FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 7789
Courier Newsroom, *et al*.	)	
	)	

STATEMENT OF REASONS OF COMMISSIONER SEAN J. COOKSEY

I joined the Commission's unanimous vote to dismiss the Complaint in this matter alleging that Courier Newsroom violated the Federal Election Campaign Act of 1971, as amended ("Act"), by failing to organize, register, and report as a political committee.[1] Dismissal was appropriate because the available information did not substantiate claims that Courier Newsroom is an unregistered committee, and because Courier's online publications fall squarely within the Act's media exemption.[2]

I write separately, however, to explain why I believe the Federal Election Commission's two-prong test for applying the media exemption needs to be revised. Specifically, the first part of the Commission's test—asking whether the speaker in question is a "press entity"—is in clear tension with the First Amendment's Free Press Clause, difficult to administer in practice, and otherwise unnecessary. Instead, I believe the Commission should look only to the second prong of its media exemption test and ask whether the *activity* at issue constitutes a "legitimate press function" and whether the speaker or publisher is controlled by a political candidate, committee, or party. In my view, this simplified inquiry would better conform to the First Amendment, and it would protect the right of all Americans to engage in constitutionally protected press activities.

The Media Exemption

From the start of modern campaign-finance law, press activity has been carved out from regulation. When drafting the 1974 amendments to the Act, Congress was clear that the law should not "limit or burden in any way the First Amendment freedoms of the press and of association."[3] Accordingly, Congress included an exemption in the Act's definition of "expenditure" for the costs

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[1] Certification (Mar. 24, 2022), MUR 7789 (Courier Newsroom, *et al.*).

[2] The Commission did not consider whether, alternatively, Courier Newsroom's activity also falls within the agency's Internet Exemption, but it very well may. *See* 11 C.F.R. § 100.155. The Office of General Counsel did not analyze that question, however, and I leave it for another day.

[3] H.R. Rep. No. 93-1239, at 4 (1974).

of "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."[4] This protection is commonly known as the "press exemption" or the "media exemption," and it "assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns."[5]

In applying the media exemption, the Commission has long relied on a two-part test.[6] First, the Commission asks whether the party engaging in the relevant activity is a "press entity." Neither the Act nor the Commission's regulations define "press entity," and the Commission has traditionally centered this inquiry "on whether the entity in question is in the business of producing on a regular basis a program that disseminates news stories, commentary, and/or editorials."[7] Secondly, the Commission applies the analysis from *Reader's Digest Association v. FEC*, assessing: (1) whether the entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the relevant activity or conduct is a "legitimate press function."[8] To determine whether the activity in question is a legitimate press function, the Commission has looked to whether the entity's materials are available to the general public and comparable in form to those it ordinarily produces.[9]

Over time, the Commission has extended the media exemption "well beyond traditional news organizations," to include "non-media companies engaged in media activities, as well as 'media entities that cover or carry news stories, commentary, and editorials on the Internet.'"[10] In recent years, the Commission has sanctioned the press activities of blogs, news-aggregating websites, message boards, digital streaming services, satellite radio broadcasts, webcasts, documentary films, and more.[11] Despite the Commission's acceptance that the media exemption

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[4] 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. § 100.132. Commission regulations likewise exempt "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial" from the meaning of "contribution." 11 C.F.R. § 100.73.

[5] H.R. Rep. No. 93-1239, at 4 (1974).

[6] *See, e.g.*, Advisory Op. 2010-08 (Citizens United) at 4–7; Advisory Op. 2005-16 (Fired Up!) at 4–6; Advisory Op. 2000-13 (iNEXTV) at 3.

[7] Advisory Op. 2019-05 (System73) at 4; Advisory Op. 2008-14 (Melothé, Inc.) at 4.

[8] 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *see also* Advisory Op. 2011-11 (Colbert) at 6–7. The Commission has also phrased the "legitimate press function" requirement, somewhat circularly, as "whether the press entity is acting as a press entity in conducting the activity at issue." *See* Advisory Op. 2005-16 (Fired Up!) at 4.

