FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Joel Gilbert, Highway 61 Entertainment, LLC	)	MUR 6779
and DFMRM, LLC	)	

CONCURRING STATEMENT OF COMMISSIONER LEE E. GOODMAN

My vote to extend the protection of the press exemption and Advisory Opinion 2010-08 to a filmmaker in this matter is explained in the controlling Statement of Reasons I signed with Chairman Peterson and Commissioner Hunter. I write separately to make a broader observation about the recurring debate within the Commission over the boundaries of the government's regulatory jurisdiction over *bona fide* press entities.[1]

This matter is yet another press exemption case resolved by a non-unanimous vote.[2] Recurring non-unanimous votes have an insidious impact upon the exercise of First Amendment rights. They signal an active regulatory effort within the agency, caution press organizations to look over their shoulders, and chill the free exercise of press activity. The non-unanimous vote in this matter once again evidences an enduring effort within the agency to regulate *bona fide* publishers.

Consider the breadth of legal protections this filmmaker could rely upon. The First Amendment protects the right of the press to comment and editorialize about politics and public figures. The Supreme Court long ago held that filmmakers and films are *bona fide* press entities that enjoy the full protection of the First Amendment.[3] To buttress the Free Press Clause of the

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[1] In this matter, we agreed with the analysis of the Office of General Counsel that these respondents were *bona fide* press entities. *See* Matter Under Review 6779 (Gilbert, *et al.*), First General Counsel's Report at 9-10; Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Lee E. Goodman and Caroline C. Hunter at 7-8 (April 14, 2016). The disagreement among the Commissioners is apparently limited to whether these *bona fide* press entities could be investigated and punished by virtue of their chosen marketing and exhibition strategies.

[2] *See, e.g.*, Matter Under Review 6703 (WCVB-TV & Hearst Stations, Inc.) (3-3 vote to apply the press exemption); Matter Under Review 6158 (ABC, Inc. & Harpo Productions, Inc.) (5-1 vote); Matter Under Review 6320 (Sean Hannity, *et al.*) (3-2-1 vote); Advisory Opinion 2010-08 (Citizens United) (4-1-1 vote); Advisory Opinion Request 2010-25 (RG Entertainment, Ltd.) (3-3 vote).

[3] *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").

First Amendment, Congress enacted a clear statutory protection for the press in 1974. Congress explained its intent in unqualified terms:

> [I]t is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press . . . . Thus the exclusion [press exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.[4]

The Commission has applied the press exemption to filmmakers that distribute their films through a wide variety of channels, including a filmmaker that exhibited its films free to the public on television, in theatres, and on DVDs distributed free of charge in newspaper inserts.[5] In this case, the Office of General Counsel recommended that the Commission observe the press exemption to avoid any conflict with press rights.[6]

Over all those legal protections, three Commissioners nonetheless voted as a bloc to find reason to believe this filmmaker violated the law and to investigate and likely punish him, indicating the regulatory avarice within the agency to regulate press entities. To date, the only public explanation for the vote to regulate has been a Statement of Reason by Commissioner Weintraub, which concludes: "Press entities do not act as press entities when they distribute millions of free DVDs immediately before an election solely in electoral swing states."[7] There is no ambiguity in the point of this curt statement: all otherwise *bona fide* press entities are subject to investigation by the federal government through either the Commission (or the Department of Justice) based on nothing more than the means they pursue to market and exhibit their otherwise fully protected content.

This conclusion is so cursory yet sweeping that it deserves testing. As a threshold matter, press entities routinely publish editorial commentary concerning candidates immediately before an election and have done so for over two centuries. There is nothing unusual about a press entity's publication of election-related commentary in the months, weeks, and even days before an election when the public's interest is piqued. Newspaper editorials are commonplace in the weeks and days leading up to an election. It also is common for press entities to distribute their fully-protected electoral commentary and advocacy free of charge. For example, *The New York Times* charges a fee to read its news and editorials online, but it recently published editorials advocating the election of Hillary Clinton and John Kasich two days before the Iowa caucuses and one week before the New Hampshire primary—and it disseminated the editorials free of

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4 H.R. Rep. No. 93-1239, 93d Congress, 2d Sess. at 4 (1974).

