

BEFORE THE FEDERAL ELECTION COMMISSION

In re Washington Post (WP Co LLC)

MUR **8342**

COMPLAINT

INTRODUCTION

1. Press entities are only entitled to the press exemption when they engage in legitimate press activities, namely covering and commenting on the news in materials available to the general public. Adv. Op. 2011-11, at 7. Otherwise, their activities engaging in politics are subject to the normal rules of campaign finance, including the ban on corporate contributions and the limits on individual contributions.
2. The Washington Post's decision to undertake a social media advertising campaign boosting stories critical of just one candidate (President Trump) fails these tests—the advertisements are not reporting or opining on the news. Therefore, the Post's advertising campaign does not fit within the press exemption and should be analyzed as either an illegal corporate contribution or an unreported individual contribution (based on the ownership entity's tax structure).

FACTUAL ALLEGATIONS

3. According to a news report yesterday by Semafor:

The Washington Post is paying to remind readers that it is still pretty tough on Donald Trump.

Like many news organizations, the Post pays a small amount each month to show articles in feeds on Facebook and other social media platforms. But on Monday, the paper aggressively ramped up its paid advertising campaign, boosting dozens of articles related to the election.

While the articles about Vice President Kamala Harris were relatively neutral in tone and focused on her innovative digital strategy, her policy proposals, and her chances of winning next week, the articles that the Post paid to highlight about Trump told a different story.

The paper boosted multiple critical articles, including about Trump's campaign rhetoric, his misstatements, his allies'

attempts to “energize him as he struggles to adapt to Harris,” how his campaign damaged Springfield, Ohio, his fixation on the fictional serial killer Hannibal Lecter, how crowds leave his rallies early, and his questioning of the results of the 2020 election, among other stories. . . .

Prior to Monday, the paper had run just around a dozen ads all month on Facebook, which largely featured simple Post branding without any mention of Trump. Monday’s paid Facebook push was a clear acknowledgment that the paper hopes to win back some of the anti-Trump subscribers that may have canceled.

Max Tani and Josh Billinson, *Washington Post pays to boost stories critical of Trump as subscribers flee*, Semafor (Oct. 30, 2024).¹

4. The Washington Post is published by WP Co LLC, which in turn is owned by Nash Holdings LLC. Nash Holdings LLC is owned by Jeff Bezos.
5. It is unclear from the public record whether WP Co LLC or Nash Holdings LLC file as a corporation or a partnership with the Internal Revenue Service. If filing as a corporation, then they are treated as a corporation under FEC rules. The campaign finance statutes enforced by the FEC prohibit corporation contributions in presidential campaigns. 52 USC 30118(a). Alternatively, if the LLC is a partnership or a single-member LLC, it is subject to contribution limits and reporting requirements for those types of entities. As a result, the activities complained of herein constitute either an illegal corporate contribution *or* an unreported and excessive partnership or individual contribution.²

LEGAL ANALYSIS

6. The “press exemption” to the definition of “expenditure” covers “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication. . .” 52 U.S.C. § 30101(9)(B)(i).
7. “The provision excepts news items and commentary only; it does not afford *carte blanche* to media companies generally to ignore FECA’s provisions.”

¹ <https://www.semafor.com/article/10/30/2024/washington-post-pays-to-boost-stories-critical-of-trump-as-subscribers-flee>

² See generally <https://www.fec.gov/help-candidates-and-committees/partnership-llc-contributions/>.

McConnell v. FEC, 540 U.S. 93, 208 (2003). See Adv. Op. 2000-13, at 4 (“categories of news story and commentary set out in the Act.”).

