COMMENTS OF MAINE VALUES LLC ON PROPOSED
RULE RELATING TO THE PRESS EXEMPTION

Maine Values, LLC, the owner of Maine Today Media, which publishes the *Portland Press Herald*, *Kennebec Journal* and *Morning Sentinel*, among others, submits the following comments on the proposed rule relating to the "press exemption." In recognition of the first amendment values at stake, that exemption makes clear that news stories, commentaries, and editorials distributed through any newspaper are excluded from the definition of expenditures regulated by the campaign finance laws. The exemption contains an exception, however, for newspapers "owned or controlled by any…candidate or candidate's immediate family" and it is this exception that the proposed rule seeks to clarify.

Maine Values welcomes and appreciates the staff's efforts to clarify the Commission's approach to regulating at the vital intersection of the first amendment and the campaign finance laws. We wholeheartedly endorse staff's description of the importance of the press exemption generally:

> "The press exemption is important, because it allows publishers of news and commentary to present to the public news reports and viewpoints concerning candidates, without the fear that they will be entangled in campaign finance regulations."

In recognition of the importance of this concern, staff has identified several ways in which the absence of a press exemption could present difficult first amendment concerns: (i) independent expenditure reporting; (ii) disclaimer requirements; and (iii) PAC reporting. In addition to these concerns, we note that because any "expenditure" made in consultation or coordination with a campaign is deemed a "contribution," 21-A M.R.S.A. § 1015(5), given the nature of political campaigns the mere possibility that complaints and demands for investigations by the Commission into communications between a newspaper and a campaign could arise has a

significant chilling effect on the newspaper's speech. That concern is compounded by the breadth of the definition of "immediate family," which goes far beyond any identifiable state interest.

Finally, it is important to bear in mind the long-standing principle that a candidate and candidate's spouse cannot constitutionally be subject to any expenditure limits. *Buckley v. Valeo, 424 U.S. 1, 51-58.* In *Buckley* the Supreme Court made clear that a candidate, "no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." Accordingly, the Court held that a limitation on personal expenditures by a candidate "clearly and directly" interfered with "constitutionally protected freedoms." *Id.*

These comments first set out some generally applicable first amendment principles. We then discuss some of the specific provisions of existing law and the proposed amendments in the first amendment context and provide textual comments on the language of the proposed rule. Finally, we propose a modified rule for the Commission's consideration. Overall, the proposed rule is a step in the right direction, particularly its attempt to exempt news stories and races not involving a candidate who owns a newspaper, but it requires further development and clarification. In particular, the continuing attempt to regulate editorial speech presents at least two distinct challenges, especially in light of *Buckley*'s prohibition against regulating expenditures by candidates: (i) there doesn't appear to be any compelling state interest in regulating editorials by candidates (or their immediate family) as long as the editorial includes a disclosure of the newspaper's ownership; and (ii) there is no reasonable way to determine the amount of a so-called "expenditure" in the context of typical newspaper operations; the exemption for " use of offices, telephones, computers and similar equipment when that use does

not result in additional cost to the provider" should be read to exclude any possibility that the normal editorial process would somehow constitute some kind of "expenditure" subject to regulation. *See* 21-A M.R.S.A. § 1012(3) (B) (9). Similarly, the proposed rule's clarification of the exception to news stories that provide "reasonably equal" coverage to all candidates is an invitation to complaints and litigation; it is overly broad and vague and should be changed to simply "reasonable coverage."

GENERAL COMMENTS REGARDING THE FIRST AMENDMENT AND THE PRESS EXEMPTION

The Supreme Court recently issued a unanimous decision making clear that "[w]hen speech is involved, rigorous adherence" by governmental agencies to two connected but discrete due process concerns is necessary to ensure that protected speech is not chilled: (1) "that regulated parties should know what is required of them so they may act accordingly" and (2) that regulatory "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *FCC v. Fox Television Stations, Inc*, Slip. Op at * 12, 567 U.S. ___ (June 21, 2012). Complex regulations on campaign speech that are difficult to apply in practice "function as the equivalent of prior restraint giving [an administrative agency] power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit." *Citizen's United v. FEC*, 130 S.Ct. 876, 896 (2010).

The statutory press exemption found in Maine's campaign finance laws has historically ensured that Maine's long standing institutional press can serve the role envisioned by this country's founders to advance "discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). To avoid Maine's

campaign finance laws operating as a prior restraint on the press, the Commission should clarify and expand the press exemption to the campaign finance laws.

1. Constitutional limitations on the Commission's regulations

Content-based distinctions on speech are subject to strict scrutiny, and only campaign speech that is subject to "no reasonable interpretation other than as an appeal to vote for or against a specific candidate" meets a sufficiently definite standard that it may be subject to some government imposed limits. *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 470 (2007); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 66-67 (1st Cir. 2011) ("*NOM I*"). Expenditure or contribution limits are also subject to strict scrutiny, whereas disclosure disclaimer requirements are subject to "exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *NOM I*, 649 F.3d at 66.

With regard to dollar limits and disclosure of contributions, the Supreme Court has recognized two "sufficiently important" state interests justifying regulation: an "anti-corruption" interest and an "anti-circumvention interest." The first embraces not only express or implied quid pro quo arrangements, but also the threat of undue influence by large donors over elected officials, or the appearance of it, which undermines public confidence in the integrity and fairness of the electoral system. *Buckley v. Valeo*, 424 U.S. 1, 26-29 (1976); *see also Nixon v. Shrink Missouri PAC*, 528 U.S.377, 389 (2000)("In speaking of improper influence and opportunities for abuse ... we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."). The second interest is furthered by measures designed to prevent evasion or

circumvention of legitimate campaign finance restrictions, so that individuals or organizations may not undermine valid contribution limits indirectly. *See* Buckley, 414 U.S. at 46-47.

When dealing with the regulation of independent expenditures rather than contributions, the Courts have also recognized an informational interest "in identifying the speakers behind politically oriented messages" because disclosing the identity and constituency of a speaker engaged in political speech "enables the electorate to make informed decisions and give proper weight to different speakers and messages." *NOM I*, 649 F.3d at 57.

2. The history and purpose of Maine's press exemption to campaign finance regulations

Maine's statutory press exemption is modeled on, and substantially similar to, the federal statutory press exemption in many ways. *Compare* 21-A M.R.S.A. § 1012(3)(B)(1) *with* 2 U.S.C. § 431(9)(B)(i). Because Maine's press exemption is based on the federal press exemption, the federal legislative history helps inform Maine's statute.

When Congress added the media exception in 1974, it indicated that the exemption was intended to make clear that campaign finance regulation would not "limit or burden in any way the First Amendment freedoms of the press and of association. Thus the exclusion assures the unfettered right of the ... media to cover and comment on political campaigns." H. Rep. No. 93-943, 93d Congs., 2d Sess. at 4 (1974); see also *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (discussing rationale for media exception). This special protection of press freedoms is justified not because of any special privilege the press enjoys, but because press entities serve a critical role in our society as a forum for public debate. *Id.*; *see generally Mills v. Alabama*, 384 U.S. 214 (1966).

