illegal corporate contributions in violation of 2 U.S.C. § 441i(e)(1)(A).

Based on the above, this Office recommends that the Commission find no reason to believe that Dave Ross; Friends of Dave Ross and Philip Lloyd, in his official capacity as treasurer; or Entercom Seattle, LLC (d/b/a KIRO-AM) violated the Act, and close the file.

V. RECOMMENDATIONS

1. Find no reason to believe that Dave Ross; Friends of Dave Ross and Philip Lloyd, in his official capacity as treasurer; or Entercom Seattle, LLC (d/b/a KIRO-AM) violated the Federal Election Act of 1971, as amended, or the Commission's regulations in connection with the allegations in MUR 5555.

2. Close the file.

4. Approve the appropriate letters.

1/10/06
Date

Lawrence L. Calvert, Jr.
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FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Dave Ross	)	
Friends of Dave Ross	)	MUR 5555
Philip Lloyd, in his official capacity as treasurer	)	
Entercom Seattle, LLC d/b/a KIRO-AM	)	

STATEMENT OF REASONS OF CHAIRMAN MICHAEL E. TONER AND COMMISSIONERS DAVID M. MASON AND HANS A. von SPAKOVSKY

The Washington State Republican Party filed the complaint in this matter alleging that Respondents violated the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.* The Commission voted unanimously to adopt the Office of General Counsel ("OGC") recommendation to (1) find no reason to believe Respondents violated FECA and (2) close the file.[1]

Although we agree with the OGC recommendation, we write separately to clarify why the press exemption applies in this matter, because the standard is easier to meet than the analysis[2] accompanying the recommendation might suggest and does not require any content analysis of the radio shows.

I. BACKGROUND

Respondent Dave Ross has a radio talk show on Respondent KIRO-AM in Seattle, Washington,[3] that "discusses news, current events, politics, entertainment, technology, and a range of other subjects."[4] Ross also provides occasional short commentaries on CBS News Radio, which KIRO carries.[5] The station is owned by Respondent Entercom Seattle, LLC, which

[1] First General Counsel's Report ("GCR") at 13 (Jan. 10, 2006). Voting affirmatively were Chairman Toner, Vice Chairman Lenhard, and Commissioners Mason, von Spakovsky, Walther, and Weintraub.

[2] *Id.* at 4-12.

[3] *Id* at 2, 4.

[4] *Id.* at 2 (citing Resp. of Dave Ross and Friends of Dave Ross at 4; Resp. of Entercom and KIRO-AM at 2).

[5] *Id*

is owned by Entercom Communications Corporation.[6] No political party, political committee, or candidate owns or controls the station.[7] KIRO's signal reaches a district[8] where Ross ran for the United States House of Representatives in the 2004 primary and general elections.[9]

Ross discussed the possibility of his candidacy on the air and later, on a show other than his own, acknowledged he was running.[10] KIRO asked its audience – both on the air and via its website – whether Ross should run.[11] After Ross won the primary, KIRO interviewed him[12] on the Dave Ross Show. During the campaign, the show kept the Ross name,[13] and KIRO believes Ross continued doing commentaries on CBS Radio.[14]

In addition, the complaint makes unsubstantiated[15] implications that KIRO heralded Ross's candidacy on the KIRO website and provided a prominent link to the Ross campaign website.[16]

The complaint has multiple allegations of illegal contributions, expenditures, and electioneering communications.

II. DISCUSSION

In this matter, all of the allegations involve (1) a "cost incurred in covering or carrying a news story, commentary, or editorial" (2) carried or covered by a radio station, and (3) the facilities are not "owned or controlled by any political party, political committee, or candidate ... ." 11 C.F.R. § 100.73.

Under 2 U.S.C. §§ 431(9)(B) and 434(f)(3)(B), all of the allegations (1) involve a "news story, commentary, or editorial" (2) distributed through a radio station's facilities, and (3) the facilities are not "owned or controlled by any political party, political committee, or

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[6] *Id.* at 2 n.1, 5.

[7] *Id.* at 5, 10.

[8] *Id* at 2, 3

[9] *Id.* at 3, 4.

[10] *Id* at 3 n.2, 7.

[11] *Id* at 8, *see id* at 2.

[12] *Id* at 7-8.

[13] *See id* at 4.

[14] *Id* at 10.

[15] *See id.* at 9.