8. Implementing regulations state, “Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), website, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, is not a contribution . . .” 11 C.F.R. § 100.73.
9. Additional implementing regulations state, “Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), website, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, is not an expenditure. . .” 11 C.F.R. § 100.132.
10. As a matter of statutory and regulatory text, advertisements do not fit within the press exemptions. Paid advertisements by a newspaper in social media are not news stories distributed through the facilities of that newspaper. Nor are the advertisements a “cost incurred in covering or carrying a news story.” The Washington Post ran the stories originally in its newspaper’s print edition and online, and any costs in running the stories is clearly within the exemption. But an advertisement is a step beyond covering the news itself. The costs of running an advertisement promoting the newspaper are different in kind from the costs of creating and carrying the news story itself.
11. The Commission has historically summarized these concepts—covering and commenting on the news—as a press entity “acting in its legitimate press function.” Adv. Op. 2011-11, at 7. See Adv. Op. 2004-07, at 4 (discussing General Counsel’s report in MUR 3657, finding activity was outside press entity’s “cablecasting function”); Adv. Op. 2000-13, at 3 (activity is “akin to a periodical or news program distributed to the general public.”).
12. The U.S. Court of Appeals for the Tenth Circuit confronted a similar question interpreting the State of Colorado’s press exemption, which covers “news articles, editorial endorsements, opinion or commentary writings, or letters to the editor.” The Court explained that this language “does not on its face include an advertisement placed by a media entity on a television or radio broadcast to increase the number of its readers or viewers. Thus, if the advertisement mentions a candidate or expressly advocates the election or defeat of a candidate, it may have to be treated as an electioneering communication or independent expenditure. We do not understand anything the Secretary [(Colorado’s campaign finance regulator)] has told the court as indicating that such an ad would be exempt from the disclosure requirements.” *Citizens United v. Gessler*, 773 F.3d 200, 207 (10th Cir. 2014). The Court concludes in a

footnote, “Certainly, solicitations [to support a press outlet] are neither articles nor opinion pieces.” *Id.* at 214, n.7.

13. When the statutory text is clear, the inquiry should end. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017) (“[C]ourts must give effect to the clear meaning of statutes as written. We thus begin and end our inquiry with the text, giving each word its ordinary, contemporary, common meaning.” Cleaned up). Here, it is clear that advertising is not a “cost” to “covering or carrying” a news story, opinion column, or editorial.
14. If the Commission analyzes the question beyond the statutory and regulatory texts, three principles point toward holding that a media company’s advertisements mentioning candidates falls outside the confines of the press exemption, especially close in time to an election.
15. First, the Supreme Court and the Commission have recognized that “the media exemption is ‘narrow,’” Adv. Op. 2004-07, at 5 (quoting *McConnell*, 540 U.S. at 208), and therefore “should be narrowly construed.” Adv. Op. 2005-19 (concurring op. of Chairman Scott E. Thomas & Comm’r Danny Lee McDonald) (discussing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986)).
16. This interpretive principle is, in part, intended to ensure that companies do not use the press exemption to evade the other statutory requirements. In a Statement, Commissioner Scott E. Thomas explained the reason for the line between normal press functions and advertising: “If advertising brochures distributed by corporations are considered exempt from the general §441b prohibition simply because a corporation asserts the press exemption, then the ban on corporate contributions will mean very little.” *Wal-Mart Stores*, MUR 5315 (Statement of Comm’r Thomas).³

³ The Commission recently considered an advisory opinion request wherein an advertisement was “indistinguishable to the viewer from a standard campaign advertisement” except that in the final two seconds, there was a fundraising appeal and QR code. Advisory Opinion 2024-07 Draft B, available at https://www.fec.gov/files/legal/aos/2024-07/202407_1.pdf. Three Commissioners voted to adopt Draft B, but it did not receive the four votes needed for issuance.

Imagine a corollary example: a newspaper runs a television ad that for 28 seconds is indistinguishable from a standard independent expenditure advertisement savaging one candidate, quoting from a recent editorial against that candidate, and then in the last two seconds says, “For more news and views like this, subscribe now” with a QR code linking to the newspaper’s website. The press exemption is obviously worded differently from the rules on joint fundraising committees, but the illustration is a powerful reminder of the possible use of this tool if taken to its logical conclusion.

17. To bring advertising within the “press function” is a gloss that goes beyond the text of the law and rules, as explained above, and in particular as interpreted by the Supreme Court in *McConnell* (“news items and commentary only”). Because this gloss is expansive, it contradicts the Court’s command in *McConnell* to read the press exemption narrowly.
18. Second, advertising falls outside the legislative intent for the press exemption. *See* Adv. Op. 2023-10 (“The exemption was enacted to [assure] the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.” Quoting H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974)). Advertising is fundamentally different in kind from covering and commenting on political campaigns.
19. Third, such a distinction is based on a fundamental legal difference: advertising is commercial speech, which enjoys less constitutional protection than news and editorial content. “[S]peech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression.” *Cincinnati v. Discovery Network*, 507 U.S. 410, 422 (1993). Indeed, in that case the Supreme Court found “a ‘commonsense’ basis for distinguishing between” advertising in a newspaper and “editorial content.” *Id.* at 423. Advertising for various products and services is commercial speech entitled to lesser protection under existing precedent, while “editorial content” receives greater protection. The press exemption is designed to incorporate First Amendment principles; it must incorporate this key distinction within First Amendment law as well.
20. Distinguishing advertising also makes sense when compared to other FEC rules. Corporations, trade associations, and labor organizations may make election-related communications to their members under different rules than

