



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Frank Durkalski, *et al.*) MUR 7210

**CONCURRING STATEMENT OF
COMMISSIONER LEE E. GOODMAN**

In this matter, the complaint alleged that *Chesterland News*, a newspaper in Chesterland, Ohio, ran two advertisements expressly advocating the defeat of Hillary Clinton which were paid for by Frank Durkalski but which lacked the disclaimers required by the Federal Election Campaign Act of 1971, as amended (the “Act”).¹ The Commission’s Office of General Counsel (“OGC”), consistent with over 35 years of precedent, recommended the Commission find no reason to believe that *Chesterland News* violated the Act on the basis “that a media entity has no duty to ensure a paid political ad complies with the Act’s disclaimer requirements; instead, the obligation rests with the person placing the ad.”²

Commissioners Weintraub and Walther objected to OGC’s recommendation and, on December 12, 2017, Commissioner Weintraub proposed edits to the Factual and Legal Analysis recommended by OGC, attempting to change the no reason to believe finding as to *Chesterland News* to a discretionary dismissal under *Heckler v. Chaney*.³ The proposed edits deleted the language asserting the Commission’s longstanding position that press entities are not responsible for ensuring paid political ads comply with the Act’s disclaimer requirements. Commissioner Weintraub’s proposal failed by a vote of 2 to 2.⁴

Returning to the matter, on January 9, 2018, I moved approval of OGC’s original recommendation: no reason to believe *Chesterland News* violated the Act based on the

¹ 52 U.S.C. § 30120 requires persons paying for communications that expressly advocate the election or defeat of a clearly identified federal candidate or solicits any contribution to include a disclaimer identifying the person who paid for the communication.

² See MUR 7210 (Frank Durkalski, *et al.*), First Gen. Counsel’s Rpt. at 2.

³ See MUR 7210 (Frank Durkalski, *et al.*), Certification (Dec. 12, 2017)..

⁴ *Id.* (Commissioners Weintraub and Walther voted to approve Commissioner Weintraub’s proposed edits; Commissioners Goodman and Hunter dissented).

established legal rule that press publications are not legally responsible for the sponsor's disclaimer. That motion failed by a vote of 3 to 2.⁵ Unable to agree upon the legal rationale with respect to *Chesterland News*, the Commission closed the file.⁶

I write separately to express my strong disagreement with any proposal to impose civil and criminal liability upon press entities, as well as their new media counterparts, when they agree to make their publications available for political advertisements.

Historically, responsibility for disclaimers has been placed solely on the person who pays for the advertisement. For example, in MUR 5158, the complaint alleged that a political committee failed to include the proper disclaimer on a television advertisement.⁷ The committee responded that the allegation should be dismissed because the media consultant was contractually required to place disclaimers on the advertisement, and thus the committee was not at fault.⁸ However, the Commission rejected that argument because "committees, not vendors, are responsible for ensuring that proper disclaimers appear on communications."⁹ Accordingly, the Commission found reason to believe the committee violated the disclaimer provision of the Act.¹⁰

The Commission consistently has applied this general rule to absolve press organizations of legal liability for over 35 years. For example, as far back as the 1980s, when the Commission enforced the disclaimer rules in *Furgatch*, the Commission and federal courts held only the ad sponsor legally responsible.¹¹ Mr. Furgatch had sponsored several advertisements, one without a disclaimer, in newspapers around the country, including the *New York Times* and *Boston Globe*. The Commission, which generated the enforcement matter *sua sponte*, did not name the newspapers as respondents or seek to impose liability upon them.¹²

A decade later, in 1994, the Commission found no reason to believe that the *Jewish Exponent*, a print publication in Philadelphia, was liable for publishing an advertisement paid for

⁵ MUR 7210 (Frank Durkalski, *et al.*), Certification at ¶ 1 (Jan. 9, 2018) (Chair Hunter and Commissioners Goodman and Petersen voted to approve OGC's recommended Factual and Legal Analysis; Commissioners Walther and Weintraub dissented).

⁶ *Id.* at ¶ 2.

⁷ MUR 5158 (Brady Campaign to Prevent Gun Violence, *et al.*), Factual and Legal Analysis at 1.

⁸ MUR 5158 (Brady Campaign to Prevent Gun Violence, *et al.*), Response at 4-5 (Nov. 9, 2004).

⁹ MUR 5158 (Brady Campaign to Prevent Gun Violence, *et al.*), Factual and Legal Analysis at 9.

¹⁰ MUR 5158 (Brady Campaign to Prevent Gun Violence, *et al.*), Certification (Nov. 4, 2003).

¹¹ See *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987); MUR 1438 (Furgatch).

