IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CAMPAIGN LEGAL CENTER, *et al.*	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 1:19-cv-02336-JEB
	:	
FEDERAL ELECTION COMMISSION	:	
Defendant,	:	
	:	
HILLARY FOR AMERICA and	:	
CORRECT THE RECORD	:	
Defendant-Intervenors.	:	

PROPOSED *AMICUS CURIAE* BRIEF
OF THE INSTITUTE FOR FREE SPEECH
IN SUPPORT OF NO PARTY
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

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CORPORATE DISCLOSURE STATEMENT

The Institute for Free Speech, a nonprofit corporation organized under the laws of the Commonwealth of Virginia, hereby states that it has no parent companies, subsidiaries, or affiliates and that it does not issue shares to the public.

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INTRODUCTION

Amicus Institute for Free Speech ("Institute") has no dog in this fight. At this time, it takes no position on whether Correct the Record ("CTR") and Hillary for America ("HFA") illegally coordinated their campaign activities, nor on whether the Federal Election Commission ("FEC" or "Commission") should have found reason to believe such based on Plaintiffs' Campaign Legal Center and Catherine Kelley's ("CLC") complaint.

The Institute does write to flag an important and unsettled issue that this Court briefly touched upon at the motion to dismiss stage: the so-called media, or press, exemption. Although the FEC did not rely on the press exemption in its disposition of the complaint, this Court addressed the exemption in denying the motion to dismiss. The FEC considers the media exemption to be "for the media" and "the media" only, and this Court suggested that this is a correct understanding of the exemption. Mem. Op. (ECF No. 33) at 26. In fact, it is unclear whether the Commission's cabining of this statutory protection in that fashion is consistent with the First Amendment's Press Clause. Properly understood, the Press Clause protects the *acts* of publishing and distribution, not the publishing or media *industry*. Given that the press exemption was not the basis for the FEC's action, and that the issue has not been fully briefed by the parties, *Amicus* respectfully suggests that reference to the press exemption is not necessary to resolve this matter and accordingly, should not be addressed by the Court in resolving this matter.

INTEREST OF *AMICUS CURIAE*[1]

As explained in the accompanying motion for leave to file, the Institute is dedicated to the protection and defense of the rights of speech, press, assembly, and petition enshrined in the First

[1] No other party's counsel authored this brief in whole or in part, nor did any person contribute money that was intended to fund the preparation or submission of this brief.

Amendment. Here, it seeks to highlight certain constitutional equities impacted by the FEC's narrow reading of the media exemption.

ARGUMENT

I. The Federal "Press Exemption" Need Not Be Used To Decide This Case.

This case focuses on a narrow question: whether an administrative complaint brought by a third party was inappropriately dismissed by a government agency. Pl. Mem. in Sup. of Mot. for Summ. J. (ECF No. 35) at 1; Def.-Int. Mem. in Supp. of Cross-Mot. for Summ. J. (ECF No. 38-1) at 2. Plaintiffs alleged that the Clinton campaign illegally coordinated with Correct the Record, and the FEC rejected those allegations and dismissed the complaint. Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, *In the Matter of Correct the Record, et al.*, MURs 6940, 7097, 7146, 7160, 7193 (Aug. 21, 2019) ("Controlling Commissioners' Statement").[2] It is undisputed that CLC's complaint was dismissed because the controlling commissioners did not buy Plaintiffs' theory of coordination, not due to its review of any proffered defense involving the media exemption. ECF No. 35 at 3, 14-15, 35-36; ECF No. 38-1 at 42-43.

Yet, when this Court rejected the Intervenors' motion to dismiss[3], it briefly discussed the proposition that "op-eds written in support of [Hillary] Clinton by senior CTR personnel fell under

[2] *Available at*: https://eqs.fec.gov/eqsdocsMUR/6940_1.pdf

[3] At the present time, the FEC is statutorily incapable of defending its decision not to find reason to believe that the Intervenors broke the law. 52 U.S.C. §§ 30106(c) and 30107(a)(6) (jointly requiring "the affirmative vote of 4 members of the Commission" to "defend… any civil action" under § 30109(a)(8)). At present, there are only three serving commissioners. The President has announced an intention to nominate a fourth commissioner. Nominations & Appointments, "President Donald J. Trump Announces Intent to Nominate and Appoint Individuals to Key Administration Posts," The White House (June 26, 2020); *available at*: https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-appoint-individuals-key-administration-posts-43/.

