



1 states immediately before the general election without reporting the cost of doing so as an  
2 independent expenditure; *second*, by similarly failing to report the cost to run an advertisement  
3 for the film in the *New York Post*; and *third*, by not including disclaimers in either the film or  
4 that advertisement.<sup>2</sup>

5 As discussed below, the record before the Commission reflects that a legitimate  
6 filmmaking entity, unconnected to any political committee, candidate, or party, produced and  
7 distributed the film. Further, the costs incurred to produce, sell, and distribute the film through  
8 traditional commercial channels and to place the challenged advertisement all constitute  
9 legitimate press activity within the scope of the media exemption. As to the Respondents'  
10 alleged distribution of free copies of the film before the election, the Respondents assert that that  
11 distribution was designed to market the film and was promotional in nature, and the filmmaker's  
12 contemporaneous statements are consistent with that representation. Further, the challenged free  
13 distribution appears consistent with the activity of at least one similarly situated media vendor to  
14 which the Commission previously afforded protection under the media exemption — an entity  
15 that also recently prevailed in a constitutional challenge enjoining a state from requiring  
16 disclosure under that state's media exemption. Thus, although the factual record concerning the  
17 commercial basis for the challenged distribution strategy is not comprehensive, under these  
18 circumstances we recommend that the Commission dismiss the allegations that the Respondents  
19 violated sections 30104(c) and 30120(a) of the Act (formerly 2 U.S.C. §§ 434(c), 441d(a)) in the  
20 exercise of the Commission's broad prosecutorial discretion.<sup>3</sup>

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<sup>2</sup> See Compl. ¶¶ 26, 51-60.

<sup>3</sup> See *Heckler v. Chaney*, 470 U.S. 821 (1985).

1    **II.    FACTUAL BACKGROUND**

2           Joel Gilbert is a filmmaker and producer.<sup>4</sup> He is the sole owner and President of  
3 Highway 61,<sup>5</sup> which was registered as an LLC with the state of California on January 4, 2005.<sup>6</sup>  
4 Since its inception, Highway 61 has produced at least five political documentaries and seven  
5 musical documentaries.<sup>7</sup> In addition, Highway 61 has produced fictional accounts made in  
6 documentary format, including *Elvis Found Alive* and *Paul McCartney Really Is Dead*.<sup>8</sup> Gilbert  
7 wrote and directed *Dreams*, and Highway 61 completed production of *Dreams* in April 2012.<sup>9</sup>  
8 In July 2012, Gilbert established DFMRF, LLC for the purpose of distributing and promoting  
9 *Dreams*.<sup>10</sup>

10          **A.    The Nature and Content of the Film**

11           The slip cover of the *Dreams* DVD describes the film as “the alternative Barack Obama  
12 ‘autobiography,’ offering a divergent theory of what may have shaped our 44th President’s life  
13 and politics.” The film is narrated by an actor impersonating Obama, recited from a first-person  
14 perspective. The design elements of the film and its marketing materials mirror Obama’s  
15 authorized autobiographical account, *Dreams of My Father: A Story of Race and Inheritance*,

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4           Resp. at 1.

5           *Id.*

6           CAL. SEC’Y OF STATE, <http://kepler.sos.ca.gov/> (business search for “Highway 61”).

7           Resp. at 1, 2.

8           *Id.* at 2.

9           *Id.*

10          Resp. at 2.

1 first published in 1995 and re-released in 2004 after the nomination of Obama as a Democratic  
2 candidate for the U.S. Senate in Illinois.<sup>11</sup>