The Supreme Court first extensively dealt with the question of press activity in conflict with a campaign finance law in *United States v. CIO*, 335 U.S. 106 (1948). There, although the

statute did not expressly exempt the press, the Court looked to legislative history to conclude that the statute had not been intended to reach activities of the press such as the publication of a weekly periodical urging union members to vote for a particular candidate. *Id.* at 120 ("[I]t is clear that Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgment of the freedoms of the First Amendment."). The holding in *CIO* was reiterated by the Court in *Mills*, when the Supreme Court struck down Alabama's campaign finance statute prohibiting newspaper editorials published on election day that urged readers to vote for a candidate:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs.

Mills, 384 U.S. at 218 (citations omitted).

Recognizing the important societal and constitutional purpose served by an independent press, the courts have consistently strengthened first amendment protections where the press has been the vehicle by which public discourse of items of political importance has occurred. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (constitutionalizing protections for certain potentially libelous speech); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down a "right of access" statute that interfered with the editorial judgment of news editors).

Likewise, courts have recognized that the news media is exempted from campaign finance regulation in order to preserve its critically important role in covering elections. The exemption exists, not for the journalists themselves, but so that the public has access to and can participate in important political discussions. *See generally Mills*, 384 U.S. 214. As a result,

courts have recognized that an administrative agency enforcing campaign finance laws is without jurisdiction to investigate traditional press entities acting within their proper press function. *See The Readers Digest Ass'n. v. Fed. Elections Comm'n.*, 509 F.Supp. 1210 (S.D.N.Y. 1981); *Fed. Elections Comm'n v. Phillips Publ'g.*, 517 F.Supp. 1308 (D.D.C. 1981). This proper press function includes editorials and opinion pieces. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 712 (Kennedy, J., dissenting) ("It is beyond peradventure that the media could not be prohibited from speaking about candidate qualifications."); *McConnell*, 540 U.S. at 156 n.51 ("Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a *benefit* on the candidate"); *id.* at 355 (Rehnquist, C.J., dissenting in part) (doubting "the Court would seriously contend that we must defer to Congress' judgment if it chose to reduce the influence of political endorsements in federal elections").

As the FEC recognized in response to a complaint that ABC, CBS, NBC, *The New York Times*, *The Washington Post* and the *Los Angeles Times* were making illegal corporate campaign contributions because of their commentary about political candidates, the media exemption allows the press to continue to serve the important role of election coverage.

> It is clearly a part of the normal press function to attend to the competing claims of parties, campaigns and interest groups and to choose which to feature, investigate or address in news, editorial and opinion coverage of political campaigns. The question of whether a news organization may have credulously or recklessly accepted and reported the claims of one political party or candidate is the type of inquiry which the courts have held to be foreclosed by the [Federal Election Campaign Act]'s media exemption.

In re ABC, CBS, NBC, New York Times, Los Angeles Times and Washington Post, et al. Matter Under Review 4929, 5006, 5090 and 5117 at 4 (Fed. Elections Comm'n Dec. 20, 2000) (*available at* http://eqs.sdrdc.com/eqsdocs/000011BC.pdf). Indeed, the first amendment guarantee of a free press "'has its fullest and most urgent application' to speech uttered during a

campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

Maine's press exemption, like the federal press exemption, recognizes that burdensome regulation of the news media would muzzle "one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Mills*, 384 U.S. at 219. This nation was founded on the idea that "[t]he liberty of the press is … essential to the nature of a free state," *McConnell v. FE*C, 540 U.S. 93, 286 n. 17 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting 4 W. Blackstone, Commentaries on the Laws of England 151 (1769)), and a free press is "one of the greatest bulwarks of liberty." *Id.* at 286 (quoting 1 J. Elliot, Debates on the Federal Constitution 335 (2d ed. 1876)). When a press entity is operating within the sphere of its traditional press function, administrative inquiry should be kept at a minimum "since there is a danger [that] further [administrative] inquiry would impinge upon First Amendment freedoms." *Fed. Elections Comm'n v. Phillips Publ'g.*, 517 F.Supp. 1308,1314 (D.D.C. 1981).

Other States have recognized that they are without authority to treat commentary and editorials as expenditures or contributions. Maryland's campaign finance laws contain no express press exemption whatsoever. Nonetheless, when issuing guidance in 2010 addressing "the circumstances under which the broadcast of political discussion or commentary by a candidate or prospective candidate would amount to an in-kind contribution by the broadcaster," the Maryland Attorney General looked to federal law in order to imply a press exemption into Maryland's statutes, and limit any inquiry into a press entity's performance of traditional press functions:

> In light of the more than 35 years' experience of courts and the FEC in interpreting a media exception consistent with the First Amendment, federal law probably offers the

> most useful guidance on the issue you have asked about. In line with that guidance, we would advise that, in considering possible misconduct relating to the coverage of political discussion by a candidate or potential candidate, the focus should remain on activity by the media outlet that appears to be inconsistent with its ordinary press or broadcast function.

95 Md. Op. Att'y Gen. 110 (2010). (A copy is attached for your convenience).

SPECIFIC ISSUES RAISED BY THE PROPOSED RULE

The proposed rule is complex since it seeks to clarify an exception to an exemption. The general rule is that the costs of press stories and editorials are not "expenditures" unless the newspaper is owned by a candidate or a candidate's immediate family member. The proposed rule clarifies the exception by preserving the exemption from the definition of "expenditure" for a) "the costs of a bona fide news story appearing in a publication of general circulation…that is part of a pattern of campaign-related news coverage that provides reasonably equal coverage to all opposing candidates;" and (b) "the costs of commentary and editorials about other candidates not in the same race as the candidate." These proposed exceptions unfortunately do not include all the circumstances where newspaper articles or editorials should be exempt, and even the two proposed areas of clarification present vagueness and overbreadth problems.

1. **The Commission should not attempt to create a content-based distinction between "bona fide news story" and "commentary or editorial."**

The current statutory text does not provide any distinction between, nor a basis on which to create a distinction between, the terms "news story, commentary, or editorial," and the Commission should not attempt to do so by regulation. Commentary and editorials are a longstanding component of the proper press function of a traditional press entity such as a newspaper. The only content-based distinction that the Commission should make with regard to newspapers is one between "endorsements" that are subject to "no reasonable interpretation

other than as an appeal to vote for or against a specific candidate" and all other news, commentary, or editorials, which should not be subject to any regulation.

In every American election since George Washington's uncontested bid for the presidency in 1789, the press has reported on the candidates' qualifications for office, distributing commentary that often attacks one candidate and favors another. *See* John Allen Hendricks & Shannon K. McCraw, *Coverage of Political Campaigns,* in *American Journalism: History, Principles, Practices* 181 (W. David Sloan & Lisa Mullikin Par-cell eds., 2002).

Court's have recognized that regulations that encroach on the editorial autonomy of newspapers must withstand strict scrutiny. In *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court struck down "right of access" laws intended to encourage diverse viewpoints in the media, refusing to "intru[de] into the function of editors" by interfering with "the exercise of editorial control and judgment." *Id.* at 258. The Court ruled that "[t]he choice of material to go into a newspaper … and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment," adding that "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.; see also CBS v. Democratic National Committee*, 412 U.S. 94, 117 (1973) (plurality opinion) ("[t]he power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers – and hence advertisers – to assure financial success; and, second, the journalistic integrity of its editors and publishers"); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 391 (1973) ("we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial").