the 'media exemption' of 11 C.F.R. § 100.73, which exempts from the definition of 'contribution' 'any cost incurred in covering or carrying a news story, commentary, or editorial.'" Mem. Op. at 26 (quoting 11 C.F.R. § 100.73) (cleaned up, brackets supplied). The Court found that it could not credit such a claim of immunity, because "the media exemption…is for the media," suggesting that neither Correct the Record nor the Clinton campaign functions as the institutional press. *Id*. at 26. As *Amicus* has noted, this is a fair reading of the current standard as applied by the FEC. *See* Statement of Reasons of Vice Chairman Bradley A. Smith and Commissioners Michael E. Toner and David M. Mason, *In the Matter of Wal-Mart Stores, Inc.*, MUR 5315, Fed. Election Comm'n (Aug. 25 2003).[4] The media exemptions of federal campaign finance law, *e.g.* 52 U.S.C. § 30101(9)(B)(i); 52 U.S.C. § 30104(f)(3)(B)(i), and 11 C.F.R. § 100.73, are interpreted by the FEC as shielding the "media industry."

But this license rests on questionable ground. As the Tenth Circuit observed in *Citizens United v. Gessler*, 773 F.3d 200, 212 (10th Cir. 2014) ("*Gessler*"), "as a constitutional proposition," the "justification[]…that a valid distinction exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public," is one that "can be disposed of summarily." (citation and quotation marks omitted). Such a "distinction has *no basis* in the First Amendment and cannot immunize differential treatment from a First Amendment challenge." *Id*. (emphasis supplied). Given that the media exemption raises complex issues of First Amendment law, it should not be used to shed light, in any direction, on the question of whether the Commission acted appropriately in

[4] *Available at*: https://www.fec.gov/files/legal/murs/5315/000001AA.pdf

dismissing CLC's complaint, [5] at least without the benefit of thorough examination and separate briefing on the media exemption itself.[6]

A. The history and application of the federal media exemption.

All major federal campaign finance laws enacted since 1974 have included a protection for "the press" or "the media." 52 U.S.C. § 30101(9)(B)(i); 52 U.S.C. § 30104(f)(3)(B)(i). This immunity was first enacted in the Federal Election Campaign Act ("FECA"), which exempts from its coverage expenditures for a "news story, commentary, or editorial distributed through the facilities of any broadcasting station, news, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."[7] 52 U.S.C. § 30101(9)(B)(i). The FEC's understanding of this statutory exemption comes not from *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) or *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), but principally from two 1981 district court cases, *Federal Election Commission v. Phillips Publishing*, 517 F. Supp. 1308 (D.D.C. 1981) ("*Phillips Publishing*") and *Reader's Digest Association v. Federal Election Commission*, 509 F. Supp. 1210 (S.D.N.Y. 1981)

[5] While the FEC did not address the media exemption at all below, should this complaint be remanded with the understanding that CLC's coordination theory is a proper reading of the law, the Commission will likely have to address whether the media exemption shields any of Intervenors' joint activities. And if those acts are found not to slot into the press exemption, it hardly staggers the imagination that the constitutionality of the FEC's application of the media exemption would end up before this Court on appeal from such an adverse finding.

[6] In the event that this Court orders such briefing, *Amicus* requests that it be permitted to file papers on the question.

[7] Of course, the press exemption would not protect Correct the Record if it were true that Mrs. Clinton's campaign was in actual control of it. *E.g.* Controlling Commissioners' Statement at 6 ("Correct the Record's founder and chairman David Brock…describes [CTR] as a 'surrogate arm of the campaign' and 'under [Hillary for America's] thumb") (second brackets in original, citation omitted).

("*Reader's Digest*") *See* Fed. Election Comm'n, Advisory Opinion 2016-01 ("Ethiq") at 3 (applying *Reader's Digest* and *Phillips Publishing* to determine whether the applicant is protected by the media exemption).[8] Thus, to vindicate "the right of the media," *Phillips Publishing*, 517 F. Supp. at 1312 (ellipsis removed, citation omitted), the FEC determines whether an entity is protected by the media exemption through "a two-step analysis." Fed. Election Comm'n, Advisory Opinion 2011-11 ("Colbert") at 6.

"First, the Commission asks whether the entity engaging in the activity is a press entity," *id*., by "focus[ing] 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.'" Fed. Election Comm'n, Advisory Opinion 2019-05 ("System73") at 4 (quoting Fed. Election Comm'n, Advisory Opinion 2008-14 ("Melothé") at 4)). Regularity is the touchstone for determining if an entity is a "press" institution. *Compare* Fed. Election Comm'n, Advisory Opinion 2004-30 ("Citizens United") at 7 (denying exemption for documentary urging viewers to vote against John Kerry for President because "Citizens United does not regularly produce documentaries or pay to broadcast them on television. In fact, the information you provided indicates that Citizens United has produced only two documentaries since its founding in 1988…") *with* Fed. Election Comm'n, Advisory Opinion 2010-08 ("Citizens United II") at 2 (granting media exemption and noting that "[s]ince 2004, Citizens United has produced and distributed fourteen films, [and]…also has four additional films currently in production"); *Bailey v. State of Me. Comm'n on Gov't Ethics and*

[8] The Commission also often references a small portion of *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), where the Court determined that FECA's media exemption could not protect a "Special Edition" of the MCFL newsletter since "[n]o characteristic of the Edition associated it in any way with the normal MCFL publication[s]." 479 U.S. at 250-251. The *MCFL* Court did not pass on the constitutionality of the media exemption as interpreted by the FEC, but merely observed that MCFL's activities did not fit within the exception.

