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No. 77966-0

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, CITY OF SEATTLE, a political subdivision of the State of Washington, *ex rel.* the State of Washington,

Respondents,

v.

NO NEW GAS TAX, a Washington Political Action Committee, and JEFFREY DAVIS, an individual and Treasurer of NO NEW GAS TAX,

Appellants.

On Appeal From Thurston County Superior Court
05-2-01205-3

BRIEF OF *AMICUS CURIAE* WASHINGTON STATE ASSOCIATION OF BROADCASTERS

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I. IDENTITY AND INTEREST OF AMICUS

The identity and interest of the Washington State Association of Broadcasters ("WSAB") as amicus in the current matter is set forth in the Motion by the Washington State Association of Broadcasters to File *Amicus Curiae* Brief, filed herewith.

II. STATEMENT OF THE CASE

For purposes of this brief, the WSAB adopts the Statement of the Case set forth in Appellants' Opening Brief.

III. ARGUMENT

A. This Court Should Protect Open and Vigorous Debate of Important Political Issues on the Airwaves in Washington

This case presents a significant issue of first impression: To what extent may the Fair Campaign Practices Act ("FCPA") restrict controversial political speech on radio and television broadcasts? In this case, the trial court interpreted the FCPA to require that political talk radio shows be considered "contributions" to a political campaign if the hosts of the shows are sufficiently affiliated with the campaign and if they engage in "open advocacy" and/or "solicit funds" during the shows. CP 1496.

This interpretation of the FCPA poses a severe threat to free speech and open political debate in the media. While characterized as only involving "disclosure," the trial court's interpretation of the FCPA actually implicates several contribution *limits* as well. The trial court's

interpretation thus will *directly restrict* political speech on the air. In addition, the inherent vagueness of the standards under which liability was imposed will encourage broadcasters to self-censor their programming, chilling free and open discussion of important political issues even further.

This Court should reject the trial court's interpretation of the FCPA and hold that these shows were not campaign "contributions." It should rule in favor of open and vigorous public debate of important political issues and against these direct restraints on political speech.

B. The Trial Court's Interpretation Threatens to Render Ordinary Talk Show Broadcasts Illegal During Elections

The trial court held that these talk shows were political "contributions" because it found that the hosts[1] were (1) "principals" of the I-912 campaign that (2) advocated for it on the air and urged listeners to make donations. CP 1496. The trial court rejected the application of Washington's "media exemptions," wrongly believing that the speech did not qualify as protected "editorial" or "commentary." CP 1495-1496.

This reasoning threatens to renders much ordinary radio talk show broadcasting illegal during elections, because the conclusion that these shows are "contributions" has several direct and unavoidable

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[1] The WSAB will refer to the on-air personalities, such as Carlson and Wilbur, as "the hosts." The FCC licensees of the radio and television stations, such as Fisher Broadcasting, will be referred to as "the broadcasters."

consequences under the FCPA. *First,* RCW 42.17.105(8) imposes a $5,000 cap on "contributions" in the final three weeks before an election. It is illegal for a campaign to receive such contributions, and for potential donors to make them. RCW 42.17.105(8). Violators are subject to civil penalties of $10,000 per violation, attorneys' fees, and punitive assessment of costs. RCW 42.17.390(3), .400(5). If these talk shows are "contributions," the law thus imposes a direct cap on their dissemination in the three-week period before an election, enforced by severe penalties.

Second, similar caps are imposed by RCW 42.17.610-.790. *See, e.g.*, RCW 42.17.640(1). Although *this* case involved an initiative campaign, which is not subject to RCW 42.17.610-.790, the definition of "contribution" in RCW 42.17.020(15) applies throughout the FCPA. If these shows were in-kind "contributions" to an initiative campaign, then similar speech in a contested race would be a "contribution" to a political candidate, which would be subject to RCW 42.17.610-.790.