¹² See MUR 1438 (Furgatch), Certification (Apr. 23, 1982).

by an authorized committee without the required disclaimer.¹³ The Commission made clear that “[u]nder the Act, however, it is Respondent’s [the committee’s] obligation to ensure that their advertisement includes the appropriate disclaimer.”¹⁴ Subsequently, the Commission found probable cause to believe that the political committee violated the Act’s disclaimer requirements.¹⁵

And in 2002 the Commission found no reason to believe that radio stations WORD and WSPA of Greenville, South Carolina, violated the Act when a political committee failed to include the required disclaimer in its advertisements.¹⁶ The Commission concluded that the radio stations’ “failure to treat the advertisement as a political advertisement does not implicate [the radio stations] in any violation of the Act or regulations.”¹⁷

In 2005, the Commission issued an advisory opinion concluding that a candidate committee could pay a radio station for broadcast time so the candidate could host a radio show.¹⁸ The committee asked the Commission: “what is the proper disclaimer that the Committee must include on all broadcasts?”¹⁹ The Commission stated that the *committee* was required to include the disclaimer, not the radio station.²⁰ The Commission explained that persons who do not have editorial control over the content of the program, and do not pay for or authorize the communication, are not required to make disclaimers.²¹ Thus, responsibility for disclaimers rests solely upon the person paying for and controlling the content of the advertisement.

Indeed, in over 40 years of enforcing the Act’s disclaimer requirements, the Commission has never held a press entity legally responsible for disclaimers in its own content or publication of paid ads.²² The Commission’s approach has conformed to the Act which as a general rule

¹³ MUR 3682 (Fox for Congress Committee, *et al.*), Factual and Legal Analysis at 4; MUR 3682 (Fox for Congress, *et al.*), Certification (March 4, 1994).

¹⁴ MUR 3682 (Fox for Congress Committee, *et al.*), Factual and Legal Analysis at 4.

¹⁵ MUR 3682 (Fox for Congress, *et al.*), Certification (Dec. 9, 1994).

¹⁶ MUR 5147 (Spartanburg County Republican Party), First Gen. Counsel’s Rpt. (Apr. 22, 2002); MUR 5147 (Spartanburg County Republican Party), Certification (May 8, 2002) (approving First Gen. Counsel’s Rpt.).

¹⁷ MUR 5147 (Spartanburg County Republican Party), First Gen. Counsel’s Rpt. (adopted by the Commission).

¹⁸ See Advisory Opinion 2005-18 (Rcycs).

¹⁹ *Id.* at 1.

²⁰ See *id.* at 5.

²¹ See *id.*

²² See, e.g., MUR 4863 (WABC AM 770, *et al.*), First Gen. Counsel’s Rpt. (May 27, 1999); MUR 4863 (WABC AM 770, *et al.*), Certification (June 3, 1999).

holds the person who makes an expenditure legally responsible for the legal compliance of her expenditure. Section 30120 imposes the responsibility squarely upon the person making the disbursement to disseminate the ad because the disclaimer is required to be included in the text of the ad and it is required to include voice-overs and pictures of ad sponsors—content exclusively within the control of the ad sponsor.²³

Nothing in the Act or its legislative history even suggests that Congress intended to impose upon press organizations the responsibility to police disclaimers in political advertising. Requiring press organizations to determine, before running an advertisement, if its text contains express advocacy, requires a disclaimer, or contains an adequate disclaimer would be a wholly unreasonable burden. Since a six-member Commission cannot always agree on what constitutes express advocacy, the *Chesterland News* cannot reasonably be expected to censor potentially hundreds of advertisements until its editors and lawyers are satisfied the sponsors have complied with the Act's disclaimer requirements.

Moreover, to hold press organizations legally liable for including such information would introduce an entirely extra-statutory realm of vicarious liability under the Act. There is no indication in the language of the Act or its legislative history that Congress intended to impose vicarious liability upon press entities. Instead, Congress expressly exempted press and media organizations from regulation under the Act, and this is fully consistent with the speech rights conferred by the Free Press Clause of the First Amendment and the absence of any articulated corruption justification.²⁴

Even when they sell advertising space, press entities retain their Constitutional and statutory protections.²⁵ The Supreme Court long ago held that press entities have First Amendment protection when publishing political advertisements. In 1964, the Supreme Court established clear First Amendment rights for press entities when they publish political advertisements in *New York Times Co. v. Sullivan*.²⁶ The *Times* published a political advertisement that a public official in Alabama claimed was libelous. The Court distinguished commercial speech from paid political advertisements and stated that the “advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection to which the *Times* was entitled.”²⁷

²³ See 52 U.S.C. § 30120(a), (c), (d).

²⁴ The Press Exemption: 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 11 C.F.R. 100.73, 100.132 (exempting news stories, commentary, or editorials distributed through facilities of press organizations from the definition of expenditure and contribution).

²⁵ The Commercial Vendor Exemption: 52 U.S.C. § 30101(8)(A), 11 CFR §§ 100.52(d)(1), 100.111(e)(1), MUR 5474 (Dog Eat Dog Films, Inc.). In sum, newspapers and other media are exempt from § 30120(a) under two overlapping and independent exemptions, the Press Exemption and the Commercial Vendor Exemption.

²⁶ 376 U.S. 254 (1964).

²⁷ *Id.* at 266, 271.