5 Advisory Opinion 2010-08 (Citizens United); Advisory Opinion 2003-34 (Showtime).

6 Matter Under Review 6779 (Joel Gilbert, *et al.*), First General Counsel's Report at 16.

7 Matter Under Review 6779 (Joel Gilbert, et al.), Statement of Reason of Commissioner Ellen L. Weintraub at 1 (April 13, 2016).

charge on its website.[8] *The New York Times* enjoys the protection of *Phillips Publishing, Inc. v. Federal Election Commission*—cited by Commissioner Weintraub—which held the Commission has no regulatory authority over a publisher that mass mailed commentary about a federal candidate free of charge.[9]

Likewise, while some news entities are national in scope, most press entities are local or regional and conscientiously focus their news and editorial commentary on local, state or regional politics. Some new media press outlets target content to readers or viewers specifically based upon their locations or idiosyncratic interests.

In short, the premise of the legal violation articulated by Commissioner Weintraub is that free dissemination of otherwise protected press speech by a *bona fide* press entity immediately before an election in a particular geographical location is unlawful. That is a deeply problematic theory of government regulatory power over free press rights. If there is some greater nuance to the asserted prohibition against press publication, the threshold is not apparent from the face of the Act, Commission regulations, past decisions of the Commission, or my colleague's statement.

But further, the statement must be compared to Commission precedent. In Advisory Opinion 2010-08, the filmmaker indeed distributed free DVDs in select states. There are no obvious material distinctions between the film production and distribution conduct of Highway 61 Entertainment, the respondent in this matter, and the film production and distribution activities of Citizens United in Advisory Opinion 2010-08. And Commissioner Weintraub's Statement articulates no distinction between this matter and Advisory Opinion 2010-08. That would lead one to the inference that the three Commissioners who voted to regulate Highway 61 Entertainment in this case do not adhere to the Commission's precedent in Advisory Opinion 2010-08. There was one dissenting vote in Advisory Opinion 2010-08, which was explained as follows:

> In light of the Citizen United decision, it would be my hope that the Commission will revisit the breadth of the Act's press exemption, and its policy underpinnings, as part of our rulemaking proceeding.[10]

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[8] Editorial, *Hillary Clinton for the Democratic Nomination*, N.Y. Times, Jan. 30, 2016 (available free of charge at http://www.nytimes.com/2016/01/31/opinion/sunday/hillary-clinton-endorsement.html); Editorial, *A Chance to Reset the Republican Race*, N.Y. Times, Jan. 30, 2016 (available free of charge at http://www.nytimes.com/2016/01/31/opinion/sunday/a-chance-to-reset-the-republican-race.html). *The New York Times* charges a fee to read its news and editorials once the reader has read ten articles, but these editorials are made available free of charge at all times.

[9] Commissioner Weintraub's statement cites two court decisions. In both cases, press entities mass mailed news and commentary about a federal candidate to readers free of charge. In both cases, federal courts rejected Commission authority to regulate press activity. *Federal Election Commission v. Phillips Publishing, Inc.*, 517 F. Supp. 1308 (D.D.C. 1981); *Reader's Digest Ass'n v. Federal Election Commission*, 509 F. Supp. 1210 (S.D.N.Y. 1981).

[10] Statement of Commissioner Steven Walther in Advisory Opinion 2010-08 (Citizens United) (June 10, 2010). The argument that the Commission should regulate more press activity after *Citizens United*, because the

That dissenting opinion in Advisory Opinion 2010-08 shines a light on the drive within the Commission to "revisit the breadth of the Act's press exemption" and apparently explains why a bloc of three Commissioners voted to investigate (and eventually punish) the filmmaker here. Notwithstanding the boundaries demarcated by the Free Press Clause of the First Amendment, Congress' explicit press exemption and clear intent, and the binding decision of the Commission in AO 2010-08 to shield this precise activity from enforcement, three Commissioners desire to expand this agency's regulatory power over *bona fide* press organizations.