The trial court's interpretation of the FCPA thus creates direct restrictions on broadcast political speech in Washington. Broadcasters who choose to air shows such as these will, at some point, be *required by law* to halt their speech. This interpretation will also chill political speech because many broadcasters will simply elect to steer clear of such topics to

limit their potential "contributions" and avoid prosecution for an inadvertent violation of the FCPA.

The Prosecutors have consistently tried to minimize these problems by asserting that they are merely "hypothetical" applications of the statute. The Prosecutors are wrong: these are the unavoidable legal consequences of treating these shows as "contributions" under the FCPA.

Moreover, these restrictions would have broad application, because the basic format of political talk radio is similar to that of the shows at issue here. It is common for talk show hosts, from Rush Limbaugh (on the right) to Al Franken (on the left), to express opinions about controversial topics and to support or oppose candidates and initiatives. *See, e.g.*, First General Counsel's Rept., *In the Matter of John Kobylt, et al.*, MUR 5569 (Federal Election Comm'n 2006) ("*Kobylt*") at 7-8 (describing shows).

The broad reach of the trial court's interpretation is not significantly limited by the fact that liability here was predicated on a finding that the hosts were "principals" of the campaign. There are many politically active on-air personalities who become involved in supporting campaigns and candidates.[2] Under the trial court's interpretation, these

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[2] It is well known, for example, that John Carlson is a former gubernatorial candidate, that Dave Ross is a former Congressional candidate, that talk radio hosts in California played a significant role in instigating and supporting the

hosts are "principals" of the respective campaigns they endorse, and their on-air "advocacy" would thus be "contributions" to those campaigns.

This apparent limitation on the scope of the trial court's ruling actually *magnifies* its chilling effect. If the existence of a "contribution" turns on whether the host might be considered a "principal" of a campaign, then broadcasters will be forced to start monitoring the political behavior of their employees before letting them take to the air to discuss controversial political topics. If they do not, broadcasters run the risk of finding out *after the fact* that otherwise apparently legal broadcasts were actually illegal contributions.[3]

C. The Trial Court Erred In Its Interpretation of the Media Exemptions

1. The Shows Satisfy the Elements of the Media Exemptions

Notwithstanding the consequences of its reading of the FCPA, the trial court held that these shows were "contributions." In this the court erred. It should have held—as this Court should hold—that these broadcasts were not "contributions" under RCW 42.17.020(15)(b)(iv) and under the definition of "political advertising" contained in WAC 390-05-

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successful recall of Governor Gray Davis, that Pat Buchanan ran for President (twice), and that Al Franken has been openly discussing a run for Senate.

[3] Some broadcasters may *choose* to prohibit their employees from associating with political campaigns, but that is a private editorial choice very different from

290 (collectively the Washington "media exemptions"). *See* Appendix. As the United States Supreme Court has recognized, such exemptions recognize "the unique role that the press plays in informing and educating the public, offering criticism, and providing a forum for discussion and debate." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990).

The elements of the exemptions are clearly satisfied. These broadcasts involved regularly scheduled radio talk shows, broadcast to the general public, that contained protected "commentary" and "editorializing" (discussed in more detail in Section III(C)(2) below)), controlled by a person (Fisher Broadcasting) that is in the business of radio broadcasting, and that is not owned or controlled by any candidate or political committee. The additional requirements of WAC 390-05-290 are also satisfied because, as correctly noted by NNGT, the factual record in this case demonstrated that the speech at issue occurred during KVI's "content time," not its "advertising time," meaning that it was time for which payment " is not normally required."

Notably, the media exemptions apply whether or not the hosts are considered "principals" of the campaign. RCW 42.17.020(15)(b)(iv) does

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the government indirectly *imposing* that result through the FCPA. *See Nelson v. McClatchy Newspapers, Inc.*, 131 Wn.2d 523, 544, 936 P.2d 1123 (1997).

require that the press entity is "not controlled by a candidate or a political committee," but that is a different issue. The "person" whose control is at issue is not the *host* (e.g., John Carlson), but rather the controller of the "news medium," i.e., Fisher Broadcasting, the FCC licensee and owner of the broadcasting facilities. As long as the broadcaster is not controlled by a candidate or committee, the media exemption applies.