Mindful of this constitutional interest in "ensur[ing] that the law does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events," several federal statutes have drawn a distinction between "the media industry" and other entities "that are not involved in the regular business of imparting news to the public." *McConnell*, 540 U.S. at 208. Campaign finance statutes have likewise recognized the "unique role that the press plays in informing and educating the public, offering criticism, and providing a forum for discussion and debate." *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 667 (1990); *id.* at 712 (Kennedy, J., dissenting) ("It is beyond peradventure that the media could not be prohibited from speaking about candidate qualifications."); *McConnell*, 540 U.S. at 156 n.51 ("Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a *benefit* on the candidate").

The law is clear that the only constitutionally permissible content-based distinction with regard to candidate elections involves express advocacy – statements subject to "no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 470 (2007) ("*WRTL*"). Because it is clear that the Commission cannot regulate news stories, commentary or editorials that do not meet the *WRTL* standard, the Commission should issue an interpretative rule that makes clear that the "costs," whatever they are, of any news story, commentary or editorial that is subject to any reasonable interpretation as something other than an "appeal to vote for or against a specific candidate" is not an expenditure subject to regulation.

And even in the case of an editorial expressly advocating the election or defeat of a candidate in this context, the requirement that a candidate or member of a candidate's immediate family who owns a newspaper will, unlike every other newspaper owner, be subject to campaign

finance laws presents serious first amendment questions. First, the disparity of treatment and regulation of the content of speech can only be justified if there is a compelling state interest being furthered in the least restrictive way possible. Since the only interest sought to be furthered here is the informational interest, it can plainly be furthered without subjecting the speaker to the campaign finance laws—if "the names of the persons or entities who own, control and operate the broadcasting station or publication are identified within the publication or otherwise made known to the public" then the government's informational interest "in identifying the speakers behind politically oriented messages … enable[ing] the electorate to make informed decisions and give proper weight to different speakers and messages" is fully protected. Any interest the State seeks to further through disclosure, accordingly, can be furthered by a much narrower requirement than compliance with the reporting obligations that might otherwise be triggered. Second, as we now show, attempts to quantify the costs of any editorial endorsements cannot as a practical matter meet the potential vagueness and overbreadth problems they present.

2. The Commission should issue an interpretative rule determining that the "costs of preparing and disseminating a news story, commentary, or editorial" by a newspaper covers only the additional costs incurred by the paper above and beyond its normal operating costs.

For newspapers of general interest and broad circulation such as those owned by Maine Today Media, which include Maine's largest-circulation newspapers as well as Maine's longest-running newspapers, it is not at all clear what costs the newspaper would need to track and report if it ceased to receive the protection of the press exemption. It is clear that most of the costs associated with a newspaper would not be expenditures subject to regulation. *See, e.g.*, 21-A M.R.S.A. §§ 1012(3)(B)(6) and 1052(4)(B)(6) ("Any communication by any person that is not made for the purpose of influencing the nomination for election, or election, of any person

to state or county office" is not an expenditure). The majority of the news stories, commentary and editorials are not about politics or elections at all. An even smaller percentage is actually subject to an interpretation that would meet the *WRTL* standard, or the 1012(3)(B)(6) and 1052(4)(B)(6) standards.

With respect to actual endorsements, if a large newspaper carries a single editorial that expressly advocates for the election or defeat of an identified candidate, and hence might be deemed an "expenditure" within the meaning of the campaign finance laws, it is hard to see how any such "expenditure" could be quantified. If the editorial or endorsement were not published, something else would be published in its place, so there would be no increased cost in the paper or ink, the costs of computers, office space, telephones, etc. Furthermore, there is no way to allocate the salary of employees such as a reporter, editor, printer, newspaper delivery person or others with regard to an individual endorsement. Since 21-A M.R.S.A. § 1012(3)(B)(9) provides that "[t]he use of offices, telephones, computers and similar equipment [is not an expenditure] when that use does not result in additional cost to the provider," the Commission should make clear that the cost of an editorial/endorsement should not be considered an "expenditure" unless the costs involved are above and beyond normal operating costs. Any other interpretation raises significant first amendment issues.

3. The Commission should clarify that the term "candidate" as used in the press exemption applies only to certain candidates for state, county or municipal office.

The term "candidate" is defined by statute to include federal candidates. 21-A M.R.S.A. § 1(5). It is clear, however, that press stories about *federal* candidates are not contemplated by the statute or regulations. *See* 21-A M.R.S.A. §§ 1012(3)(B)(6) and 1052(4)(B)(6) ("Any communication by any person that is not made for the purpose of influencing the nomination for election, or election, of any person to state or county office" is not an expenditure). *See also*

21-A M.R.S.A. § 1011 (campaign reporting requirements apply to "candidates for all state and county offices); 21-A M.R.S.A. § 1051 (PAC reporting applies to elections of state, county or municipal officers). To avoid any possible future disputes, however, we urge the Commission to make clear in its rule that the exception to the press exemption for broadcast facilities or publications "owned or controlled by any candidate" carries with it the limitation "owned or controlled by any candidate for state, county or municipal office."

Similarly, the Commission should not attempt to regulate a publications' endorsement of candidates in races other than that in which the candidate-owner is running for office, as the proposed rule suggests. Just as the Legislature could not have intended that a long-running newspaper owned by the stepgrandchild of a federal candidate would lose the protections of the media exemption with regard to news stories, commentary or editorials about state, county or municipal candidates, the Legislature could also not have intended that a newspaper owned by the stepgrandchild of a municipal candidate in one municipality would lose the protections of the media exemption with regard to news stories, commentary or editorials about candidates running for unrelated offices in different municipalities or other unrelated state or county offices.

In narrowing Maine's press exemption for press entities owned by a candidate or a candidate's immediate family (broadly defined), the Legislature could not have meant to regulate the legitimate press function of the press entity regarding every other candidate race occurring in the state. Commentary and editorial, even outright endorsement, is part of the proper press function of a newspaper. *McConnell*, 540 U.S. at 355 (Rehnquist, C.J., dissenting in part) (doubting "the Court would seriously contend that we must defer to Congress' judgment if it chose to reduce the influence of political endorsements in federal elections"). Newspapers, as part of their traditional proper press function, have historically engaged in this practice of

providing editorial endorsements of candidates. Since at least the 1800 presidential race, American newspapers have endorsed candidates and provided commentary praising their favored candidate (and often denigrating the opponent). Edward J. Larson, *The Tumultuous Election of 1800, America's First Presidential Campaign: A Magnificent Catastrophe* 206-07 (2008). In every American presidential election, newspapers have played an important role by advocating for endorsed candidates. *See, e.g., Endorsements through the Ages*, http://www.nytimes.com/interactive/2008/10/23/opinion/20081024-endorse.html (reprinting *New York Times* presidential endorsements from 1860 to the present).