Election Practices, 900 F. Supp. 2d 75, 89 (D. Me. 2012) (quoting FEC determination that press exemption did not apply because "'[t]he website existed for a specific and limited time only. It first appeared just prior to the gubernatorial election and was taken down shortly before the election'") (citation omitted).

If an entity is regularized enough to qualify as a "press entity," the Commission next turns to an additional "two part-analysis…which requires it to establish" that (1) "the entity is not owned or controlled by a political party, political committee, or candidate" and (2) that "the press entity is acting in its 'legitimate press function.'" Advisory Opinion 2010-08 ("Citizens United II") at 4-5. While ownership or control can be taken literally, Fed. Election Comm'n, Advisory Opinion 2005-07 ("Mayberry") at 3[9], determining whether a press entity is acting within its "legitimate press function" is a slightly broader query. Advisory Opinion 2011-11 ("Colbert") at 7. The Commission asks two questions: "whether the press entity's materials are available to the general public" and "whether the materials are comparable in form to those ordinarily issued by the press entity," which appears to be just a restatement of the need for regularity. *Id*.; *see* Fed. Election Comm'n, Advisory Opinion 2004-07 ("MTV") at 4 (noting that in 1994, the "Commission concluded that [certain] broadcasts were covered by the press exemption, but that the distribution of [some] fliers" by "a cable television provider" was not "because [the applicant] was 'acting in a manner unrelated to its cablecasting function' when it produced and distributed the fliers") (citation omitted); *MCFL*, 479 U.S. at 250-251.

As a result, the test makes for a remarkably shallow safe harbor. The FEC has restricted the statutory exemption's reach to established organizations in the business of regularly publishing

[9] "Because you are a candidate for Federal office and your opinion columns are distributed through publications that you co-own, those opinion columns are not exempt from the definitions of 'contribution' or 'expenditure' under the press or media exemption."

and distributing news and even then, only provides immunity to activities performed consistent with that narrow mission. It is not at all clear, however, that this is a constitutionally correct or even permissible interpretation of the exemption.

B. The FEC's application of the press exemption is constitutionally problematic.

The FEC has interpreted the federal media exemption as "extend[ing] protection to an institution," as if the media "business is…the only organized private business that is given explicit constitutional protection." Potter Stewart, Or of the Press, 26 Hastings L.J. 631, 633 (Jan. 1975); 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, 537 (2012) ("[T]he FEC appears to be taking a press-as-industry-specially-protected view of the First Amendment"). This standard, which this Court appears to have adopted, Mem. Op. at 26, is in serious tension with the Supreme Court's understanding of the Press Clause and the activities protected by the First Amendment. After all, "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion," *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938), and "[i]t 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." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 390 n.6 (2010) (Scalia, J., concurring).

Indeed, "[t]he argument that the First Amendment…confine[s] freedom of the press to professional" or at least formalized "journalism," Michael McConnell, Reconsidering *Citizens United* as a Press Clause Case, 123 Yale L.J. 412, 438 (Nov. 2013), "the idea that the institutional press has superior rights under the [Press] Clause, [is a] view that has never commanded a majority" of the Supreme Court, *id*. at 438, and one which has no historical pedigree. *Near v.*

Minn., 283 U.S. 697, 707 (1931) (defining the "the press" as an "essential personal liberty of *the citizen*") (emphasis supplied); *Aldrich v. Press Printing Co.*, 9 Minn. 133, 138 (Minn. 1864) ("The press does not possess any immunities, not shared by *every individual*") (emphasis supplied). As former Judge Michael McConnell observed, a standard that seeks to offer First Amendment protections because of "[t]he regular or periodical status of publications…cannot serve as a limiting principle under the Press Clause. This would exclude not only the lonely pamphleteer so beloved by Supreme Court opinions, but also books, which the Court has squarely held are protected by the Press Clause. It would also exclude documentary films, tweets, YouTube clips, and many blogs. It would retroactively exclude Tom Paine, Publius, and the Federal Farmer." 123 Yale L.J. at 440. As Judge Sentelle has wryly observed, "[i]f the press-as-institution view prevails, is the printer of a first edition of a newspaper or periodical part of that institutional press or just an aspirant? If not a member, then how many issues does the printer have to issue before being admitted into the protected class?" David B. Sentelle, Freedom of the Press: A Liberty for All or a Privilege for a Few?, 2013-14 Cato Sup. Ct. Rev. 15, 26 (2013-2014).