This is critical because it provides a clear rule whereby the entity that provides the financing, i.e., the broadcaster, may also control compliance with the exemption. By way of contrast, if the "person" who controls the "news medium" is deemed to be the talk show host, then the broadcaster may find itself in the position of having unwittingly financed illegal contributions if the host is later determined by a court to have been a "principal" of a campaign. This absurd and unfair result is avoided by recognizing that the issue of "control" concerns whether the *broadcaster* is controlled, not whether a particular *host* is affiliated with a campaign.[4]

This application of Washington's media exemptions to these talk shows is strongly supported by FEC authority, most notably its decision in the *Dornan* case. The Prosecutors' attempts to distinguish *Dornan* are

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[4] Federal law similarly recognizes that the question is "whether the press entity is owned or controlled by a political party." *See* Stmt. of Reasons of Vice-Chairman Wold, et al., *In the Matter of Dornan*, MUR 4689 (Federal Election Comm'n Febr. 14, 2006) ("*Dornan* SOR") at 2-3 (identity of host is immaterial).

factually and legally mistaken. Factually, the Prosecutors erroneously assert that there was "no indication that the guest radio host promoted or raised money for his campaign." Resp. Br. at 40. As pointed out by the dissent in *Dornan*, however, "most of the air time [used by Mr. Dornan] was spent either promoting himself or attacking [his opponent]." *Dornan*, Stmt. of Reasons of Vice Chairman McDonald (Feb. 22, 2000) at 2. The case thus involved express advocacy for a candidate, and the FEC still held that the media exemption applied.

Legally, the Prosecutors erroneously imply that *Dornan* was undermined or over-ruled by *McConnell v. FEC*, 540 U.S. 92, 124 S.Ct. 619, 157 L.Ed.2d 491 (2000). Resp. Br. at 40. In subsequent cases, however, the FEC has repeatedly adhered to its reasoning in *Dornan*. *See, e.g., In the Matter of Dave Ross, et al.*, MUR 5555 (Federal Election Comm'n 2006) ("*Ross*"); *In the Matter of John Kobylt, et al.*, MUR 5569 (Federal Election Comm'n 2006). Thus, *McConnell* did not undermine or overrule *Dornan*.

2. Express Advocacy and Solicitation of Funds Qualify as "Commentary" or "Editorial" Under the Media Exemptions

The final question is whether the content of the talk shows at issue exceeded the coverage of the exemptions. Contrary to the Prosecutors' assertions, neither express advocacy nor the solicitation for funds removed this speech from the protection of the media exemptions.

a. Express Advocacy Is Covered by the Media Exemptions

The trial court first concluded that these shows were not "commentary" or "editorial" because they included express "advocacy." CP 1496. Although the Prosecutors choose essentially not to defend this position, focusing instead on the "solicitation of funds," it is nevertheless critical that this issue be decided correctly.

There is no persuasive authority or logic supporting the view that mere advocacy in favor of a position falls outside the scope of the media exemptions. To the contrary, it is unquestionably in the very *nature* of "editorializing" to advocate. Every election season, for example, many newspapers endorse candidates or ballot propositions, accompanied by detailed explanations supporting their choices. No one seriously suggests that this is not "editorializing" merely because it contains "advocacy."

The authority interpreting the federal exemption is in accord. *See, e.g.*, *Dornan* SOR, *supra* (media exemption applied notwithstanding express advocacy in favor of host's campaign); *Dornan,* Additional SOR of Comm'r Mason at 4 ("I find it beyond dispute that talk radio programs of the kind at issue constitute commentaries" within the exemption).

This point was made quite recently and forcefully in the *Ross* case. There, the FEC considered whether KIRO had provided illegal

contributions to the Congressional campaign of Dave Ross. Ross, who has a popular talk show on KIRO, had discussed the possibility of running on the air and was even interviewed on KIRO after he won the Democratic primary. *See Ross*, Stmt. of Reasons of Chairman Toner, et al. (Mar. 17, 2006) ("*Ross* SOR") at 1-2 (attached hereto). The FEC's General Counsel concluded that the media exemption applied to this conduct, and the FEC agreed, voting unanimously to dismiss the complaint. *Id.* at 1.