3 The film's narration commences with the statement, "Everywhere you look in my  
4 background, you'll find people who despise America and want to transform it radically.  
5 Americans often wonder: why am I so comfortable with anti-American extremists, and why are  
6 they so comfortable with me?"<sup>12</sup> The film then generally asserts that Obama sought to deceive  
7 the American public through a web of lies and concealed relationships, all stemming from the  
8 central allegation that Franklin Marshall Davis, an American communist, was Obama's real  
9 father.<sup>13</sup> Ultimately the film ties these various allegations together in a final "chapter," which  
10 commences with historical footage of Obama speaking on election night 2008, after which the  
11 Obama voice actor asserts that his "real father was right: 'Frank Marshall Davis Jr.' could not  
12 have won, but Barack Hussein Obama II could lead America to socialism."<sup>14</sup> The film then  
13 displays footage and clips of Obama's presidential campaign logos, addresses the pending 2012  
14 re-election campaign,<sup>15</sup> and concludes with the Obama actor's statement that, "America will be  
15 irreversibly socialist, without ever realizing how it happened."<sup>16</sup>

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<sup>11</sup> See generally <http://www.amazon.com/Dreams-My-Father-Story-Inheritance/dp/1400082773> (last visited Oct. 3, 2014).

<sup>12</sup> Corrected Transcript of *Dreams* at 1 ("Corrected Transcript").

<sup>13</sup> See, e.g., *id.* at 3 ("This is the story I would have told if I were being honest with you. Now let me introduce you to my real father, Communist Frank Marshall Davis and his dreams."). For example, the film's narrative asserts, among other things, that Obama's grandfather was a clandestine CIA agent, *id.* at 15, Obama's mother secretly engaged in a sexual relationship with the married Davis, *id.* at 7-8, and former Weather Underground member Bill Ayers and the Ayers family provided support for Obama's education, directed his political career, and ghost-wrote the autobiography that Obama previously published. *Id.* at 13-21.

<sup>14</sup> *Id.* at 27.

<sup>15</sup> *Id.* at 29.

<sup>16</sup> *Id.* at 30.

1           **B.     Steps Taken to Promote and Distribute the Film**

2           Gilbert solicited private investors through DFMRF to finance the film's distribution and  
3 obtain distribution contracts.<sup>17</sup> Highway 61 signed a contract with MVD Entertainment Group to  
4 sell DVD copies of the film on hundreds of websites and to provide the film through the Netflix  
5 and Amazon video streaming services.<sup>18</sup> As of this date, *Dreams* remains available on Amazon,  
6 which also offers the DVD version for sale and reflects over 800 customer reviews.<sup>19</sup> Highway  
7 61 also sells the *Dreams* DVD on its own website and through an official website established for  
8 the film.<sup>20</sup>

9           Gilbert and DFMRF claim that they engaged in significant efforts to obtain a theatrical  
10 release or a television broadcast contract for *Dreams*, which they contend would have been more  
11 profitable than selling DVDs or streaming the video alone.<sup>21</sup> By July 2012, however, they  
12 concluded that a theatrical or broadcast release of the film was unavailable. According to the  
13 Respondents, DFMRF and Gilbert undertook to create grassroots demand for a significant  
14 theatrical release.<sup>22</sup> Respondents represent that they mailed several hundred thousand copies of  
15 the *Dreams* DVD to households in numerous states,<sup>23</sup> modeling that distribution strategy on the  
16 allegedly similar grassroots campaign of the producers of *The Passion of the Christ*.<sup>24</sup>

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<sup>17</sup> Resp. at 3 (citing Affidavit of Joel Gilbert ¶ 4 (Mar. 24, 2014) ("Gilbert Aff.")).

<sup>18</sup> *Id.* at 3.

<sup>19</sup> See <http://www.amazon.com/Dreams-From-Real-Father-Deception/dp/B007XW07CO>.

<sup>20</sup> See <http://www.highway61ent.com/store/dreams-from-my-real-father/>; <http://www.obamasrealfather.com>.

<sup>21</sup> Resp. at 3.

