



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MURs 7821, 7827 & 7868
Twitter, Inc., *et al.*)
)

**STATEMENT OF REASONS OF
COMMISSIONER SEAN J. COOKSEY**

For modern campaigns, the internet isn't optional. Fundraising, advertising, and messaging all depend on a candidate's ability to directly reach donors, voters, and supporters online. Campaign websites, email lists, digital ads, and social media profiles have become critical tools for electoral success. What's more, today most Americans consume their news, including political news, through the internet and social media. As federal campaigns and technology have evolved, the Federal Election Commission has worked—often imperfectly—to apply its pre-internet rules to the post-internet world. This matter presents that kind of problem.

I joined the Commission's unanimous vote to find no reason to believe that Twitter violated campaign-finance law when it blocked users from sharing a politically damaging *New York Post* story about then-candidate Joe Biden's son or affixed editorial comments to then-candidate Donald Trump's tweets.¹ But I disagree with my colleagues about why. The Commission's approved Factual and Legal Analysis concludes that Twitter was simply enforcing preexisting, commercially reasonable policies to protect its product quality and business interests.² According to the Commission, none of the behavior at issue was for the purpose of influencing the 2020 presidential election. I'm not so sure. In my view, the record doesn't establish whether Twitter was consistently enforcing a politically neutral business policy or using its platform to support one candidate over another. But I also think the answer to that question is ultimately irrelevant.

I voted to find no reason to believe because I conclude Twitter is a publisher with a First Amendment right to control the content on its platform and to favor or disfavor certain speech and speakers. Its conduct therefore falls under the FEC's media exemption, doesn't qualify as an expenditure or contribution, and doesn't violate campaign-finance law.

¹ Certification (Aug. 8, 2021), MURs 7821, 7827 & 7868 (Twitter, Inc., *et al.*).

² *See* Factual & Legal Analysis at 13–19 (Aug. 16, 2021), MURs 7821, 7827 & 7868 (Twitter, Inc., *et al.*).

The Federal Election Campaign Act of 1971, as amended (“FECA” or “the Act”), and Commission regulations exempt from the Act’s definitions of “contribution” and “expenditure” the “cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, ... unless the facility is owned or controlled by any political party, political committee, or candidate.”³ This exclusion is known as the “media exemption” or the “press exemption,” and its protections extend well beyond traditional news organizations.⁴ It includes non-media companies engaged in media activities,⁵ as well as “media entities that cover or carry news stories, commentary, and editorials on the Internet.”⁶ Indeed, the Commission has recognized “the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach.”⁷

In determining the media exemption’s scope, the Commission uses a two-part test: (1) whether the entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the conduct at issue is press or media activity (that is, whether the entity is acting in a “legitimate press function”).⁸ Two considerations are whether the entity’s materials are available to the general public and are comparable in form to those the entity ordinarily issues.⁹

The Commission has consistently maintained that blogs, news-sharing sites, message boards, and similar websites are engaged in legitimate press activities and fall under the media exemption. For example, in Advisory Opinion 2005-16 (Fired Up!), the Commission considered whether plainly partisan news websites that hosted both original news commentary and user-generated content qualified for the media exemption. The Commission reasoned that the “provision of news stories, commentary, and editorials on its websites falls within Fired Up’s legitimate press function.”¹⁰ Likewise, in Advisory Opinion 2016-01 (Ethiq), the Commission held that a platform providing algorithmically curated news through its website and mobile app also

³ 11 C.F.R. §§ 100.73, 100.132; *see also* 52 U.S.C. § 30101(9)(B)(i).

⁴ The media exemption is a statutory recognition of the First Amendment’s Free Press Clause and the critical role the press plays in our democratic system of government. *See* U.S. Const. amend. I (“Congress shall make no law ... abridging the freedom of the press.”). Congress’s purpose in providing the media exemption in FECA was to prohibit the Commission from “limit[ing] or burden[ing] in any way” the exercise of press activities or editorial decisions. H.R. Rep. No. 93-1239, at 4 (1974).

⁵ *See* Statement of Reasons of Vice Chair Bradley A. Smith and Commissioners Michael E. Toner and David M. Mason (Sept. 25, 2003), MUR 5315 (Wal-Mart Stores, Inc.); First General Counsel’s Report at 6–9 (Nov. 2, 1993), MUR 3607 (Northwest Airlines, Inc.).

⁶ Explanation and Justification for Final Rules on Internet Communications, 71 Fed. Reg. 18,589, 18,608 (April 12, 2006).

⁷ *Id.* at 18,589.

⁸ *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312–13 (D.D.C. 1981); Advisory Op. 2004-07 (MTV); Advisory Op. 2005-16 (Fired Up!).

⁹ *See FEC v. Mass. Citizens for Life*, 479 U.S. 238, 251 (1986); Advisory Op. 2000-13 (iNEXTV) at 3.

¹⁰ Advisory Op. 2005-16 (Fired Up!) at 6; *see also* Advisory Op. 2008-14 (Melothe, Inc.) at 5.

fell under the media exemption.¹¹ Finally, in MUR 5928 (Kos Media, LLC), the Commission dismissed a complaint against the news blogging website Daily Kos under the press exemption. The accompanying Factual and Legal Analysis observed that “by creating and distributing the DailyKos, containing news stories with links to ‘breaking news,’ original political commentary, and calls to actions akin to editorials, Kos Media is acting within its legitimate press function that qualifies it as a press entity.”¹²

Under Commission precedent, Twitter and similar social media companies are media entities, and their content and editorial decisions are therefore not expenditures or contributions under the Act. First, Twitter is not owned or controlled by any political party, political committee, or candidate. Second, the company is best understood to be operating as a publisher engaged in legitimate media activities: Twitter is functionally a free microblogging platform like other user-driven news websites. It allows hundreds of millions of users to publish original content and to share writing, photos, videos, and weblinks. The platform also sells advertising space, curates and summarizes news articles, and hosts live-streamed events. In short, Twitter’s principal business is the creation and distribution of media content, subject to its editorial and moderation standards, which is at the heart of constitutionally protected press activity.

Consequently, Twitter is entitled to engage in these traditional media activities—even if done with a political motive or bias—without tripping into a campaign-finance violation.¹³ Because the media exemption is the most straightforward basis for dismissal, I don’t believe the Commission needs to decide whether Twitter was acting solely for commercial reasons or to pass judgment on other possible grounds for dismissal.

There is an important public debate over whether today’s largest social media companies are politically biased. Indeed, that is only one of the myriad policy issues Big Tech creates. Those problems should be addressed by our democratically elected representatives and expert executive agencies, but the Federal Election Commission isn’t one of them. Because Twitter is a publisher protected by the Act’s media exemption, I voted to find no reason to believe it violated the law.



 Sean J. Cooksey
 Commissioner

September 13, 2021

 Date

¹¹ Advisory Op. 2016-01 (Ethiq) at 2–5.

¹² Factual & Legal Analysis at 5 (Sept. 4, 2007), MUR 5928 (Kos Media LLC).

¹³ See First General Counsel’s Report, MUR 5440 (CBS Broadcasting, Inc.) (“Even seemingly biased stories or commentary by a press entity can fall within the media exemption.”); see also *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”).