Some commentators have criticized the Supreme Court for ruling too broadly in *Citizens United*.[11] They argue that the Court should not have struck the corporate ban, but rather should have decided the case on the narrower ground that Citizens United's film was exempt from regulation under the statutory press exemption.[12] As we know, the Court's colloquy with the government at oral argument informed the Court's decision to rule as it did. In response to questions about books, the government represented that the Commission (and by extension the Department of Justice) had authority to ban political books, but that it was unlikely the government would exercise this power.[13] The Court had a choice, to trust the government's restraint with respect to book publishers, or to remove government power to ban any publisher. The Court chose the broader course.

The Commission's subsequent recognition of Citizen United's press freedom in Advisory Opinion 2010-08 no doubt was a proper exercise of government restraint. However, the Commission's non-unanimous vote in this matter, and the apparent desire of some Commissioners to break from Advisory Opinion 2010-08, indicates that publishers and filmmakers cannot trust the government's continuing restraint, and, moreover, that the Court was wise and correct to rule as broadly as it did rather than trust the government with authority to pick and choose exempt publications under highly discretionary standards that are at best unclear and at worst inconsistent. For example, although Commissioner Weintraub's Statement asserts

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regulatory stakes are disclosure rather than censorship, is not valid. The threat of censorship of the press continues after *Citizens United*, because corporate publications coordinated with candidates and parties—*e.g.*, news interviews—would remain prohibited. Moreover, requiring press organizations to register and report all of their finances to the Commission as a condition of publishing political commentary is an onerous burden and intrusion of press rights. *Citizens United v. Federal Election Commission*, 558 U.S. 310, 337-38 (2010) (*quoting McConnell v. Federal Election Commission*, 540 U.S. 93, 331-32 (2003)) (observing burdens of registration and reporting). The attendant threats of investigations are equally as intrusive. *Readers Digest Ass'n v. Federal Election Commission*, 509 F.Supp. 1210, 1214 (S.D.N.Y. 1981) (the mere investigation of a press organization violates free press rights). More fundamentally, however, *Citizens United* did not alter the definition of the press or its unqualified freedom from regulation enacted by Congress in 1974.

11. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

12. *See, e.g.*, M.W. McConnell, Reconsidering *Citizens United* as a Press Clause Case, 125 Yale L.J. 412 (2013).

13. Transcript of Oral Argument at 66-68, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

free DVD distribution in limited geographical areas is the critical transgression here, three Commissioners opined in another matter that a filmmaker did not qualify for protection of the press exemption even though the film was distributed by a national film distribution company to play in over 500 theatres nationwide.[14] Imagine the specter of a government investigation and punishment of a filmmaker for showing a political film in over 500 theatres nationally.

The regulatory result of this attempt to narrow the press exemption would be illusory press freedom reminiscent of the Greek myth of Tantalus. The Gods punished Tantalus by forcing him to stand in a pool of water with a fruit tree above his head. Whenever he reached for fruit, the branches would rise beyond his reach. Whenever he bent down to drink, the water receded. Meanwhile, a large stone hung over his head threatening to fall upon him.

In sum, the efforts by a bloc of Commissioners to regulate the press in this case calls for a reminder that Congress expressly forbade the Commission from violating the Constitutional rights of the press, a mandate that Congress determined should be inserted into the Act itself to buttress the independent superior authority of the Free Press Clause of the Constitution. Perhaps Congress foresaw the danger of a Commission that would not heed the limits of its power. Chairman Petersen, Commissioner Hunter, and I respect this mandate. Yet the chill cast by non-unanimous votes, unclear and inconsistent standards, and unabated regulatory ambitions countermands the clear jurisdictional limit set by Congress and threatens the free press rights of all press entities everywhere, not just the small, independent filmmaker innovating a way to market and exhibit one film.

Lee E. Goodman
Commissioner

April 18, 2016
Date

[14] *Compare* Matter Under Review 6779 (Joel Gilbert, *et al.*), Statement of Reason of Commissioner Ellen L. Weintraub *with* Advisory Opinion Request 2010-25 (RG Entertainment Ltd.).