<sup>22</sup> *Id.*

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

<sup>24</sup> *Id.*

1 Information provided with the Complaint tends to suggest that the Respondents may have  
2 distributed far more free DVDs than the Response acknowledges. The Complaint provides a  
3 copy of a speech that Gilbert apparently gave on July 19, 2012, at the National Press Club,<sup>25</sup>  
4 where Gilbert announced that DFMRF would "send a free copy of the DVD in the US mail  
5 direct to millions of households."<sup>26</sup> He reportedly further stated that, "[w]ithin three weeks,  
6 hundreds of thousands [of] DVDs will be mailed across the United States until every American  
7 sees this DVD and understands the deadly Marxist dreams Obama has for us, from his real  
8 father, Frank Marshall Davis."<sup>27</sup> Moreover, the official website of the film states that 1.5 million  
9 DVDs were sent to Florida, 700,000 to Colorado, and 1.2 million to Ohio.<sup>28</sup>

10 The Complaint also alleges that Gilbert targeted "voters in swing states."<sup>29</sup> Gilbert's own  
11 statements indicate that he mailed free DVDs to households in states that were generally  
12 considered "swing" states,<sup>30</sup> but also intended to mail DVD copies of the film to a variety of  
13 other states, including Illinois, Louisiana, Michigan, New York, and Arizona.<sup>31</sup> The Complaint  
14 further alleges that, in addition to these free mailings, the Respondents held public screenings of

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<sup>25</sup> See Compl., Ex. 11.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Compl., Ex. 15; see also Jerome R. Corsi, *Swing State Stunner: "Dreams" Mailed to 2.7 Million*, WND.com (Oct. 7, 2012), Compl., Ex. 20; Jeremy W. Peters, *Strident Anti-Obama Messages Flood Key States*, N.Y. TIMES, Oct. 23, 2012 (reporting that Gilbert claimed to have distributed over 4 million free copies of the *Dreams* DVD).

<sup>29</sup> Compl. ¶ 52.

<sup>30</sup> In advance of the 2012 general election, the *Washington Post* identified the following nine states as "swing" states: Colorado, Florida, Iowa, Nevada, New Hampshire, North Carolina, Ohio, Virginia, and Wisconsin. See Chris Cilizza, *The 9 Swing States of 2012*, WASH. POST, Apr. 16, 2012, [http://www.washingtonpost.com/blogs/the-fix/post/the-9-swing-states-of-2012/2012/04/16/g1QABuXaLT\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/the-9-swing-states-of-2012/2012/04/16/g1QABuXaLT_blog.html).

<sup>31</sup> Rosie Gray, *Anti-Obama Movie Mailed to 1 Million Ohioians*, BUZZFEED.COM (Sept. 21, 2012), <http://www.buzzfeed.com/rosiegray/anti-obama-movie-mailed-to-1-million-ohioians> (attached as Exhibit 27 of Complaint).

1 the film in the months prior to the November 2012 election, including two free events in Des  
2 Peres, Missouri in October 2012, and four screenings of the film at the "Republican National  
3 Conference" in August 2012.<sup>32</sup>

4 **C. Advertisement of the Film in the *New York Post***

5 Respondents placed a full-page advertisement for the film in the *New York Post* on  
6 September 11, 2012.<sup>33</sup> Entitled, "OBAMA'S BIG LIE REVEALED," the advertisement states  
7 that Obama's "real" father was "Communist Party Propagandist Franklin Marshall Davis."<sup>34</sup>  
8 The advertisement further claims that Davis indoctrinated Obama into Marxism from ages 10 to  
9 18; Obama's "life story" based on his Kenyan father was a "fairy tale"; Weather Underground  
10 member Bill Ayers funded Obama's education and aided his political career; and Obama was a  
11 "Red Diaper Baby."<sup>35</sup> The advertisement concludes with a statement apparently taking a  
12 position on a number of issues: "TAX Health Care + LEGALIZE Illegals + STIMULUS for  
13 Cronies + ATTACK Business + Food Stamp DEPENDENT Society + Welfare WAIVERS =  
14 BANKRUPT AMERICA."<sup>36</sup> The advertisement does not mention the pendency of any federal  
15 election either in connection with the film or Obama's candidacy.