[9] *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986); Advisory Op. 2010-08 (Citizens United) at 6; Advisory Op. 2008-14 (Melothé, Inc.) at 5; Advisory Op. 2000-13 (iNEXTTV) at 3.

[10] Statement of Reasons of Commissioner Sean J. Cooksey at 2 (Sept. 13, 2021), MURs 7821, 7827 & 7868 (Twitter, Inc.) (quoting Explanation and Justification for Final Rules on Internet Communications, 71 Fed. Reg. 18,589, 18,608 (Apr. 12, 2006)). *See also* Advisory Op. 2008-14 (Melothé, Inc.) at 3 ("The Commission has not limited the press exemption to traditional news outlets, but rather has applied it to 'news stories, commentaries, and editorials *no matter in what medium they are published*'") (quoting Explanation and Justification for the Regulations on Internet Communications, 71 Fed. Reg. 18589,18,608 (Apr. 12, 2006)).

[11] *See, e.g.*, MUR 5928 (Kos Media, LLC) (dismissing complaint against news blog under Act's media exemption); Advisory Op. 2016-01 (Ethiq) (concluding website and digital app that provided "news and information about candidates . . . through both curated and original news content" qualified for media exemption); Advisory Op.

broadly protects "news stories, commentaries, and editorials *no matter in what medium they are published*,"[12] our test for applying the exemption continues to include an initial requirement for "press entity" status that is "grounded in a notion that some publishers are bona fide while others are not."[13]

Problems with the "Press Entity" Standard

The first part of the Commission's two-prong media exemption test—that is, asking whether the organization in question is a "press entity"—poses problems both constitutional and practical.

First and foremost, limiting the media exemption only to "press entities" conflicts with the Supreme Court's longstanding First Amendment jurisprudence. The Free Press Clause protects "every sort of publication which affords a vehicle of information and opinion."[14] The Commission's "press entity" analysis, by contrast, seeks to "distinguish between corporations which are deemed to be exempt as media corporations and those which are not,"[15] based largely on whether they are in the business of distributing political news or commentary "on a regular basis."[16] In other words, the Commission's articulated test largely limits the exemption to professional journalism and corporate media, and grants this class of "institutional press" a "constitutional privilege beyond that of other speakers."[17]

That distinction cannot withstand constitutional scrutiny. As past Commissioners have pointed out, the Act "provides the exemption, *period*."[18] The freedom of the press, as enshrined in the First Amendment, protects every citizen's right to engage in press activities. The Framers "surely did not intend to create a favored group of individuals who possess more rights than their

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2005-16 (Fired Up!) (concluding "unabashedly progressive" websites that provided original news content as well as links to and summaries of other websites' articles qualified for media exemption); Advisory Op. 2010-08 (Citizens United) (concluding documentary films produced by nonprofit advocacy organization qualified for media exemption); Advisory Op. 2008-14 (Melothé, Inc.) (concluding "interactive multi-channel Internet TV Web site" qualified for media exemption); Advisory Op. 2007-20 (XM Radio) (concluding satellite radio broadcasts, including "Candidate Supplied Content," qualified for media exemption); Advisory Op. 2000-13 (iNEXTV) (concluding network of "webcast video periodicals" qualified for media exemption).

[12] Explanation and Justification for the Regulations on Internet Communications, 71 Fed. Reg. 18,589, 18,608 (Apr. 12, 2006) (emphasis added).

[13] Statement of Reasons of Vice Chairman Bradley A. Smith and Commissioners Michael E. Toner and David M. Mason at 3 (Sept. 25, 2003), MUR 5315 (Wal-Mart Stores, Inc.).

[14] *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

[15] *Citizens United v. FEC*, 558 U.S. 310, 352 (2010).