An FEC plurality elaborated, explaining that once it was established that (1) the broadcasts involved a "news story, commentary, or editorial" (2) distributed through a radio station's facilities and (3) the facilities were not owned or controlled by any political party, committee, or candidate, "this should have ended the investigation of th[e] matter." *Id.* at 2-3. The Commissioners emphasized that, in determining the application of the exemption, "[t]he content of a news story, commentary, or editorial is irrelevant." *Id.* at 3. To qualify, "the press need not ... [a]void express advocacy, or avoid solicitations." *Id.*

The reason for the rule described in *Ross* is simple: if the exemption turns on the content of shows, then regulators will inevitably be required to act as media censors, parsing transcripts to determine if mere discussion of an issue has strayed into impermissible "advocacy" or "solicitation." *See Dornan*, Additional SOR of Comm'r Mason at 4

(media exemption test is "designed to exclude any inquiry or consideration of the substance of a communication").

The Prosecutors fail to provide any persuasive contrary authority; indeed, as noted, they hardly even try to defend this position. Regardless of how this Court resolves this appeal, therefore, it should clearly hold that advocating for or against a particular position is within the scope of "commentary" or "editorializing" under the media exemptions.

b. "Solicitations for Funds" Are Not Excluded From the Media Exemptions

The trial court also concluded that the media exemptions did not apply to the extent that the hosts used airtime to "solicit funds" for the campaign. CP 1496. On appeal, the Prosecutors rely heavily—if not exclusively—on this point to argue that the press exemptions do not apply. This reliance fails for several reasons.

First, the United States Supreme Court has specifically recognized that protected "editorializing" *includes* seeking financial support. In *New York Times v. Sullivan*, 376 U.S. 254, 266, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Court recognized that an advertisement that openly "sought financial support" for a political cause constituted an "editorial advertisement" entitled to full First Amendment protection. The talk shows here were no different.

Second, as the *Ross* SOR makes clear, "the press need not ... avoid solicitation" to qualify for the exemption. *See Ross* SOR at 3. The FEC applied this principle recently in *Kobylt*, *supra*, another of its recent, post-*McConnell* decisions. In *Kobylt*, the complaint alleged that the talk show hosts both expressly advocated for the election of their candidate and allegedly invited her to solicit funds for her campaign on the air. *See Kobylt*, Stmt. of Reasons of Chairman Toner, et al. (Mar. 17, 2006) ("*Kobylt* SOR") at 2. Notwithstanding the allegations that airtime had been used to solicit funds, the FEC dismissed the complaint.

Third, and most important, the use of a purported distinction between "solicitation" and other advocacy is itself logically unsustainable and will suppress and chill free speech. There is no clear line between merely "advocating" for a particular position and "soliciting" for funds to support it. It may appear easy to decide that a statement like "Please give money" is a "solicitation," but life is rarely so simple.

For example, what if the host expresses her "support" for the campaign, and urges listeners to "support" the campaign as well. What if the host then mentions that she has personally contributed? Does that suggest to listeners that they too should contribute, i.e., a "solicitation"?

What if instead the host merely expresses "support" for the campaign and urges listeners to "support" the campaign as well, but notes

that the campaign is running short of funds? Is that message clear enough to be a "solicitation"? What if the host doesn't make that point but, earlier in the show, there is a news report that the campaign has announced that it must have new funding or shut down? Is the juxtaposition of those statements sufficient to constitute a "solicitation"? How close in time would the statements need to be to qualify as a "solicitation"?

Alternatively, what if a *guest* or a *caller* makes a solicitation for funds? If the broadcaster is liable for the solicitations by the hosts, why not for solicitations by guests? Would the broadcaster be indirectly liable if the talk show host implicitly endorsed the guest or caller's position?