16 **III. LEGAL ANALYSIS**

17 The Act and Commission regulations define the terms "contribution" and "expenditure"  
18 to include any gift of money or "anything of value" for the purpose of influencing a federal

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<sup>32</sup> See Compl., Ex. 8. We have no information as to whether the screenings at the conference were free of charge.

<sup>33</sup> Compl., Ex. 21.

<sup>34</sup> *Id.* (emphasis in original).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

1 election.<sup>37</sup> But the Act exempts from the definition of expenditure “any news story,  
2 commentary, or editorial distributed through the facilities of any broadcasting station,  
3 newspaper, magazine, or other periodical publication, unless such facilities are owned or  
4 controlled by any political party, political committee, or candidate.”<sup>38</sup> This exclusion is  
5 generally referred to as the “press exemption” or “media exemption.”<sup>39</sup>

6 To determine whether the media exemption applies, the Commission first assesses  
7 whether the entity that engaged in the challenged activity is a press entity.<sup>40</sup> If so, the exemption  
8 applies so long as the entity (1) is not owned or controlled by a political party, political  
9 committee, or candidate and (2) is acting within its “legitimate press function” in conducting the  
10 activity that is the subject of the complaint.<sup>41</sup> If the exemption applies, the entity’s activities are  
11 exempt from the Act’s disclosure, disclaimer, and reporting requirements.<sup>42</sup> In this, the  
12 Commission has long recognized that an entity otherwise eligible for the exemption “would not  
13 lose its eligibility merely because of a lack of objectivity in a news story, commentary, or  
14 editorial, even if the news story, commentary, or editorial expressly advocates the election or  
15 defeat of a clearly identified candidate for Federal office.”<sup>43</sup>

<sup>37</sup> 52 U.S.C. § 30101(8)(A), (9)(A) (formerly 2 U.S.C. § 431(8)(A), (9)(A)); 11 C.F.R. §§ 100.52(a), 100.111(a).

<sup>38</sup> 52 U.S.C. § 30101(9)(B)(i) (formerly 2 U.S.C. § 431(9)(B)(i)).

<sup>39</sup> Advisory Op. 2010-8 (Citizens United) at 3 (“AO 2010-08”).

<sup>40</sup> *See, e.g.*, AO 2010-08; Advisory Op. 2005-16 (Fired Up!) (“AO 2005-16”); Advisory Op. 1996-16 (Bloomberg).

<sup>41</sup> *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

<sup>42</sup> AO 2010-08 at 7.

<sup>43</sup> AO 2005-16 at 6; Factual & Legal Analysis at 3, MUR 6579 (ABC News, Inc.) (July 5, 2012); *see also* AO 2010-08 (“While Citizens United’s films may be designed to further its principal purpose as a non-profit advocacy organization, an entity otherwise eligible for the press exemption does not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial.”).

11-15-2011 10:00:00 AM

1           **A.     Press Entity Status**

2           “Neither the Act nor Commission regulations use or define the term ‘press entity.’

3           Therefore, when determining whether the term applies to a particular entity, the Commission has  
4           focused on whether the entity in question produces on a regular basis a program that  
5           disseminates news stories, commentary, and/or editorials.”<sup>44</sup> The Commission has recognized  
6           that the exemption covers a broad array of media entities and types of publications, including  
7           entities that produce documentaries and films on a regular basis.<sup>45</sup> In AO 2010-08, the  
8           Commission determined that Citizens United was a press entity where it had distributed 14 films  
9           and documentaries with another four films in production.<sup>46</sup> Here, Highway 61, Gilbert’s  
10          production company, produced at least 13 films and documentaries prior to the release of  
11          *Dreams* in 2012 and — unlike Citizens United — does not appear to engage in any other activity  
12          besides producing films.<sup>47</sup> We therefore conclude that Highway 61 is a media entity to the same  
13          extent as other traditional press entities. Further, because Gilbert is the sole owner of Highway  
14          61 and the founder and manager of DFMRF, LLC, which he established for the purpose of

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<sup>44</sup> AO 2010-08 at 5.