[16] *See* Advisory Op. 2008-14 (Melothé, Inc.) at 4; *see also* Advisory Op. 2004-30 (Citizens United) at 7 (denying media exemption to documentary filmmaker because it did "not regularly produce documentaries or pay to broadcast them on television.").

[17] *Citizens United*, 558 U.S.at 352. *See also* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 538 (2012) ("[T]he FEC appears to be taking a press-as-industry-specially-protected view of the First Amendment.").

[18] Statement of Reasons of Commissioner Bradley A. Smith and Vice Chairman Michael E. Toner at 3 (July 22, 2005), MUR 5491 (Jerry Falwell Ministries, Inc.) (emphasis added).

fellow citizens, by virtue of belonging to a certain group that in some way 'acts' like the press, or produces websites that look more like some people think a news website should look."[19] But limiting the media exemption only to "press entities" does just that.

The Supreme Court has made clear that any "differential treatment" of press and non-press corporations in the law "cannot be squared with the First Amendment."[20] In *Citizens United v. FEC*, the Court observed that "[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not."[21] Likewise, in *First National Bank of Boston v. Bellotti*, the Court reasoned that "[i]f we were to adopt [the] suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by [other corporations], the result would not be responsive to the informational purpose of the First Amendment."[22] Still other courts have criticized the limited scope of the media exemption on First Amendment grounds.[23] These judicial admonitions alone are reason enough for the Commission to drop the first prong of its media exemption test.

But in addition to its constitutional problems, the "press entity" standard is impractical and difficult to apply fairly and consistently. Even if it were conceivable at one time to reasonably distinguish which entities are "press" and which are not, that taxonomy is surely unworkable today. The modern media landscape has fragmented and reorganized away from traditional journalistic outlets. Among the greatest changes to news publishing and distribution has been the rise of multipurpose digital platforms, whose diverse features and user-driven content models defy easy classification. In *Citizens United*, Justice Kennedy recognized that "the advent of the Internet and the decline of print and broadcast media" had "blurred" the distinctions between the institutional press and "others who wish to comment on political and social issues."[24] That observation is even more incisive twelve years later.

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[19] *Id.* Similarly, one former federal judge has observed that "[t]he regular or periodical status of publications [ ] cannot serve as a limiting principle under the Press Clause," as such a principle would deny the First Amendment's press protection to numerous sources of important news and information, including books, films, and myriad varieties of digital content available to Americans today. Michael McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 440 (Nov. 2013).

[20] *Citizens United*, 558 U.S. at 353.

[21] *Id.* at 352. *See also id.* at 390 n.6 (Scalia, J., concurring) ("It is passing strange to interpret the phrase 'the freedom of speech, or of the press' to mean, not everyone's right to speak or publish, but rather everyone's right to speak or the institutional press's right to publish.").

[22] 435 U.S. 765, 782 n.18 (1978); *see id.* at 801 (Burger, C.J., concurring) ("The very task of including some entities within the 'institutional press' while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country.").

[23] *See, e.g.*, *Citizens United v. Gessler*, 773 F.3d 200, 212 (10th Cir. 2014) (observing that the "distinction" between media corporations and other speakers "has no basis in the First Amendment and cannot immunize differential treatment from a First Amendment challenge").

[24] *Citizens United*, 558 U.S. at 352.

Because the Act and Commission regulations do not define "press entity," the Commission has relied on inconsistent, case-by-base evaluations that "[do] not necessarily turn on the presence or absence of any one particular fact."[25] Although the Commission's "press entity" analysis has generally hinged on whether an entity is in the business of regularly distributing news or commentary, the Commission has at times probed "a number of factors found nowhere in the statute," such as the binding of an entity's publication, its publishing schedule, revenue sources, and the appearance or presentation of its content, among other considerations.[26] This approach to determining "press entity" status is "unnecessarily complicated," and by no means "simple, objective, [or] grounded in the statute," particularly in relation to new forms of media.[27]