Those who would point to the Federal Communications Commission's ("FCC") political file rules for broadcast licensees as a guide to imposing liability upon all media entities under the Act might overestimate its usefulness. The Supreme Court, by a 5 to 4 vote, upheld the regime against a *facial* challenge in *McConnell v. FEC*, but the Court left open *as applied* challenges,²⁸ and the Court's First Amendment jurisprudence has been trending to a decidedly more protective stance.²⁹ A more apt comparison may be the Foreign Agents Registration Act, which requires disclaimers on propaganda sponsored by foreign speakers, and which expressly exempts American press organizations from regulation as domestic agents of foreign ad sponsors as well as legal responsibility for the disclaimers.³⁰ Likewise, Section 230 of the Communications Decency Act generally protects online media platforms from civil liability based upon the content posted by third-party users.³¹

Contrary to these established principles, two of my colleagues supported a legal analysis premised upon the authority of the Commission to impose civil and criminal liability on the press as a condition of providing advertising space to political speakers. That is the flawed legal theory underlying the proposed Factual and Legal Analysis that I voted against.

Advertising platforms emphatically are not legally responsible under the Act for compliance with FEC disclaimers. To the extent the edits proposed in this matter and the split vote signal a renewed effort by some to change current law to impose civil and criminal liability upon traditional press organizations like *Chesterland News*, or to new media platforms like Facebook and Twitter, whether by prosecutorial fiat,³² rulemaking or legislation, I am confident

²⁸ 540 U.S. 93 (2003). The Supreme Court, by a 5 to 4 vote, held that the political file regime codified in the Bipartisan Campaign Reform Act of 2002, which requires broadcast licensees to maintain a public file of persons who request broadcast time for political advertisements, was facially constitutional because the administrative burdens were minimal for licensees, but left open as applied challenges. Chief Justice Rehnquist dissented arguing that the majority failed to apply any recognizable First Amendment analysis to the provision. *Id.* at 359. The D.C. District Court panel that first ruled on the case held that the political file provision did not serve a substantial governmental interest to outweigh the possibility of infringement on First Amendment rights. *McConnell v. FEC*, 251 F. Supp. 2d 176, 378 (D.D.C. 2003).

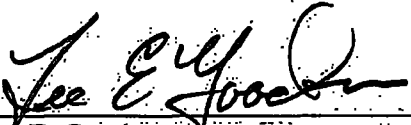
²⁹ See, e.g., *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017); *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (striking corporate ban on electioneering communications in as applied challenge left open by *McConnell*).

³⁰ 22 U.S.C. § 611(d).

³¹ 47 U.S.C. § 230.

³² Commissioner Weintraub's proposal to change 40 years of law in this enforcement matter was procedurally improper even if the new legal approach had substantive merit (it does not). *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 254-55 (2012); *CBS Corp. v. FCC*, 663 F.3d 122, 138 (3rd Cir. 2011), cert. denied, 132 S.Ct. 2677 (2012) (holding that an agency "cannot change a well-established course of action without supplying notice of and a reasoned explanation for its policy departure."). See generally HARVEY SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2001).

such efforts will fail as a matter of Constitutional law, faithful implementation of the Act, and tolerable public policy.³³



Lee E. Goodman
Commissioner

Feb. 12, 2018
Date

³³ Renewed debate within the Commission over the freedom of press organizations, and the boundaries of that freedom, have been cause for concern. Certain Commissioners have fought consistently to expand Commission authority to regulate and punish press entities under the Act, ranging from Fox News to Grand Central Publishing to independent filmmakers. *See, e.g.*, Agenda Document 16-43-C (Memorandum to proposed amendment to Technical Modernization NPRM) (Sept. 29, 2016). I proposed amendments to 11 CFR 100.73 and 100.133 to include satellite television and radio, internet-enable applications, motion pictures, and books in the press exemption. The motion to amend Agenda Document No. 16-43-B to include the above amendments in the Notice of Proposed Rulemaking failed by a vote of 3-3 (Commissioner Goodman, Hunter, and Petersen voting to approve the amendments while Commissioners Ravel, Walther, and Weintraub voted against); Agenda Document No. 16-64-A (Minutes of an Open Meeting of the Federal Election Commission) (Sept. 29, 2016); *see also* Advisory Opinion 2014-06 (Ryan for Congress), Concurring Statement of Chairman Lee E. Goodman and Commissioners Matthew S. Petersen and Caroline C. Hunter; MUR 6952 (Fox News), Statement of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman (June 28, 2016); MUR 6952 (Fox News), Supplemental Statement of Reasons of Commissioner Lee E. Goodman (June 30, 2016); MUR 6779 (Highway 61), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Lee E. Goodman and Caroline C. Hunter (April 14, 2016); MUR 6779 (Highway 61), Concurring Statement of Commissioner Lee E. Goodman (April 18, 2016); MUR 6703 (WCVB-TV), Statement of Reasons of Vice Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen; MUR 6320 (John Gomez, *et al.*).