[16] *Id* at 3.

candidate ...." Once those facts were established, this should have ended the investigation of this matter.

As to the law, the final factor listed in FECA and the regulations does not look to whether a *press entity* is *independent* of a political party, political, committee, or candidate.[17] Instead, the inquiry is whether the *facilities* are *owned or controlled* by one. 11 C.F.R. § 100.73; 2 U.S.C. §§ 431(9)(B), 434(f)(3)(B).

A number of factors are irrelevant in determining whether the press exemption applies. The content of a news story, commentary, or editorial is irrelevant. *In re CBS Broadcasting, Inc., et al.*, MURs 5540, 5545, 5562 and 5570, Statement of Reasons ("SOR") of Comm'rs Mason and Smith at 8 (Fed. Election Comm'n July 12, 2005), *available at* http://eqs.sdrdc.com/eqsdocs/0000457E.pdf (visited Feb. 10, 2006) (citing *In re CBS News, et al.*, MUR 4946, SOR of Chairman Wold and Comm'r Mason at 2 (Fed. Election Comm'n June 30, 2000), *available at* http://eqs.sdrdc.com/eqsdocs/000025B0.pdf (visited Feb. 10, 2006)).[18] This principle applies to broadcasts, including broadcasts featuring candidates. *See In re Robert K. Dornan,* MUR 4689, SOR of Vice Chairman Wold and Comm'rs Elliott, Mason and Sandstrom at 4 (Fed. Election Comm'n Dec. 20, 1999), *available at* http://eqs.sdrdc.com/eqsdocs/000038E3.pdf (visited Feb. 10, 2006).

Moreover, for the press exemption to apply, the press need not:

- Be fair, provide equal access, *id.* SOR of Comm'r Mason at 7 & n.6 (Fed. Election Comm'n Feb. 14, 2000), *available at* http://eqs.sdrdc.com/eqsdocs/000038E4.pdf,
- Be balanced, *In re ABC, CBS, NBC, New York Times, Los Angeles Times, Washington Post et al.*, MUR 4929, 5006, 5090, 5117, SOR of Chairman Wold, Vice Chairman McDonald and Comm'rs Mason, Sandstrom and Thomas at 3 (Fed. Election Comm'n Dec. 20, 2000), *available at* http://eqs.sdrdc.com/eqsdocs/000011BC.pdf (visited Feb. 10, 2006),
- Avoid express advocacy, or avoid solicitations. *Dornan,* SOR of Comm'r Mason at 11.

Nor are the press entity's editorial policies relevant. *Id.* at 6, 9. After all, it "is difficult to imagine an assertion more contrary to the First Amendment than the claim that the FEC, a federal agency, has the authority to control the news media's choice of formats, hosts, commentators and editorial policies ... ." *Id.* at 6. When it comes to candidate debates, for example, "the press exemption allows the press to use whatever criteria it deems appropriate to select candidates, regardless of how slanted the debate may be." *CBS Broadcasting,* SOR of Commr's Mason and Smith at 8 (July 12, 2005) (citing *In re Union Leader Corp., et al.*, MURs 4956, 4962 and 4963, SOR of Comm'r Mason at 2 (Fed. Election Comm'n Feb. 13, 2001), *available at* http://eqs.sdrdc.com/eqsdocs/00001280.pdf (visited Feb. 10, 2006)). The press

[17] *Id* at 5 (citations omitted).

[18] The same MUR has another SOR by the same authors but with a different date. *CBS Broadcasting,* SOR of Comm'rs Mason and Smith (Fed. Election Comm'n July 15, 2005), *available at* http://eqs.sdrdc.com/eqsdocs/00004580.pdf (visited Feb. 10, 2006).

exemption even covers express advocacy in debates. *Id.* (citing *Union Leader,* SOR of Comm'r Mason at 3).

For these reasons, part of the OGC analysis[19] accompanying the OGC recommendation in this matter[20] is unnecessary to holding that the press exemption applies.