A more limited version of this is already happening with some media outlets that target swing states, report only stories that praise one side and attack the other side, and then promote those stories via microtargeting to specific voters via social media. Stuart David Anderson, “Pink Slime Journalism” and a history of media manipulation in America, *Columbia Journalism Review* (Feb. 23, 2024) (“One of the most visible networks is Courier Newsroom, a self-described ‘pro-democracy...civic news organization’ that is led by former Democrat strategist Tara McGowan and was funded via a progressive ‘dark money network.’ Courier operates news outlets in ten key swing states (with Texas ‘coming soon’), producing content that is microtargeted at voters (via extensive social media amplification) with the intention to inform, but also to persuade.”).

to the general public.⁴ In the same way, it makes sense to say that press entities may communicate directly with their subscribers (or those that choose to visit their website or tune in to their broadcast program), which is different from when the press entity proactively reaches out to impose its news and views on others. *See* Marc Elias, Request for an Advisory Opinion on behalf of Melothe, AOR 2008-14 (Aug. 11, 2008) (“Unlike mass mailings or special newsletters, the contents of the proposed sites will not be thrust upon unwilling or targeted viewers; people will choose consciously to view them.”).

21. Complainant is aware that the FEC has followed one lower court decision finding advertising by a media entity as falling within the press exemption. *Federal Election Com. v. Phillips Pub., Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981). *See* Adv. Op. 2010-08, at 7; Adv. Op. 2010-25 (applying *Phillips*). *Phillips* is over four decades old and should be disregarded by the Commission in light of more recent precedent interpreting the press exemption, especially *McConnell*, *Cincinnati*, and *Gessler*.
22. As an additional point, it is likely that the Post is using algorithms to target an audience that is narrower than the general public, such as social media users who prefer Democratic or liberal candidates or causes on social media. If that is true, doing so would reach less than the general public. *See* Adv. Op. 2000-13 (“viewable by the general public and akin to a periodical or news program distributed to the general public.”). It would have the practical effect of driving electoral interest among just one subset of the public that is favorable to just one party.
23. This Commission may be ready to rethink its interpretation of the media exemption entirely in light of modern scholarship on the meaning of the First Amendment’s press clause and developments in Supreme Court doctrine. “There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.” *Citizens United v. FEC*, 558 U.S. 310, 352 (2010).
24. That is precisely what the press exemption invites: *carte blanche* for long-time institutional media players like the Washington Post to spend money in ways that are different from other speakers. Imagine if the Washington Post published an editorial slamming Trump and endorsing Harris for president. If the Harris campaign posted the headline and link to its social media, and then

⁴ <https://www.fec.gov/help-candidates-and-committees/making-disbursements-ssf-or-connected-organization/corporation-labor-organization-communications-restricted-class/>

paid to promote that post, it would obviously count as an expenditure. But if the Post posted the headline and link to its social media, and then paid to promote that post, it would be protected under the press exemption under *Phillips Publishing*. That anomalous result cannot stand *Citizens United*.

CONCLUSION

25. When a news outlet engages in advertising, it does not act as the press serving its subscribers and the general public with information and opinion; instead, it operates as a self-interested business. As such, it falls outside the plain text of the press exemptions.

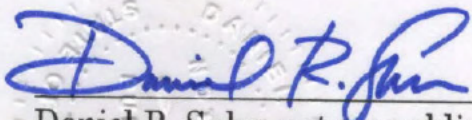
COMPLAINANT:

No statement of fact is based on my personal knowledge. All statements of fact are based upon publicly available news sources.



Patrick J. Hughes, chairman
Center for American Rights
747 N. LaSalle St., Suite 210
Chicago, Illinois, 60654

This document was signed and sworn before me:



Daniel R. Suhr, notary public (Wisconsin)
My commission is permanent (attorney)

Date: Oct. 31, 2024

Sent via email (EnfComplaint@fec.gov)