<sup>45</sup> *Id.* at 4; *see also United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) (“We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”).

<sup>46</sup> AO 2010-08 at 5.

<sup>47</sup> *See* <http://www.highway61ent.com/>. Moreover, Highway 61 recently released *There's No Place Like Utopia*, a film that appears similar in nature to *Dreams*, in a number of theaters during the summer of 2014. According to its official website, *Utopia* was released in three theaters in Texas on August 29, 2014. <http://www.theresnoplacelikeutopia.com/theatres/>. Although we lack access to the full content of that film, *Utopia* appears to offer a critique of Obama's policies through examination of the “progressive” movement in the United States. *See* <http://www.theresnoplacelikeutopia.com/the-film/>.



1 For these reasons, the costs relating to the production, sale, and distribution of the film  
2 through traditional commercial channels appear to be covered by the media exemption.<sup>51</sup>  
3 Moreover, the Commission has previously concluded that “where the underlying product is  
4 covered by the press exemption, so are advertisements to promote that underlying product.”<sup>52</sup>  
5 Therefore, the challenged advertisement also satisfies the media exemption and is not subject to  
6 any Commission disclosure obligation.

7 **C. The Distribution of Free DVD Copies in Advance of the 2012 Election**

8 Notwithstanding that the media exemption applies to much of the costs for producing and  
9 distributing the film through ordinary channels, the Commission and courts have acknowledged  
10 that media entities may nonetheless forfeit that protection if they engage in certain core election-  
11 related activities unrelated to their ordinary press functions. In *FEC v. Massachusetts Citizens*  
12 *for Life* (“MCFL”), the Supreme Court held that a “Special Edition” of a newsletter did not  
13 qualify for the media exemption because it deviated from certain “considerations of form”  
14 relating to the production and distribution of the organization’s regular newsletter.<sup>53</sup> The Court  
15 noted that MCFL did not publish the “Special Edition” through the facilities of the regular  
16 newsletter but with staff who prepared no previous or subsequent newsletters, and distributed it  
17 to a much larger audience than the newsletter’s regular audience.<sup>54</sup> Similarly, in *Reader's Digest*  
18 *Ass'n v. FEC*, the court indicated that the press exemption “would seem to exempt only those

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<sup>51</sup> *Cf. Reader's Digest*, 509 F. Supp. at 1215 (noting that “only the dissemination to other media of the video tapes was within the FEC’s reason to believe finding, suggesting a recognition by the FEC that the research and the publication of the article were on their face exempt functions”).

<sup>52</sup> AO 2010-08 at 7.

<sup>53</sup> 479 U.S. at 250-51.

<sup>54</sup> *Id.* at 251.

1 kinds of distribution that fall broadly within the press entity's legitimate press function."<sup>55</sup> Thus,  
2 for example, the exemption would not apply where, "on Election Day a partisan newspaper hired  
3 an army of incognito propaganda distributors to stand on street corners denouncing allegedly  
4 illegal acts of a candidate and sent sound trucks through the streets blaring the denunciation, all  
5 in a matter unrelated to the sale of its newspapers."<sup>56</sup>

6 The Commission also has advised that the legitimate media function is "distinguishable  
7 from active participation in core campaign or electioneering functions."<sup>57</sup> For example,  
8 producing independent expenditure advertisements for a political committee,<sup>58</sup> paying the  
9 administrative costs of a political committee,<sup>59</sup> engaging in get-out-the-vote activities,<sup>60</sup> and  
10 preparing briefings for campaign volunteers<sup>61</sup> would not constitute legitimate press functions.  
11 Thus, even if an entity is deemed to be a press entity, if it were to act in a manner atypical of a  
12 press entity in the way in which it engages in core electioneering activities, the media exemption  
13 will not shield that particular conduct.