The current language of the press exemption could arguably be read to impinge on the proper press function of a newspaper in regard to issuing editorials or commentary on candidate races wholly unrelated to owner or family member of the owner of the newspaper, and the resulting ambiguity could impermissibly censor the speaker or "compel[ ] the speaker to hedge and trim." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 52 (1st Cir. 2011) cert. denied, 132 S. Ct. 1635, 182 L. Ed. 2d 233 (U.S. 2012).

For this reason, the Commission should adopt an interpretive rule clarifying that when a broadcasting facility is owned or controlled by a candidate, or a candidate's immediate family, "the cost of a news story, commentary or editorial about other candidates not in the same race as the candidate" is not an expenditure.

4. **The Commission shall narrow the term "immediate family" as used in the press exemption in order to avoid a constitutional defect**.

In 2007, when Maine narrowed its press exemption by treating press entities owned or controlled by a candidate's immediate family in the same manner as those owned or controlled by a candidate, the Legislature did not intend to upset the traditional role of Maine's institutional press in covering Maine's elections. *See* P.L. 2007 c. 443. The change was originally proposed as part of a larger amendment that sought to limit the ability Maine Clean Election candidates to use public money to reimburse the candidate or the candidate's immediate family members for professional services provided to the campaign. L.D. 1854 (123rd Legis. 2007). The change to the press exemption was never discussed or debated on the floor, or in the committee record.

The use in 2007 of the extraordinarily broad definition of "immediate family" to narrow Maine's press exemption is neither narrowly tailored nor substantially related to any governmental interest. Maine statute's definition of "immediate family," 21-A M.R.S.A. §1(20), was originally adopted in 1985 to cover only a spouse, parents, children and siblings. The definition was broadened in 1993 to include "in-laws and guardians," then again in 1997 to include "stepparent, stepchild, stepsister, stepbrother," again in 2001 to include "grandparent, grandchild, stepgrandparent and stepgrandchild," and again in 2007 to include "domestic partner." This broad definition is necessary and desirable for many parts of the law, which by way of non-exhaustive example: provide voter anonymity to protect the physical safety of an immediate family member, 21-A M.R.S.A. §22(3); allow an immediate family member to file a certificate with the secretary of state to withdraw a candidate who is permanently and continuously incapacitated by catastrophic illness, 21-A M.R.S.A. §374-A(1)(B); and permit a voter to designate an immediate family member to pick up an absentee ballot, 21-A M.R.S.A. §§ 753-A-753-C.

There is no reason, however, to apply this broad definition to limit the press exemption in the context of campaign expenditures. Apart from the overbroad assumption that anyone with any tangential familial connection to a candidate will necessarily support that candidate, the only state interest conceivably implicated is the same informational interest that applies to a candidate. But the context is critically different, since requiring a newspaper owned by a member of a candidate's immediate family which publishes an endorsement of that candidate's opponent to become subject to the campaign finance laws as a result of the relationship is, to put it charitably, somewhat irrational.

A court generally will not address a constitutional challenge to a definition, but instead will look to the substantive burdens imposed as a result of that definition. *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 40 (1st Cir. 2012) (*NOM II*). Under the broad definition of immediate family member, if the stepgrandchild of the owner of a long-running newspaper decides to run for office, then news stories, commentary and editorials that are within the proper press function and historic practice of that long-running newspaper would suddenly become expenditures subject to regulation. That result simply cannot be squared with the first amendment.

What's even more problematic is that these expenditures could be deemed a contribution to a candidate under the provisions of 21-A M.R.S.A. § 1015(5):

> Any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents is considered to be a contribution to that candidate.
>
> The financing by any person of the dissemination, distribution or republication, in whole or in part, of any broadcast or any written or other campaign materials prepared by the candidate, the candidate's political committee or committees or their authorized agents is considered to be a contribution to that candidate.

Id. The statue does not define the terms "in cooperation, consultation or concert with, or at the request or suggestion of." Arguably, if the candidate calls a press conference or issues a press release (even if it is a candidate other than the family-member candidate), that action could be considered a "request or suggestion" that the newspaper publish a news story, editorial or commentary related to the press release, which could then be treated as a contribution. Furthermore, if the newspaper quotes a candidate's press release "in whole or in part" then the dissemination of the news story apparently automatically becomes a contribution. *Id.* Contributions are limited to $750 for most candidates under 21-A M.R.S.A. § 1015(1)-(2). Depending on whether the amount of the "expenditure" would include the salary of the reporter, and depending on what the cost and circulation numbers of the newspaper are, this news story could theoretically exceed the contribution limit with the circulation of a single day's newspaper. After the threshold was reached, the newspaper would thereafter be censored from publishing any more articles related to the candidate. This is clearly constitutionally impermissible and is unrelated to any important governmental interest. Sections 1015(1)-(2) are clear that the limitation "does not apply to contributions in support of a candidate by that candidate or that candidate's spouse or domestic partner." *See also Buckley,* 424 U.S. 1.

In order for Maine's press exemption and the contribution limits to be read together in a constitutionally permissible way, then either contribution limits must be interpreted not to apply to a candidate's immediate family, or the press exemption must be interpreted as limited to a press entity owned by a "candidate or that candidate's spouse or domestic partner," not the broad definition that includes stepgrandchildren and inlaws. For this reason, we would suggest that the Commission adopt an interpretive rule that reads the phrase "immediate family" used in the press exemption to be limited to a "candidate's spouse or domestic partner," as that phrase is used in

21-A M.R.S.A. § 1015(1)-(2). That would also bring Maine's regulatory framework in line with the FEC and federal campaign finance law, which applies the exception to the press exemption only to press entities "owned or controlled by any political party, political committee, or candidate" and does not include the far too broad "immediate family" provision. 2 U.S.C. § 431(9)(B)(i); 11 CFR §100.132.

SPECIFIC RESPONSES TO THE COMMISSION'S PROPOSED RULE

The Commission staff's proposed rule attempts to address some, but not all of the issues raised in our general comments. Here, we will attempt to respond to specific portions of the proposed rule. We have placed the language of the Commission's proposed rule in a box, and then provided our specific comments immediately following that box.

Press exemption. In order for the costs of preparing and disseminating a news story, commentary, or editorial to be exempt from the definitions of expenditure under the press exemption [§§ 1012(3)(B)(1) & 1052(4)(B)(1)], the following criteria must be met:

See Comment #2 above regarding the difficulty in determining "the costs of preparing and disseminating a news story, commentary, or editorial."

a. the names of the persons or entities who own, control and operate the broadcasting station or publication are identified within the publication or otherwise made known to the public;

We completely support this provision becoming part of the Commission's interpretive rule. Such a provision ensures that the government's informational interest "in identifying the speakers behind politically oriented messages … enable[ing] the electorate to make informed decisions and give proper weight to different speakers and messages" is furthered. The existence of this provision, in conjunction with the provision immediately below, fully satisfies the

government's informational interest and its anti-circumvention interest. As such, these two provisions weigh in favor of providing the protections of the press exemption to broadcast facilities and publications that are owned or controlled by a candidate or the candidate's family.

b. the broadcasting station or publication and the individuals or entities described in paragraph a of this subsection are not compensated for or reimbursed for expenditures by a candidate, candidate's authorized campaign committee, political party, political action committee, or ballot question committee, or their agents, except in exchange for providing advertising time or space to the candidates or committees; and