In fact, it is probable that the FEC has hitherto successfully fenced off the media exemption's protections based on regularity and structure simply because it has not been squarely challenged on the subject. As Professor Volokh observed, after a thorough review of the case law as of January 2012, he "could find no court decision that agreed with the FEC['s]," 160 U. Pa. L. Rev. at 538, "view [of] the federal election law media exemption – which is limited to broadcasting and periodicals, and thus excludes books, occasional newsletters, and occasionally produced documentaries – as tracking a First Amendment mandate." *Id*. at 538. The Supreme Court itself has cast doubt on the media exemption's constitutionality, observing that the carve-out embedded in Congress's 2002 campaign finance reforms "distinguish[es] between corporations which are

deemed to be exempt as media corporations and those which are not;" a provision with "no precedent supporting" it, which rests on a "constitutional privilege" for the "institutional press" that the Court has "consistently rejected." *Citizens United*, 558 U.S. at 352 (citation and quotation marks omitted); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 782 n.18 (1978) ("If 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 appellants, the result would not be responsive to the informational purpose of the First Amendment").[10] "This is not to say that [the law]…can never properly distinguish the news media from other speakers. But that distinction has no basis in the First Amendment and cannot immunize differential treatment from a First Amendment challenge." *Gessler*, 773 F.3d at 212.

[10] In *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 668 (1990), which was substantially undone by *Citizens United*, the Supreme Court determined that the 1974 media exemption did not violate the Fourteenth Amendment's Equal Protection Clause. *Id*. But it did not conduct a First Amendment analysis, and even acknowledged that "the press'[s] unique societal role may not entitle [it] to greater protection under the Constitution." *Id*. Likewise,

The *per curiam* opinion of this Court in *McConnell v. Federal Election Commission* dismissed an overall attack on the 2002 campaign finance reform brought under the Press Clause because it considered the breadth of constitutional protection provided by the "Speech and Association [*sic*] Clauses" to be comparable to those of the Press Clause, and that "there [was] no need for the Court to treat their grievances separately." 251 F. Supp. 2d 176, 233-236 (D.D.C. 2003) (three-judge court); *see also McConnell*, 540 U.S. at 208, n.89. But it did not squarely deal with the discrete, particular question of whether, by sheltering the press as an industry, the FEC's interpretation of its mandate under the press exemption was constitutional under the Press Clause.

Both cases antedate the Tenth Circuit's reasoning regarding the Colorado media exemption (which closely mirrors the federal one), as well as the Supreme Court's later pronouncement of hostility toward the media exemption in *Citizens United v. Federal Election Commission*. *Gessler*, 773 F.3d at 212 (noting that a limited discussion of the exemption at *McConnell*, 540 U.S. at 208 in defense of the corporate ban on electioneering communications had been "overruled by *Citizens United* on that point"); *see also United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) ("[C]arefully considered language of the Supreme Court, even if technically *dictum*, generally must be treated as authoritative") (citation and quotation marks omitted).

Of course, while immunizing the "media industry" as an industry is constitutionally troublesome, it does not follow that the Commission is powerless to protect "media activities" under its current statutory mandate.[11] As Judge McConnell determined, "history and precedent indicate" that "the Press Clause refers…to the right of any person to use the technology of the press to disseminate opinions," and therefore "everyone has a constitutional right to publish their views about officials and candidates during the election season." 123 Yale L.J. at 441.

In any case, the media exemption is not presently before this Court. But it might be at some future date. In the absence of full briefing on that issue, *Amicus* cautions the Court against broadly recognizing, in *dicta* or otherwise, an interpretation of the "media exemption" that is only "for the media" in order to dispose of any part of the case presently before it. Mem. Op. at 26.

CONCLUSION

Regardless of this Court's disposition of this matter, it ought not rely on or address the FEC's application of the media exemption, at least not without undertaking a thorough examination of the issue, including an order for additional briefing on the subject.

Respectfully submitted,

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Date: September 9, 2020

[11] Although if that concept brings about a feeling of trepidation, *Amicus* submits that might say something about the comprehensive onerousness of our political speech rules.

CERTIFICATE OF SERVICE

I hereby certify that on the 9th of September, 2020, I caused a copy of the foregoing to be filed via CM/ECF on all Parties that have entered an appearance in this Court.

/s/ Zac Morgan
Zac Morgan