14 In this matter, the Complaint specifically challenges the Respondents' distribution of free  
15 copies of a politically themed movie before an election to millions of households in so-called

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<sup>55</sup> 509 F. Supp. at 1214.

<sup>56</sup> *Id.*

<sup>57</sup> Advisory Op. 2011-11 (Viacom, Inc.) at 8 ("AO 2011-11") (citing Advisory Op. 2008-14 (Melothe, Inc.) at 5 ("AO 2008-14")).

<sup>58</sup> AO 2011-11 at 9.

<sup>59</sup> *Id.*

<sup>60</sup> AO 2008-14 at 5.

<sup>61</sup> *Id.* at 6 ("Because the provision of personnel to benefit a political campaign is not a legitimate press function, if Melothe, Inc. staffers were to prepare and deliver daily briefings to campaign volunteers, a prohibited in-kind contribution or expenditure would result from the corporation.")

1 “swing” states.<sup>62</sup> Although the current factual record is not comprehensive, it does not appear  
2 that the challenged conduct involves the sort of “core campaign or electioneering functions” that  
3 necessarily would bring the media entities’ activity outside the scope of the exemption. The  
4 Respondents claim that circulating free copies of *Dreams* was legitimate press activity because it  
5 marketed the film by attracting media attention and obtaining grassroots interest, thus improving  
6 the producer’s ability to negotiate a theatrical or broadcast release.<sup>63</sup> Gilbert also avers that he  
7 solicited private investors to make investments in DFMRF “for the purpose of financial gain and  
8 not for any other purpose.”<sup>64</sup> Although Respondents do not assert that Gilbert or Highway 61  
9 have previously engaged in similar promotional efforts, they compare the strategy to that  
10 employed to market *The Passion of the Christ*, which sought to create grassroots demand after  
11 initial difficulties in obtaining interest in a large theatrical release.<sup>65</sup> The *Passion*’s producers  
12 reportedly provided previews to leaders in the religious community and free marketing materials  
13 to churches in the hope that those steps would encourage congregants to see the movie in  
14 theaters.<sup>66</sup> It does not appear, however, that the marketing campaign for *Passion* included  
15 distribution of free copies of the film to millions of households, as alleged here.<sup>67</sup>

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<sup>62</sup> Compl. ¶ 52.

<sup>63</sup> Resp. at 6.

<sup>64</sup> Gilbert Aff. ¶ 4.

<sup>65</sup> Resp. at 3. See Advisory Op. 2004-07 (Music Television) at 7 (finding press exemption applied where press entity’s proposal was “consistent with established industry practice”).

<sup>66</sup> Theresa Howard, *Promoting 'The Passion,' USA TODAY* (Feb. 24, 2004); Peter A. Maresco, MEL GIBSON’S THE PASSION OF THE CHRIST: MARKET SEGMENTATION, MASS MARKETING AND PROMOTION, AND THE INTERNET at 4 (Bus. Faculty Publ’ns 2004), available at [http://digitalcommons.sacredheart.edu/cgi/viewcontent.cgi?article=1024&context=wcob\\_fac](http://digitalcommons.sacredheart.edu/cgi/viewcontent.cgi?article=1024&context=wcob_fac).

<sup>67</sup> Advisory Opinion Request 2010-25 (RG Entertainment) also involved the application of the media and *bona fide* commercial activity exemptions to an entity that produced and distributed a politically-themed documentary film. The Commission was unable to garner four affirmative votes to apply either exemption on the facts in that request. Nonetheless, as here, the request represented that the filmmaker engaged in significant

1           Nonetheless, in AO 2010-08, the Commission determined that Citizens United's  
2 distribution of its documentary films by broadcast, cable, and satellite television, DVD, and in  
3 movie theaters qualified for the media exemption.<sup>68</sup> In that opinion, the Commission noted that  
4 "in 2008, [Citizens United] provided free DVDs of one film, *HYPE: The Obama Effect*, as a  
5 newspaper insert in five newspapers in Florida, Nevada, and Ohio."<sup>69</sup> Although the Commission  
6 did not analyze whether the distribution of free DVD copies of the film in so-called swing states  
7 during an election year would constitute legitimate press activity, it found that the exemption  
8 applied and did not suggest that the fact of that free mass-market distribution vitiated its  
9 protections in any respect.