We completely support this provision becoming part of the Commission's interpretive rule. Because this proposed language is part of an exception to an exemption to the definition of the term "expenditure," the use of the term "expenditure" may lead to some confusion and the staff may want to consider replacing that word with the "costs incurred in covering or carrying a news story, commentary or editorial."

c. the broadcasting station or publication is not owned or controlled by any political party, political action committee or ballot question committee and is not owned or controlled by any candidate or authorized campaign committee of the candidate, who is a subject of the news story, commentary, or editorial, or by a member of the immediate family of such a candidate; except that

See Comments #1 and #3above. For the reasons set out in those comments, and for reasons of clarity, we would suggest making the following changes to the Commission's proposed rule:

c. the broadcasting station or publication is not owned or controlled by any political party, political action committee or ballot question committee ~~and is not owned or controlled~~ or by any candidate for state, county or municipal office who is a subject of the news story, commentary, or editorial, or by the authorized campaign committee of ~~the~~ such a candidate, ~~who is a subject of the news story, commentary, or editorial,~~ or by a member of the immediate family of such a candidate; except that

Also, for the reasons articulated in Comment #4 above, we would also propose replacing the term "immediate family" with the "spouse or domestic partner."

i. the cost of a bona fide news story appearing in a publication of general circulation or on a broadcasting station that is part of a pattern of campaign-related news coverage that provides reasonably equal coverage to all opposing candidates, is not an expenditure; and

See Comment #1 above. The separation of the terms "bona fide news story" in subparagraph (i) from "commentary and editorials" in subparagraph (ii) appears to imply a content-based distinction other than the *WRTL* standard of "no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Such a content-based standard is neither desirable nor constitutionally permissible. We propose that this problem be addressed in our proposed modified rule below by adding a simple disclosure requirement.

Furthermore, the phrase "reasonably equal coverage to all opposing candidates" should not be used. Such a standard impermissibly intrudes on the editorial judgment of the publication, which necessarily makes judgments every day about content and newsworthiness. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down a "right of access" statute that interfered with the editorial judgment of news editors). For example, in a twelve candidate primary election, all twelve opposing candidates may not merit "reasonably equal coverage to all opposing candidates." For these reasons we would propose the following changes to the Commission's proposed rule

i. the cost of a bona fide news story or commentary appearing in a publication of general circulation or on a broadcasting station that is part of a pattern of campaign-related news coverage that provides ~~reasonably equal~~ reasonable coverage to all opposing candidates, is not an expenditure; and

ii. the cost of commentary and editorials about other candidates who are not in the same race as the candidate is not an expenditure.

See Comments #1 and #4 above. We support what the Commission is trying to achieve by this provision, but we suggest that it be worded instead as follows:

ii. when the broadcasting facility or publication is owned or controlled by any candidate for state, county or municipal office, or by the authorized campaign committee of such a candidate, or by a spouse or domestic partner of such a candidate, the cost of a news story, commentary ~~and~~ or editorial ~~editorials~~ about other candidates who are not in the same race as the candidate is not an expenditure.

Furthermore, for the reasons articulated in Comment #2 above, we would suggest adding the additional clarification of what costs must be tracked and reported:

iii. when a broadcasting facility or publication is owned or controlled by any candidate for state, county or municipal office, or by the campaign committee of such a candidate, or by the spouse or domestic partner of such a candidate, the cost of any editorial or other endorsement subject to no reasonable interpretation other than an appeal to vote for or a against a specific candidate in the same race as such candidate is not an expenditure as long as (i) disclosure of the ownership or control of the broadcast facility or publication is made in the endorsement and (ii) no costs are

incurred in the making of such endorsement above the normal operating costs of the broadcast facility or publication.

In addition to the above criteria, to qualify as a periodical publication, including one in electronic form on the Internet, or a newspaper or magazine, a publication (i) must have been disseminating news stories, commentaries or editorials on a variety of topics to the general public on a periodic basis for at least the previous twelve months, or (ii) must have a record of disseminating news stories, commentaries or editorials on a variety of topics to the general public that objectively indicates that the publication will continue to be published on a periodic basis beyond the election cycle during which the press exemption is claimed.

We support this provision as a mechanism to further the informational and anti-circumvention governmental interests.

PROPOSED MODIFIED RULE

For all of the above reasons, we recommend that the Commission adopt the following interpretive rule:

Press exemption. In order for the costs of preparing and disseminating a news story, commentary, or editorial to be exempt from the definitions of expenditure under the press exemption [§§ 1012(3)(B)(1) & 1052(4)(B)(1)], the following criteria must be met:

a. the names of the persons or entities who own, control and operate the broadcasting station or publication are identified within the publication or otherwise made known to the public;

b. the broadcasting station or publication and the individuals or entities described in paragraph a of this subsection are not compensated for or reimbursed for costs incurred in covering or carrying a news story, commentary or editorial by a candidate, candidate's authorized campaign committee, political party, political action committee, or ballot question committee, or their agents, except in exchange for providing advertising time or space to the candidates or committees; and

c. the broadcasting station or publication is not owned or controlled by any political party, political action committee or ballot question committee or by any candidate for state, county or municipal office who is a subject of the news story, commentary, or editorial, or by the authorized campaign committee of such a candidate, or by the spouse or domestic partner of such a candidate; except that

    i. the cost of a bona fide news story or commentary appearing in a publication of general circulation or on a broadcasting station that is part of a pattern of campaign-related news coverage that provides reasonable coverage to all

opposing candidates is not an expenditure; and

ii. when the broadcasting facility or publication is owned or controlled by any candidate for state, county or municipal office, or by the authorized campaign committee of such a candidate, or by a spouse or domestic partner of such a candidate, then:

a. the cost of a news story, commentary or editorial about a candidate not in the same race as such a candidate is not an expenditure; and

b. the cost of any editorial or other endorsement of a candidate subject to no reasonable interpretation other than an appeal to vote for or against a specific candidate in the same race as such candidate is not an expenditure as long as (i) disclosure of the ownership of the broadcast facility or publication is made in the endorsement and (ii) no costs are incurred in the making of such endorsement above the normal operating costs of the broadcast facility or publication.

In addition to the above criteria, to qualify as a periodical publication, including one in electronic form on the Internet, or a newspaper or magazine, a publication (i) must have been disseminating news stories, commentaries or editorials on a variety of topics to the general public on a periodic basis for at least the previous twelve months, or (ii) must have a record of disseminating news stories, commentaries or editorials on a variety of topics to the general public that objectively indicates that the publication will continue to be published on a periodic basis beyond the election cycle during which the press exemption is claimed.

95 Md. Op. Atty. Gen. 110 (Md.A.G.), 2010 WL 3547900 (Md.A.G.)

Office of the Attorney General

State of Maryland
May 24, 2010

ELECTION LAW
***1** CAMPAIGN FINANCE - IN-KIND CONTRIBUTION - CONSTITUTIONAL LAW - FREEDOM OF SPEECH
Ms. Linda H. Lamone
Administrator
Maryland State Board of Elections

You have requested legal advice regarding a letter submitted to the State Board of Elections ("SBE") by the Maryland Democratic Party alleging that former Governor Robert Ehrlich and WBAL Radio have violated Maryland's campaign finance law. In essence, the letter asserts that, because the former Governor acts as host or co-host of a show on WBAL Radio, the station has made an illegal in-kind contribution to his gubernatorial campaign. The legal issue concerns the circumstances under which the broadcast of political discussion or commentary by a candidate or prospective candidate would amount to an in-kind contribution by the broadcaster.