As these examples demonstrate, the line between "solicitation" and discussion of a controversial political issue is not sufficiently distinct to provide a reliable basis for distinguishing between protected "editorializing" and unprotected "contributions." The essential problem is that open and robust debate of political issues requires advocacy for political causes, and such advocacy often cannot be distinguished from an endorsement of financial support. Accordingly, it is impossible to prohibit "solicitation" in this context without also limiting advocacy, and thus restricting the vigor of political debate itself.[5]

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[5] The uncertainty discussed in the text, i.e., when a speaker is uncertain about whether speech could be interpreted as lawful or unlawful, is precisely the sort

The only citation that the Prosecutors provide supporting their position regarding solicitation is a 1995 advisory opinion of the PDC.[6] This administrative letter is not persuasive authority for the Court to adopt this unsustainable position. Not only is the letter itself without any citation to applicable authority, it lacks any explanation of how the standards it proposes could be applied practically to actual broadcasts.[7]

3. The Practical Problem of Valuation Demonstrates the Importance of Applying the Media Exemptions to "Content Time" On Radio Broadcasts

In addition, the trial court's reasoning creates a serious practical problem of valuation. To comply with the contribution caps, a broadcaster must have a methodology for valuing the speech to determine when the caps are reached. Because this type of speech was, as the record demonstrates, not during KVI's advertising time, there is no established rate for valuing it. Any value assigned would be inherently arbitrary.

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most likely to chill speech. Where a speaker "is wholly at the mercy ... of whatever inference may be drawn as to his intent and meaning," he or she will inevitably "hedge and trim." *Washington State Republican Party v. Public Disclosure Comm'n*, 141 Wn.2d 245, 268, 4 P.3d 308 (2000).

[6] PDC Declaratory Order No. 5a expressed the view that free time for "political advertising" could be a disclosable contribution. It did not, however, discuss the scope of what qualifies as "comment" or "editorial" under the media exemptions.

[7] The fact that a former representative of Fisher Broadcasting expressed the view in 1995 that this advisory opinion set forth a "relatively clear rule" is of no legal relevance. In any event, the view expressed was—and still is—incorrect; the rule suggested in the advisory opinion is *not* "relatively clear" in application.

Even if it were possible to establish a "per minute" value, the broadcaster would still have to determine exactly how much of the show constituted a "contribution." It would have to evaluate: How much of the show constituted "advocacy" and/or "solicitation," when did the "advocacy" and/or "solicitation" begin and when did it end, etc.? Given the flow of a political talk show, any determination as to how much of the show constituted a "contribution" would also be arbitrary.

The inevitable result of these arbitrary determinations will be to chill broadcast speech. Many broadcasters will avoid these types of on-air discussions, or limit them, for fear of being drawn into disputes after the fact over whether their valuations were accurate and whether they had inadvertently violated the law by undervaluing the speech.

This is one reason why the bright line drawn by WAC 390-05-290 provides a useful test. Under that regulation, broadcast time cannot qualify as "political advertising" unless it is time that would otherwise have been charged for and the broadcaster surrenders it for less than full value. Broadcasters can easily separate time that is not "political advertising" from time that might be, and, if a contribution of time has been made, determine how much it is worth.

The Prosecutors may complain that this test allows the possibility that some "true contributions" will escape regulation. Even if that is

possible, which the WSAB doubts, it is well established that "if some constitutionally unprotected speech must go unpunished, that is a price worth paying to preserve the vitality of the First Amendment." *Houston v. Hill*, 482 U.S. 451, 462 n.11, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987).

4. The Trial Court Erred By Creating Constitutional Problems Where None Existed

Finally, the trial court erred by creating constitutional problems where none existed. It is a fundamental principle of statutory interpretation that statutes should be construed and applied to *avoid* unnecessary constitutional problems. "Where possible, statutes will be construed so as to avoid any unconstitutionality." *Duskin v. Carlson*, 136 Wn.2d 550, 557, 965 P.2d 611 (1998). Here, not only was such an interpretation of the FCPA reasonably available to the trial court, but that interpretation was *superior* to the interpretation urged by the Prosecutors.