10           More recently, the Tenth Circuit also held that the Colorado Secretary of State violated  
11 the First Amendment when it failed to treat Citizens United the same as other media entities that  
12 are exempt from Colorado's disclosure laws.<sup>70</sup> Like the Commission in its advisory opinion, the  
13 appellate panel noted that, "Citizens United has provided free DVDs inserted into newspapers  
14 and allowed its films to be screened free of charge to educational institutions and select members  
15 of the public and news media."<sup>71</sup> Notwithstanding that activity, the court rejected the argument  
16 that Citizens United was merely a "'drop-in' advocate" and found that Citizens United was  
17 entitled to the same protections as exempt media entities.<sup>72</sup>

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"grassroots and grasstops" efforts to market that film and retained the same firm credited with the successful marketing campaign for the *Passion*. As with the *Passion*, however, the request in AOR 2010-25 did not indicate whether the film itself had been provided for free to substantial numbers of households in advance of the election, as alleged here.

<sup>68</sup> AO 2010-08 at 7.

<sup>69</sup> *Id.* at 2.

<sup>70</sup> *Citizens United v. Gessler*, No. 14-1387, 2014 WL 5422920 at \*8 (10th Cir. Oct. 27, 2014).

<sup>71</sup> *Id.* at \*1.

<sup>72</sup> *Id.* at \*13.

1 Gilbert's contemporaneous statements concerning his plan to distribute free DVDs to the  
2 public in certain states further tend to support the Respondents' contention here that those  
3 mailings promoted the commercial success of the film, a legitimate press undertaking.<sup>73</sup> In  
4 September 2012, Gilbert explained that "the 1 million DVD mailing to Ohio households and  
5 100,000 to New Hampshire[] should force the mainstream media to pay attention. *This will help*  
6 *expand the market for the film into television, video on demand and even internationally.*"<sup>74</sup> And  
7 as a result of the mass distribution effort, the *New York Times* published an article concerning  
8 *Dreams* and Gilbert's dissatisfaction with "mainstream media for not looking deeper in the story  
9 he uncovered,"<sup>75</sup> further publicizing the film as a result.

10 In sum, as to the challenged distribution activity here, the current record does not indicate  
11 that these particular media entities have previously sought to promote their films through the  
12 mass distribution of free copies of those films. Nonetheless, at least one similarly situated media  
13 entity has engaged in similar conduct — albeit possibly on a different scale — a fact that did not  
14 upset the conclusions of either the Commission or the Tenth Circuit that the media exemption  
15 and its state-law analog applied in those instances. Further, Gilbert's contemporaneous

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<sup>73</sup> See *LaBotz v. FEC*, 889 F. Supp. 2d 51, 62 (D.D.C. 2012) (recognizing that the "best evidence of why a decision was made as it was is usually an explanation, however brief, rendered *at the time of the decision*") (citing *Ponte v. Real*, 471 U.S. 491, 509 (1985) (emphasis in original)). Cf. *FEC v. Phillips Publ'g, Inc.*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981) (finding that a newsletter's mailing that solicited subscriptions and advocated against the election of a federal candidate was a legitimate press function because publicizing a newsletter is a customary practice of the press); *Reader's Digest*, 509 F. Supp. at 1215 (noting that, "if [Reader's Digest] was acting in its magazine publishing function, if, for example, the dissemination of the tape to television stations was to publicize the issue of the magazine containing the Chappaquiddick article, then it would seem that the exemption is applicable and that the FEC would have no occasion to investigate whether the dissemination or the publication constituted an attempt to influence an election.").

<sup>74</sup> Jerome R. Corsi, *Media Bypass: Dreams Mailed to 1 Million*, WND.com (Sept. 18, 2012) (attached as Exhibit 12 to the Complaint) (emphasis added).