In general, state efforts to regulate media appearances by a candidate, potential candidate, or others through a state's campaign finance laws raise significant First Amendment concerns. This is true even where the person appearing has some practical control over the content of the broadcast, including as host. Significantly, research by our Office has revealed no recent instances, under either federal law or the laws of other states, where in-kind contribution limits have been successfully applied in the way urged by the complaint. To the contrary, courts have routinely disapproved efforts to closely regulate the content of print or broadcast media featuring political discussion. The role of the candidate or potential candidate in that discussion does not fundamentally change that analysis. Our Office therefore advises that, consistent with its past practice with respect to media coverage of a candidate or potential candidate, SBE should decline to treat the radio broadcasts complained of as an illegal contribution to the Ehrlich campaign.

Several objective, content-neutral factors may be of special relevance. First, if the radio show at issue significantly pre-dates the current campaign season, it is unlikely that a court would find the station created the program as a vehicle to promote an actual or prospective candidacy. Second, a live call-in show featuring political discussion that is similar in format to other broadcasts regularly aired by the station would tend to negate an inference that the show was created especially for a campaign purpose. Third, if the program appears to be part of the station's ordinary broadcasting business, sponsored by paid commercial advertisements, that, too, makes it unlikely the program would be deemed a contribution to a particular campaign. In such circumstances, it would not appear that a station has donated to a campaign free air-time for which it would ordinarily charge a fee. *Cf.* Letter from Assistant Attorney General Kathryn M. Rowe to Delegate George W. Owings, III (August 25, 1994) (concluding that political use of a public access channel is not an in-kind contribution, in part because the cable franchisee does not charge for time). Therefore, regardless of any reason a candidate or potential candidate might have for hosting this type of show, from the station's perspective, the show would not amount to an unpaid "infomercial."

***2** Unquestionably, Maryland has a strong interest in preventing the evasion of its campaign finance limits through indirect means. This includes, of course, misconduct by media companies. But the First Amendment demands a lighter touch in this area, due to the media's role in providing a forum for public debate. This calls for a regulatory approach narrowly tailored to prevent the threatened harm, while avoiding unnecessary burdens on political speech. In our view, applying in-kind contribution limits to the type of activity at issue here would not be sufficiently tailored to the problem to justify its likely impact on political speech. Accordingly, SBE should treat a broadcast hosted by a candidate or potential candidate no differently than it does other appearances or commentary by political figures in the print or broadcast media.
Greater scrutiny may be appropriate during the period immediately preceding the election, when both the temptation to abuse and the potential for harm are at their greatest. *See e.g., Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 895 (2010) ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held."). Other regulations, such as the Federal Communication Commission's ("FCC") "equal time" rule, are specifically

targeted at such pre-election campaign activity. In any event, because we understand that this latter issue is not immediately of concern, it is not addressed in this advice letter.1

I

Background

A. First Amendment Standards

A major purpose of the First Amendment is "to protect the free discussion of governmental affairs ... includ[ing] discussions of candidates." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). The First Amendment guarantee "'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). More recently, the Supreme Court has warned against laws that, either through imprecision or complexity, impose impermissible burdens or uncertainties on speakers "discussing the most salient political issues of our day." *Citizens United*, 130 S.Ct. at 888. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

This need for specificity means that not all campaign-related speech may be regulated. Only campaign speech that can be identified as "express advocacy or its functional equivalent" meets a sufficiently definite standard that it may be subject to some government imposed limits. *Federal Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) ("WRTL").2 Therefore, in the case of a radio broadcast involving a candidate or potential candidate, the question whether the appearance is subject to regulation, including as an in-kind contribution, arises *only* to the extent the broadcast involves express advocacy or its equivalent. If it does not, no further analysis is needed; the First Amendment precludes regulation of the appearance through campaign finance laws. If the broadcast *does* involve express advocacy or its equivalent, the issue becomes whether the purported restriction may be constitutionally applied. *See, e.g., Citizens United*, 130 S. Ct. at 898 ("Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.")(citation and internal quotations omitted).

*3 States have a strong interest in enacting laws to preserve the integrity and fairness of the electoral process. *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982). This includes measures relating to campaign finance. *Buckley*, 424 U.S. at 26-29; *see also Nixon v. Shrink Missouri PAC*, 528 U.S. 377, 389 (2000). Limits on campaign contributions - which generally have their most direct impact on the First Amendment right of free association, *see Buckley*, 415 U.S. at 25 - are subject to a somewhat less rigorous standard of review than are more direct restrictions on speech. In analyzing laws that limit campaign contributions, courts will uphold the restriction if it promotes a "sufficiently important" government interest and is "closely drawn" to avoid unnecessary abridgment of the right to free association. *Id.* Under either standard, however, the test to be applied is a demanding one.

With regard to dollar limits on the value of contributions, the Supreme Court has recognized two "sufficiently important" state interests: an "anti-corruption" interest and an "anti-circumvention interest." The first embraces not only express or implied *quid pro quo* arrangements, but also the threat of undue influence by large donors over elected officials, or the appearance of it, which undermines public confidence in the integrity and fairness of the electoral system. *Buckley*, 424 U.S. at 26-29; *see also Shrink Missouri PAC*, 528 U.S. at 389 ("In speaking of improper influence and opportunities for abuse ... we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."). The second interest is furthered by measures designed to prevent evasion or circumvention of legitimate campaign finance restrictions, so that individuals or organizations may not undermine valid contribution limits indirectly. *See Buckley*, 414 U.S. at 46-47. In-kind contribution limits promote both of these interests.

B. Federal Media Exception

Federal law provides a useful example of how First Amendment values may be accommodated in campaign finance regulation. The Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431, *et seq.*, was amended shortly after its enactment to provide a specific statutory exception for most media appearances by a candidate. *See* 2 U.S.C. § 431(9)(B)(i). When it added the media exception in 1974, Congress indicated that it was intended to make clear that campaign finance regulation would not "limit or burden in any way the First Amendment freedoms of the press and of association. Thus the exclusion assures the unfettered right of the ... media to cover and comment on political campaigns." H. Rep. No. 93-943, 93d Congs., 2d Sess. at 4 (1974); *see also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (discussing rationale for

media exception). This special protection of press freedoms is justified not because of any special privilege the press enjoys, but because press entities serve a critical role in our society as a forum for public debate.3

*4 Under regulations adopted pursuant to FECA, contributions and expenditures are defined so as to exclude "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station ..., Web site, newspaper, magazine, or other periodical publication ..." except when the facility is "owned or controlled by any political party, political committee, or candidate ...." *See* 11 CFR § § 100.73(contributions), 100.132 (expenditures). For media facilities owned by a party, candidate, or political committee, federal law exempts only news stories that meet other criteria to ensure fairness.4 However, fairness, balance, or lack of bias are not requirements for media outlets not owned or controlled by a party, candidate, or political committee. *Id.*

Courts interpreting this provision have set forth a two-part analysis. *Federal Election Comm'n v. Phillips Publishing, Inc.*, 517 F.Supp. 1308, 1312-13 (D.D.C. 1981) (citing *Reader's Digest Ass'n v. Federal Election Comm'n*, 509 F.Supp. 1210 (S.D.N.Y. 1981).