I have previously argued in favor of interpreting the media exemption more broadly. In a statement of reasons, I expressed the view that Twitter's and other social media companies' content-moderation decisions are fully protected by the Act's media exemption. That statement described Twitter as "functionally a free microblogging platform" that "allows hundreds of millions of users to publish original content," and that "also sells advertising space, curates and summarizes news articles, and hosts live-streamed events."[28] As a digital platform built around user-generated content, Twitter bears little resemblance to "institutional" press entities like newspapers and TV stations. But my conclusion that Twitter is protected by the media exemption was grounded in the platform's most essential activity: "the creation and distribution of media content," which is "at the heart of constitutionally protected press activity."[29]

The Commission should simplify its media exemption test to reflect this reality. Rather than trying to sort out who is a "press entity," a more straightforward test would focus solely on the factors in the second prong: (1) whether the entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the activity or conduct at issue is a "legitimate press function."[30] The scope of legitimate press activity should include all costs associated with writing, producing, publishing, or distributing news content, commentary, editorials, and other constitutionally protected speech. Whether done by individuals or corporations, regularly or sporadically, all of it is protected by the First Amendment. This more streamlined approach would ensure the media exemption's protections are properly channeled to bona fide press activity. And

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[25] Advisory Op. 2010-08 (Citizens United) at 5.

[26] *See, e.g.*, Statement of Reasons of Commissioner Bradley A. Smith and Vice Chairman Michael E. Toner at 1 (July 22, 2005), MUR 5491 (Jerry Falwell Ministries, Inc.); Statement of Reasons of Vice Chairman Bradley A. Smith and Commissioners Michael E. Toner and David M. Mason at 3 (Sept. 25, 2003), MUR 5315 (Wal-Mart Stores, Inc.).

[27] Statement of Reasons of Vice Chairman Bradley A. Smith and Commissioners Michael E. Toner and David M. Mason at 3 (Sept. 25, 2003), MUR 5315 (Wal-Mart Stores, Inc.).

[28] Statement of Reasons of Commissioner Sean J. Cooksey at 3 (Sept. 13, 2021), MURs 7821, 7827 & 7868 (Twitter, Inc.).

[29] *Id.*

[30] Other Commissioners have previously advocated for a simplified version of the media exemption test that would protect any periodical publication, so long as it is not owned or controlled by a party, political committee, or candidate. *See* Statement of Reasons of Vice Chairman Bradley A. Smith and Commissioners Michael E. Toner and David M. Mason at 5 (Sept. 25, 2003), MUR 5315 (Wal-Mart Stores, Inc.).

it would continue to guard against potential misuse of the exemption to circumvent the Act's requirements without the problematic, speaker-based gatekeeping of the "press entity" standard.

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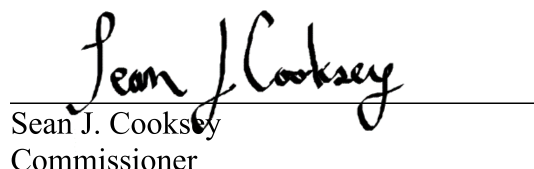
For too long, the Commission's media exemption test has been confused and constitutionally suspect. Vague and inconsistent standards for applying the media exemption grant this agency impermissible discretion to regulate a free press, and "[g]overnment officials cannot be trusted to regulate journalists fairly and without bias."[31] For the reasons just described, we should abandon any further attempt to discern who is and is not a "press entity" when applying the media exemption as both unworkable and unconstitutional. Instead, the Commission should stick to what it can handle: asking whether a party is engaged in constitutionally protected press activity and independent of any political candidate, committee, or party. The Commission's work—and Americans' constitutional rights—would be better off for it.



Sean J. Cooksey Commissioner	April 22, 2022 Date

[31] Statement of Reasons of Vice Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 10 (Dec. 19, 2013), MUR 6703 (WCVB-TV, Channel 5).