<sup>75</sup> Jeremy W. Peters, *Strident Anti-Obama Messages Flood Key States*, N.Y. TIMES (Oct. 23, 2012) (attached as Exhibit 30 of the Complaint).

1 statements reflect that the challenged distribution strategy, at least in part, promoted *Dreams*  
2 commercially.

3 Accordingly, although the current record before the Commission does not conclusively  
4 resolve to what extent the challenged distribution strategy may have marketed and promoted the  
5 film — that is, legitimate press activity — there is fair reason to conclude that the undertaking  
6 was a marketing effort. And to answer that question definitively may require substantial  
7 investigation into the business judgment of the media entities involved,<sup>76</sup> an inquiry at odds with  
8 the interests that the exemption protects.<sup>77</sup> Given these circumstances, we conclude that the  
9 Commission should exercise its prosecutorial discretion not to pursue the allegation that the  
10 media-entity Respondents' distribution of free copies of their politically-themed film prior to the  
11 relevant election vitiated the statutory protection for media entities that otherwise would apply.<sup>78</sup>

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<sup>76</sup> In *Reader's Digest*, the court recognized that the Commission may conduct a limited investigation to resolve whether the press exemption applies in the first instance, suggesting in that case that the Commission seek interrogatory responses from the media entity concerning whether the challenged distribution scheme was designed to promote the magazine. See 509 F. Supp. at 1215-16. Here, the media-entity Respondents have asserted that the challenged distribution strategy sought to market the film, a claim that is consistent with the filmmaker's previous public statements. Thus, to investigate further the commercial viability of that distribution scheme under these circumstances may require a relatively intensive fact-finding inquiry not comparable to the situation that the court confronted in *Reader's Digest*. Cf. *Phillips Publ'g, Inc.*, 517 F. Supp. at 1313 (rejecting Commission petition to enforce interrogatory requests into press entity's financial and personnel status where response and other information in the record suggested that the challenged mailing sought to market the publisher's newsletter).

<sup>77</sup> See H.R. Rep. No. 93-1239 at 4 (1974) (stating that Congress did not intend to "limit or burden in any way the First Amendment freedoms of the press and of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns."); *Reader's Digest*, 509 F. Supp. at 1214 ("[F]reedom of the press is substantially eroded by investigation of the press, even if legal action is not taken following the investigation. Those concerns are particularly acute where a governmental entity is investigating the press in connection with the dissemination of political matter.").

<sup>78</sup> See *Heckler*, 470 U.S. at 831 ("[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," including "whether the agency's resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, [and] whether the particular enforcement action requested best fits the agency's overall policies . . .").

1 We therefore recommend that the Commission dismiss the allegations that Respondents violated  
2 52 U.S.C. §§ 30104(c) or 30120(a) (formerly 2 U.S.C. §§ 434(c) and 441d(a)).<sup>79</sup>

3 **IV. RECOMMENDATIONS**

- 4 1. Dismiss the allegations that Joel Gilbert; Highway 61 Entertainment, LLC; and  
5 DFMRF, LLC violated 52 U.S.C. §§ 30104(c) and 30120(a) (formerly 2 U.S.C.  
6 §§ 434(c) and 441d(a));
- 7 2. Approve the attached Factual and Legal Analysis;
- 8
- 9 3. Approve the appropriate letters; and
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- 11 4. Close the file.

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Daniel A. Petalas  
Associate General Counsel

  
Peter Blumberg  
Assistant General Counsel

  
Jih Lee  
Attorney

<sup>79</sup> Given our recommendation, we do not address whether *Dreams* constituted express advocacy or whether the free distribution of *Dreams* would satisfy the Commission's *bona fide* commercial activity exemption. Cf. AO 2010-08 (determining that Commission conclusion that media exemption applied to Citizens United's films and related marketing activities made *bona fide* commercial activity inquiry moot).