D. The Trial Court's Limiting Interpretation of the Media Exemptions Creates Unconstitutional Restraints on Speech

The WSAB will not repeat the extensive discussions of constitutional issues contained in the principal briefing, but will instead emphasize certain limited key points.

1. The Trial Court's Interpretation of the FCPA Infringes on the Right to Free Speech by Creating Unconstitutional Content-Based Restrictions on Speech

As noted above, the trial court's interpretation creates specific caps on the permissible quantity of speech. Once broadcasts reach a certain

level of "contributions," the broadcaster must stop talking, or, more specifically, prohibit some or all of its on-air employees from talking about the prohibited subjects (elections or candidates) in the prohibited ways (express advocacy or solicitation).

"When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995).[8] Exacting scrutiny is a "well-nigh insurmountable" burden. *State v. 119 Vote No! Committee*, 135 Wn.2d 618, 625, 4 P.3d 808 (2000).

Under exacting scrutiny, "[t]he state bears the burden of showing a compelling interest to justify the burden placed on protected speech." *Rickert v. Pub. Disclosure Comm'n*, 129 Wn. App. 450, 119 P.3d 379, 386 (2005). This burden cannot be satisfied here. For example, the purpose of the 21-day prohibition in RCW 42.17.105(8) is to prevent large, last minute contributions that cannot be disclosed before the election and thus remain effectively secret, undermining the disclosure regime. The alleged

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[8] The so-called "heightened scrutiny" standard does not apply here because this case directly regulates the content of actual speech. "[C]ampaign statutes that go beyond requiring the reporting of funds used to *finance* speech to affect the *content of the communication itself*" are subject to exacting scrutiny. *ACLU v. Heller*, 378 F.3d 979, 987, 992 (9th Cir. 2004) (emphasis in original).

"in-kind contributions" at issue here, however, are by their nature public discussions. Suppression of this speech therefore is not only not narrowly tailored to achieve the goal of preventing last minute, secret contributions, it furthers that purpose hardly at all. *See Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981) (prohibition on contributions did not further interest in disclosure where contributors' identity was already known).[9]

2. The Trial Court's Interpretation of the FCPA Chills Protected Speech

An impermissible chilling effect arises when an otherwise legitimate government regulation discourages substantially more protected speech than necessary to achieve its objectives. *See Reno v. ACLU*, 512 U.S. 844, 874, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). Here, even if one assumes for the sake of argument that the State *may* legitimately prohibit in-kind "contributions by speech" under the facts found by the trial court, this interpretation of the FCPA will substantially chill protected political speech outside the scope of the permissible regulation.

As described above, the trial court's interpretation of the FCPA encourages broadcasters to engage in several forms of self-censorship,

[9] The fact that these limits are framed as regulation of "contributions" does not save them; such limitations are frequently struck down as unconstitutional. *See,*

including restricting their employees' political activities, parsing their hosts' on-air statements to ensure that those statements do not "cross the line" and become contributions, and scrutinizing their shows to "value" speech. If broadcasters do not undertake these efforts, they run the risk of discovering, after the fact, that they have unwittingly engaged in illegal campaign contributions, with potentially severe consequences.

The inevitable result of this self-censorship will be to discourage protected speech. Talk show hosts will avoid being politically active, for fear of becoming "principals" of political campaigns; broadcasters will encourage this isolation and perhaps even refuse to hire on-air personalities with too much political baggage; and broadcasters will restrict political commentary on the air for fear that it might be interpreted as express advocacy or indirect or implicit "solicitations" for funds. Given the fundamental public importance of the political speech at issue here, this Court should not accept the chilling effect that the trial court's interpretation of the FCPA will inevitably create.

The Prosecutors argue that the fact that Carlson continued to urge listeners to donate money demonstrates that this interpretation of the FCPA will not chill free speech. Just because an aggressive, opinionated

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e.g., *Berkeley*, *supra* (striking down contribution limits); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (same).

