FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 5491
Jerry Falwell Ministries, Inc.	)	
The Liberty Alliance, Inc.	)	

STATEMENT OF REASONS OF COMMISSIONER BRADLEY A. SMITH AND VICE CHAIRMAN MICHAEL E. TONER

We have joined the Statements of Reasons issued by a majority of the Commission and Commissioners Mason, Smith and Toner in this MUR. We add merely that we also believe that the exemption provided by 2 U.S.C. § 431(9)(B) (the "press exemption") applies here.

In the past, the Commission has sometimes attempted to pick and choose which publishers get the press exemption by reference to a number of factors found nowhere in the statute, such as whether or not a publication charges a fee, relies on advertising income, or is sent only to members of an organization. We believe that the factors used in these efforts are ultimately not helpful. See MUR 5315 Wal-Mart Stores, Inc., Statement of Reasons of Vice Chairman Bradley A. Smith and Commissioners Michael E. Toner and David M. Mason at 3-4.

On a different note, in *F.E.C. v. Massachusetts Citizens for Life*, 479 U.S. 238, the Supreme Court held that a one-time pamphlet by a group was not a "periodical publication" under the statute, but that is not relevant in this case. Here, there is no doubt that "Falwell Confidential" is published on a regular basis, and that the edition at issue in this case was published in the normal course of maintaining the column and the website, and also that it appears in hard copy print publications on a regular basis. First General Counsel's Report at 3, 6. The Office of General Counsel concedes that it qualifies for the press exemption not only if it meets the statutory criteria of publication through a "broadcasting station, newspaper, magazine, or periodical publication," but also if it come through "the

online equivalent of any of those media." *Id.* at 8. This concession is wise, for surely the press exemption must be read broadly – it is all but inconceivable, for example, that it does not apply to movies and books, or to the New York Times on-line edition. However, the Office of General Counsel then argues that this publication is not press, because, "it appears to be no different from other corporate or union websites that feature periodic news, events, and/or commentary sections relating to the activities or concerns of a corporation or union." *Id.* at 9. In other words, it looks like on-line publications look. And just as nothing prevents a corporation or union from publishing a newspaper for general circulation that mainly features "periodic news, events, and/or commentary sections relating to the activities or concerns of a corporation or union," or purchasing a radio station to feature "periodic news, events, and/or commentary ... relating to the activities or concerns of a corporation or union," nothing prevents a corporation or union from publishing a website of "periodic news, events, and/or commentary sections relating to the activities or concerns of a corporation or union."

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court held that a state could pass a statute treating "media corporations" differently from other corporations, exempting only the former from the limitations on expenditures. The Court noted that "media corporations... are devoted to the collection of information and its dissemination to the public," and play a "unique role ... in informing and educating the public, offering criticism, and providing a forum for discussion and debate." 494 U.S. at 669 (internal quotation and citation omitted). However, nothing in that decision suggests that had the Chamber of Commerce decided to publish a public newspaper, rather than to advertise in one, it would not have gained the benefit of the press exemption. Additionally, it seems rather clear that Jerry Falwell has a long history in media, and that "Falwell Confidential" meets the above requirements of *Austin* to qualify its publisher as a "media corporation."

What makes the internet unique is not that large corporations and unions, or very large membership groups, can take advantage of the "press exemption" – entities such as Sinclair Broadcasting, Viacom and the National Rifle Association can and do do that now, through the purchase and operation of periodicals and broadcast stations – but that almost anyone can. Because it is cheaper to operate a periodical on the internet, we will expect more corporations and unions to do that than we would expect to own and operate traditional newspapers and broadcast entities. But the potential for corruption and unequal influence are not present, because most anyone can compete in the field. In short, there may be corporate internet periodicals, but there are also poor and middle class individuals operating internet periodicals. There are very few, if any, poor or middle class individuals owning and operating newspapers and broadcast outlets. The statute does not

provide an exemption for the press only in media formats that only large corporations have the resources with which to avail themselves. It provides the exemption, period. That many corporations and unions – and individuals – might take advantage of the low cost of internet publication does not suddenly mean that the exemption excludes the internet.

This effort to determine which purveyors of information are the legitimate "press" is ultimately misguided. *Id.* at 4-5 (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 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."). By "freedom of speech" and "freedom ... of the press" the Constitution surely did not intend to create a favored group of individuals who possess more rights than their 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.

Thus, even if the various factors cited in the other Statements of Reasons which we have signed in this MUR were not present, we would dismiss the case on the grounds that no expenditure was made, pursuant to 2 U.S.C. §431(9)(B).

Bradley A. Smith /vw
Bradley A. Smith
Commissioner

7-22-05
Date

Michael E. Toner
Michael E. Toner
Vice Chairman

7/22/05
Date