Under the *Reader's Digest* procedure, the initial inquiry is limited to whether the press entity is owned or controlled by any political party or candidate and whether the press entity was acting as a press entity with respect to the conduct in question. ... If the press entity is not owned or controlled by a political party or candidate and it is acting as a press entity, the FEC lacks subject matter jurisdiction and is barred from investigating the subject matter of the complaint.

Phillips Publishing, 517 F.Supp. at 1313 (citations omitted). In other words, provided an independent press entity acts "as a press entity," the content of any political message it disseminates is largely irrelevant for federal campaign finance purposes. A number of states have adopted similar explicit media exceptions as part of their campaign finance laws to accommodate First Amendment values.

C. Maryland Campaign Finance Law

Regulation of Contributions and Expenditures

The Maryland Campaign Finance Law regulates contributions and expenditures in connection with State elections. *See* Annotated Code of Maryland, Election Law Article, § 13-101 *et seq.* Under that law, all campaign finance activity must be conducted through a "campaign finance entity." EL § 13-202(a). In addition, the establishment of a campaign finance entity is made an express prerequisite to the filing of a certificate of candidacy for State office. EL § 13-202(b).

Once established, the campaign finance entity is to file regular reports with SBE of all contributions received and expenditures made. *See* EL § 13-304. SBE publishes a Summary Guide to assist candidates, contributors, officers of campaign finance entities, and others in complying with these requirements. EL § 13-103. Campaign finance obligations are continuing in nature. So long as an individual maintains a campaign finance entity registered with SBE, the campaign remains subject to the Title 13's bookkeeping requirem ents, periodic reporting duties, and contrib ution limits. *See, e.g.*, EL § 13-312; *see also* EL § 13-305 (treasurer may file affidavit in lieu of report in certain circumstances). Winding down or terminating a campaign finance entity requires compliance with several provisions of the Election Law Article, including those relating to disposition of remaining campaign funds and the filmg of a final report. EL § § 13-247, 13-310, 13-311.

Contribution Limits and In-kind Contributions

*5 The Campaign Finance Law generally imposes limits on a donor's political contributions based on a four-year election cycle. *See* EL § 1-101(w) (defining "election cycle"). In general, during any election cycle, the statute caps a donor's contributions to any one candidate at $4,000, and at $10,000 to all campaign finance entities in the aggregate. EL § 13-226. The State election law defines a "contribution" as "the gift or transfer, or promise of gift or transfer, of money *or other thing of value* to a campaign finance entity to promote or assist in the promotion of the success or defeat of a candidate, political party, or question." EL § 1-101(o)(1) (emphasis added). When a contribution is made in a form other than a direct gift of money to the campaign treasurer, it is considered an in-kind contribution.

The Summary Guide provides, in relevant part, the following explanation of an in-kind contribution:

> An in-kind contribution includes any thing of value (except money). For example: a person can contribute bumper stickers to a candidate's committee. The amount of the contribution equals the fair market value of the bumper stickers. An in-kind contribution counts towards the donor's contribution limits.

Summary Guide - Maryland Candidacy & Campaign Finance Laws (revised July, 2006) at 27. In addition to giving a thing of value directly to a campaign, there are two other generic situations in which an in-kind contribution occurs: if a payment is made to a third party to defray a charge incurred by the campaign (*see, e.g.*, EL § 13-602(a)(4)(i)), or if spending in support of a candidate is done in "coordination" with the campaign. *Compare* EL § 1-101(bb) (defining an "independent expenditure," which is *not* treated as an in-kind contribution). The complaint letter appears to suggest that the broadcast of a talk show hosted by a candidate might be viewed as either a donation of free air-time or as an expenditure by the station made in coordination with the campaign.

II

Analysis

In contrast to federal law and the campaign finance laws of some other states, Maryland statutes do not expressly except from the definition of a "contribution" the imputed cost or fair market value of media coverage of a campaign. *See* EL § 13-101(l) (defining "contribution"). Even so, it has been SBE's longstanding administrative practice not to regard traditional media coverage of candidates as in-kind contributions. This policy has been followed without regard to the political content, if any, of the candidate's message. SBE's past practice is thus entirely appropriate in light of the First A m endment concerns outlined above. Intrusive inquiry into the content of a candidate's speech inevitably has a chilling effect on free expression. Faced with a possible campaign violation, some candidates would doubtless censor their remarks, inhibiting the quantity and quality of public discourse.

***6** On the other hand, the First Amendment does not exempt media outlets from all campaign finance regulation. Unrestricted campaign finance activity could result in the exact type of harm that contribution limits were intended to prevent.[5] Certainly, the possibility exists that elected officials could become too reliant upon or indebted to a media company in the same way this could occur with other private interests. *See, e.g., Citizens United*, 130 S.Ct. at 905 (expressing concerns about unequal treatment of corporations under federal media exception). This concern is legitimate.[6] However, it seems plain that mechanical application of the in-kind rule to prevent possible misconduct by broadcasters would not be sufficiently "tailored" to the problem to meet the First Amendment standard.

As an example, because campaign finance obligations exist so long as a "candidate" maintains a campaign finance entity to support any current or future campaign - regardless of current activity or an intention to run - the in-kind rule could in theory be applied to any past media appearance by the candidate, at any time, throughout the entire course of the candidate's State political career. In addition, the in-kind requirements could be triggered by others as well, including a spokesperson, strategist, consultant, or any other person, acting in coordination with the campaign. Thus, a significant amount of core political speech might be suppressed solely to guard against a mostly theoretical, or at least rare, threat of abuse. This is regulation the First Amendment does not allow. *See, e.g., Citizens United*, 130 S. Ct. at 891 (First Amendment requires giving "benefit of any doubt to protecting rather than stifling speech.") (quoting *WRTL*, 551 U.S. at 469 (2007)).
Our Office is not aware of any similar cases in which a federal or state agency has successfully upheld a finding that media commentary by a candidate (or those coordinating with the candidate's campaign) amounted to an impermissible in-kind contribution. *See, e.g., San Juan County v. No New Gas Tax*, 157 P.3d 831 (Wash. S. Ct. 2007) (criticism of gas tax by radio talk show hosts during regularly scheduled program for which the broadcaster did not normally require payment was not an in-kind contribution to political committee seeking to overturn tax by ballot initiative); 2003 Ariz. Op. Atty. Gen. 12, 2003 WL 23966055 (Ariz. A.G.) (candidate's media appearance not a contribution under statutory exception); *In re Dornan*, MUR 4689, Statement of Reasons ("SOR") of Chm'n Wold and Commr's Elliott, Mason, and Sandstrom (FEC "Matters Under Review," Feb. 14, 2000) (concluding media exception applies to guest host of radio show, whether before or after becoming a candidate for federal office).[7]

Nor does the absence of a statutory media exception require a different outcome. For example, the Arizona Attorney General noted that that Office had reached the same conclusion before the exception was added to the Arizona Code. "In 1988, even though there was not yet a news media exemption in Arizona's campaign finance laws, the Arizona Attorney General opined that 'regulation of newspaper editorials would clearly run afoul of constitutional guarantees of freedom of the press ..." 2003 Ariz. Op. Atty. Gen. No. I03-003 at 2 (quoting Arizona Attorney General Opinion No. 188-020 (1988)).