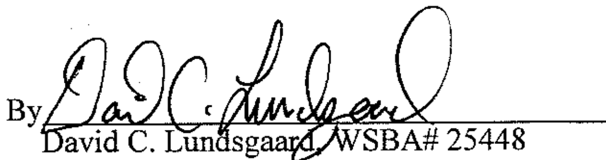
host like Carlson was not deterred by the possibility of prosecution, however, does not mean that other hosts and broadcasters would not be. This Court should not assume that exposure to potential prosecution and severe penalties under the FCPA will not affect how broadcasters and hosts approach controversial political speech on the air.

IV. CONCLUSION

The correct resolution of this appeal is of enormous importance to the broadcasting community of Washington. If this Court adopts the trial court's interpretations of the FCPA and eviscerates Washington's media exemptions, vigorous and open political debate on the airwaves will be substantially restricted. This Court should decide—as the trial court should have decided—that on-air broadcasts of political speech such as these are permissible "commentary" and "editorializing," exempt from reporting and prohibition as in-kind campaign "contributions."

Respectfully submitted this 9th day of May, 2006.

GRAHAM & DUNN PC

By 
David C. Lundsgaard, WSBA# 25448

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APPENDIX

Including:

Applicable statutes and rules

Statement of Reasons of Chairman Toner, et al.,
In the Matter of Dave Ross, et al., MUR 5555 (Federal Election Comm'n Mar. 17, 2006)

RCW 42.17.020

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

. . . .

(15)(b) "Contribution" does not include:

. . . .

(iv) 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;

RCW 42.17.105(8)

It is a violation of this chapter for any person to make, or for any candidate or political committee to accept from any one person, contributions reportable under RCW 42.17.090 in the aggregate exceeding fifty thousand dollars for any campaign for statewide office or exceeding five thousand dollars for any other campaign subject to the provisions of this chapter within twenty-one days of a general election. This subsection does not apply to contributions made by, or accepted from, a bona fide political party as defined in this chapter, excluding the county central committee or legislative district committee.

RCW 42.17.640(1)

No person, other than a bona fide political party or a caucus political committee, may make contributions to a candidate for a state legislative office that in the aggregate exceed seven hundred dollars or to a candidate for a state office other than a state legislative office that in the aggregate exceed one thousand four hundred dollars for each election in which the candidate is on the ballot or appears as a write-in candidate. Contributions made with respect to a primary may not be made after the date of the primary. However, contributions to a candidate or a candidate's authorized committee may be made with respect to a primary until thirty days after the primary, subject to the following limitations: (a) The candidate lost the primary; (b) the candidate's authorized committee has insufficient funds to pay debts outstanding as of the date of the primary; and (c) the contributions may only be raised and spent to satisfy the outstanding debt. Contributions made with respect to a general election may not be made after the final day of the applicable election cycle.

WAC 390-05-290

Political advertising does not include letters to the editor, news or feature articles, editorial comment or replies thereto in a regularly published newspaper, periodical, or on a radio or television broadcast where payment for the printed space or broadcast time is not normally required.

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

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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

[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.

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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).

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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.

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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*

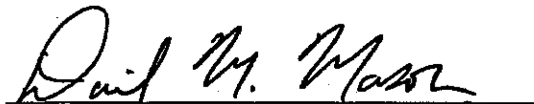
We would not want broadcasters or others to conclude from an application to particular facts in the *Dornan* matter, and the repetition of that analysis in the GCR in this matter, that these or similar restrictions on regular programming or hosts are required as conditions of the press exemption.

III. CONCLUSION

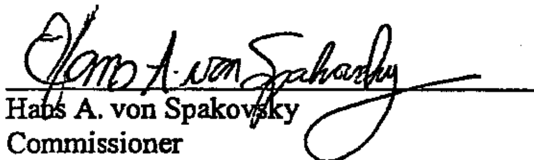
For the foregoing reasons, the Commission was correct in finding no reason to believe and closing the file in this matter.

March 17, 2006

Michael E. Toner
Chairman



David M. Mason
Commissioner



Hans A. von Spakovsky
Commissioner

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