The misunderstanding appears substantially due to a statement in a previous SOR. That statement indicated the press exemption applied in *Dornan,* because there was "no indication that the formats, distribution, or other aspects of production were *any different* when Mr. Dornan was a guest host than they were when the regular host was present." *Dornan,* SOR of Vice Chairman Wold and Comm'rs Elliott, Mason and Sandstrom at 2 (emphasis added) (citing *MCFL,* 479 U.S. at 250-51). Indeed, the OGC analysis accompanying the recommendation relied on this statement,[21] and Respondents appeared to have relied on it as well.[22]

However, this statement merely explained how the law applied in *Dornan.* It did not establish the boundary between when the press exemption applies and when it does not. Or, to put it more generally, if one begins solely with the premise that the government lacks authority to act under one narrow set of circumstances at one end of the spectrum, it does not follow that the government has authority to act under all other circumstances, along all the rest of the spectrum. *See United States v. Lopez,* 514 U.S. 549, 594 (1995) (Thomas, J., concurring) (quoting *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 194 (1824)).

Moreover, *Dornan* is different from this matter in that in *Dornan,* the issue was the use of a political figure who may or may not have been a candidate at various times as a guest or substitute host. Thus, some inquiry into having guest hosts, Dornan's professional background, and consistency with normal programming was in order to determine whether the radio show was "news, commentary, or editorial," as opposed to advertising for a candidate. By contrast, the Dave Ross Show is a regular KIRO program, so it qualifies as "news, commentary, or editorial," and no inquiry is needed into whether the host is or may become a candidate.

For the press exemption to apply, respondents need not demonstrate that there were no differences at all from what a press entity usually does. This would be a difficult standard to meet, and it is not what the law requires. For example, *MCFL* itself held that the press exemption did not apply to a special edition of a newsletter, because it was not "comparable to *any* single issue of the newsletter." 479 U.S. at 250 (emphasis added). To illustrate why, the Court noted that it "was not published through the facilities of the regular newsletter, ... was not distributed to the newsletter's regular audience," and no "characteristic of the [special e]dition associated it in any way with the normal MCFL publication." *Id.* Nor was the special edition "akin to the normal business activity of a press entity ... ." *Id.* at 251 n.5 (citing *FEC v. Phillips*

[19] GCR at 4-12.

[20] *Id* at 13.

[21] *Id.* at 6.

[22] *See id* at 6-7.

Publishing, Inc., 517 F. Supp. 1308, 1313 (D.D.C. 1981); *Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981)). The Court did not hold that, for the press exemption to apply, there must be no differences from what the press entity usually does. *See id.* at 250-51 & n.5. Indeed, *MCFL* could be interpreted to mean that *any* similarity to the regular newsletter, in facilities, distribution, or format, might have placed the publication within the press exemption.

With this in mind, the inquiry in this matter is not whether "anything about" Ross's talk show "changed after Ross became a candidate and stayed on the air."[23] Moreover, it is immaterial that:

- The show "has long been" on the air.[24]
- Ross said he would not use his show "for electioneering" and "promised station management that he would not use his show for campaigning or for discussing issues that would be of unique interest to voters ... ."[25]
- Ross kept his promise by not discussing his candidacy, and by not soliciting or answering questions about his candidacy from Dave Ross Show listeners.[26]
- KIRO gave "strict directives" to others not to refer to the Ross campaign on the air.[27]
- Ross referred to his candidacy or potential candidacy on the air.[28]
- KIRO interviewed Ross's potential primary opponents.[29]
- The format for the interview of Ross after his primary victory was like the format would have been for any candidate.[30]
- KIRO interviewed Ross's general-election opponent and hosted a debate between the general-election candidates.[31]
- Ross did not mention his candidacy on CBS Radio.[32]
- KIRO did not run Ross's CBS Radio commentaries during the campaign.[33]
- Ross took a leave of absence from KIRO during the campaign.[34]

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[23] *Id.* at 6.

[24] *Id.*

[25] *Id.* at 7 (quoting Compl. Exhs. 9, 11 (Oct. 4, 2004)).

[26] *Id.* (quoting KIRO Resp. at 3).

[27] *Id.*

[28] *Id.*

[29] *Id.* at 7-8.

[30] *Id.* at 7.

[31] *Id.* at 8.

[32] *Id.* at 8, 10.

[33] *Id.* at 10.

[34] *Id.*

We would not want broadcasters or others to conclude from an application to particular facts in the *Dornan* matter, and the repetition of that analysis in the GCR in this matter, that these or similar restrictions on regular programming or hosts are required as conditions of the press exemption.

III. CONCLUSION

For the foregoing reasons, the Commission was correct in finding no reason to believe and closing the file in this matter.

March 17, 2006

Michael E. Toner
Chairman

David M. Mason
Commissioner

Hans A. von Spakovsky
Commissioner