***7** Thus, even if a state lacks an explicit media exception in its campaign finance law, one may be implied in construing the law consistent with constitutional limitations. For example, in *Laffey v. Begin*, 137 Fed. Appx. 362 (1st Cir. 2005), the Rhode Island board of elections brought an enforcement action against an incumbent mayor, alleging that he had received an in-kind

contribution when a local radio station allowed him to host a weekly radio show. The mayor sued, claiming that the board action abridged his First Amendment rights. Eventually, the board agreed to suspend its enforcement action and the First Circuit remanded the case for an assessment of how the state election law accommodated the First Amendment.

The clear teaching of these authorities is that any enforcement policy that involves close regulation of the content of political speech can impermissibly threaten the values protected by the First Amendment. The Constitution is better served by a content-neutral analysis specifically targeting efforts to evade applicable campaign finance limits. *See, e.g., San Juan County*, 157 P.3d at 841 (observing that Washington Code "limits judicial inquiry into the content of the speech, focusing instead on the content-neutral question of whether the radio station ordinarily would collect a fee for the broadcast"); *compare* EL § 13-602(a)(4)(i) (prohibiting persons from defraying costs of campaign finance entity directly or indirectly); *see also Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 250-51 & n.5 (1986) (holding, in part, that a "Special Edition" newsletter expressly advocating election of pro-life candidates was not covered by FECA's media exception and was not akin to the normal business activity of a press entity, relying on content-neutral factors).

It is true that in some earlier cases, the FEC sought to put content restrictions on th e on-air statem ents of candidates. *See, e.g.*, FEC Advisory Op. 1977-42 (limiting candidate's permissible speech as host of public affairs radio program). But that is clearly no longer the case, provided the candidate appears on an "independent" media outlet that is performing its normal press function. *See In re Dornan*, MUR 4689, SOR of Com'r Wold *et al.; see also* FEC Advisory Op. 2005-19, at 5 (regarding press exemption for non-candidate despite "lack of objectivity" in coverage). Nor does the identity of the host change the analysis. Whatever control over program content a host might exercise, the relevant consideration under FECA is ownership or control of the station itself. *Id.* Nor is there a constitutionally relevant distinction between programs where a candidate acts as "host," as compared to those where a candidate responds to questions from a friendly interviewer or audience of supporters. For First Amendment purposes, the identity of the speaker should be irrelevant. *Citizens United*, 130 S. Ct. at 898 ("Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some, but not by others.").

***8** To avoid a potential chilling effect on free expression, courts are likely to give considerable leeway to the editorial or programming decisions of media companies, including a company's choice of host. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244 (1974) (holding 'right of reply' statute to be an unconstitutional intrusion into the function of editors).8 Therefore, generally speaking, the use of objective, content-neutral criteria is an approach better suited to the First Amendment. In this regard, some factors to consider might include whether the program at issue is consistent with the station's usual format, whether it was created well in advance of the campaign season or to provide a campaign vehicle for the candidate, and whether the station would ordinarily have collected a fee for the broadcast. The purpose of these questions would be to help SBE assess whether otherwise protected media activity is in reality an effort to promote a particular candidacy.

III

Conclusion

In light of the more than 35 years' experience of courts and the FEC in interpreting a media exception consistent with the First Amendment, federal law probably offers the most useful guidance on the issue you have asked about. In line with that guidance, we would advise that, in considering possible misconduct relating to the coverage of political discussion by a candidate or potential candidate, the focus should remain on activity by the media outlet that appears to be inconsistent with its ordinary press or broadcast function.

Ordinarily, SBE would not analyze the broadcast of a candidate's political remarks as a possible in-kind contribution. The reason advanced for doing so here appears mainly to derive from the participation of former Governor Ehrlich as a host or co-host of the broadcast, and the control over the show's content that circumstance implies. But as is explained above, this consideration does not appear to be decisive, or even greatly relevant, for First Amendment purposes. Similarly, charges of media bias or a lack of balanced coverage do not provide grounds for subjecting a particular media outlet to campaign finance regulation where it would not be otherwise. Consequently, we see no reason in this situation for SBE to depart from its usual practice.

Douglas F. Gansler
Attorney General

Jeffrey L. Darsie
Assistant Attorney General
Robert N. McDonald
Chief Counsel Opinions and Advice

***Editor's Note*:**

***9** This opinion was originally issued as a letter of advice.

Footnotes

1 According to public statements by the Ehrlich campaign and WBAL station management, the program will not be aired after the former Governor files a certificate of candidacy on or before the July 6, 2010 deadline. From that date, the FCC's "equal time" rule would apply to any "use" of the station by a filed candidate. *See* 47 U.S.C. § 315(a); 47 CFR § 73.1940 *et seq.*

2 The "functional equivalent" of express advocacy is a political message that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469-70.

3 The Supreme Court has explained:
The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate. *Mills v. Alabama*, 384 U.S., at 219, 86 S.Ct., at 1437; *see Saxbe v. Washington Post Co.*, 417 U.S. 843, 863-864, 94 S.Ct. 2811, 2821-2822, 41 L.Ed.2d 514 (1974) (Powell, J., dissenting). But the press does not have a monopoly on either the First Amendment or the ability to enlighten. *Cf. Buckley v. Valeo*, 424 U.S., at 51 n. 56, 96 S.Ct., at 650; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-390, 89 S.Ct. 1794, 1806-1807, 23 L.Ed.2d 371 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964); *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945).
Bellotti, 435 U.S. at 781-82 (footnotes omitted).

4 For a candidate-owned facility, only a news story:
(a) That represents a *bona fide* news account communicated in a publication of general circulation or on a licensed broadcasting facility; and
(b) That is part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not a contribution.
11 CFR § 100.73(a)(b).

5 Candidates often promote their candidacies through paid radio advertisements. If a radio station were to permit a candidate to air a campaign ad for free when it charged other advertisers, including other candidates, the free air time would be an in-kind contribution to the candidate by the radio station. Similarly, if a third party paid for the candidate's ad on behalf of the campaign, that, too, would be an in-kind contribution.

6 Although we recognize the potential for abuse, in the "free media" context this risk is arguably less as compared to other forms of in-kind contribution. In the case of a public broadcast, there can be no question as to the relationship between the candidate and the broadcaster. This may, in itself, encourage candidates and broadcasters to remain at arms-length with respect to policy issues affecting the company.

7 FEC Advisory Opinions and enforcement actions ("Matters Under Review") are available on-line at the FEC's website: www.fec.gov (last visited May 20, 2010).

8 As the Supreme Court observed in *Miami Herald*:
"The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."
418 U.S. at 258 (citations omitted).

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