



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ADVISORY OPINION 2014-06 (RYAN FOR CONGRESS)

CONCURRING STATEMENT OF CHAIRMAN LEE E. GOODMAN AND COMMISSIONERS MATTHEW S. PETERSEN AND CAROLINE C. HUNTER

The Commission issued an advisory opinion today to Representative Paul Ryan, his principal campaign committee, Ryan for Congress, Inc., and his leadership PAC, Prosperity Action ("Requestors"). The opinion endorses Representative Ryan's legal right to author, market, and earn royalties on his book, consistent with the provisions of the Federal Election Campaign Act ("Act") and prior advisory opinions. However, the opinion fails to answer by the necessary four votes two critically important questions posed by the Requestors: (1) whether the book and its publisher are exempt from Commission regulation under the "media exemption" of the Act; and (2) whether the leadership PAC may advertise Representative Ryan's book on its website. We write separately to state our position on these two questions.

1. The Book Publisher is Exempt from Regulation Under the Media Exemption

First, the Requestors asked the Commission to confirm that the book's publisher, Grand Central Publishing, is exempt from regulation under the "media exemption." Representative Ryan has authored a book about American politics and public policy entitled *The Way Forward*. The book is published by a well-established publisher, Grand Central Publishing, with a long track record of publications on public affairs topics. The question is whether Grand Central Publishing and its book are exempt from regulation by the Commission on the same basis as newspaper publishers, magazine publishers, television stations, and online publishers. The answer is clearly yes.

The publication of books is a centuries-old medium for disseminating political and social commentary. The Supreme Court long has recognized that book publishers and books fall squarely within the Free Press Clause of the First Amendment: "The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication."¹

Recognizing the First Amendment's Free Press Clause and the profoundly important role the press plays in the political affairs of our country,² Congress exempted from Commission

¹ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963) (citing *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)).

² U.S. Const., Amend. I ("Congress shall make no law . . . abridging the freedom . . . of the press."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (emphasizing "the special and constitutionally recognized role of [the press] in informing and educating the public, offering criticism, and providing a forum for discussion

regulation “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.”³ This protection from regulation is known as the “media exemption.”⁴

The legislative history of the media exemption indicates that Congress did not intend to “limit or burden in any way the First Amendment freedoms of the press and of association. [The exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.”⁵ Consistent with the Act’s legislative history, the Commission and courts have recognized media covered by the exemption to include magazines,⁶ newsletters,⁷ cartoons,⁸ cable television,⁹ the Internet,¹⁰ webcasts,¹¹ satellite broadcasts,¹² documentary films,¹³ radio talk shows,¹⁴ and even rallies staged and broadcast by a radio talk

and debate”); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (explaining that “the press serves . . . as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve,” and how the “[s]uppression of [that] right . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free”).

³ 2 U.S.C. § 431(9)(B)(i); *see also* 11 C.F.R. §§ 100.73, 100.132.

⁴ *See, e.g.*, Advisory Opinion 2010-08 (Citizens United) at 3.

⁵ H.R. Rep. No. 93-1239, at 4 (1974).

⁶ MUR 3607 (Northwest Airlines, Inc. and *World Traveler Magazine*); MUR 3660 (*Flower & Garden Magazine*); *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

⁷ *FEC v. Phillips Publ’g, Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981) (concerning the newsletter “*Pink Sheet on the Left*”).

⁸ MUR 3500 (Brown for President, *et al.*).

⁹ *Explanation and Justification for Final Rules on Candidate Debates and News Stories*, 61 Fed. Reg. 18049 (Apr. 24, 1996); Advisory Opinion 1998-17 (Daniels Cablevision); Advisory Opinion 2003-34 (Showtime); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (cable stations “engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment”); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (“Cable television provides to its subscribers news, information, and entertainment. It is engaged in ‘speech’ under the First Amendment, and is, in much of its operation, part of the ‘press.’”).

¹⁰ *Explanation and Justification for Final Rules on Internet Communications*, 71 Fed. Reg. 18589 (Apr. 12, 2006); Advisory Opinion 2005-16 (FiredUp!); Advisory Opinion 2008-14 (Melothe, Inc.).

¹¹ Advisory Opinion 1996-16 (Bloomberg).

¹² Advisory Opinion 2007-20 (XM Radio).

¹³ Advisory Opinion 2010-08 (Citizens United); *see also 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.”).

¹⁴ MUR 3624 (Bush-Quayle ’92 General Committee, *et al.*).

show.¹⁵ “The Commission has not limited the press exemption to traditional news outlets, but rather has applied it to ‘news stories, commentaries, and editorials, *no matter in what medium they are published*”¹⁶

The Commission historically has conducted a two-step analysis to determine whether the media exemption applies.¹⁷ First, the Commission asks whether the entity engaging in the activity is a press or media entity.¹⁸ If so, the media exemption applies as long as the entity (a) is not owned or controlled by a political party, political committee, or candidate, and (b) is acting as a press entity in conducting the activity at issue.¹⁹

“Neither the Act nor Commission regulations use or define the term ‘press entity.’ Therefore, when determining whether the term applies to a particular entity, the Commission has focused on whether the entity in question produces on a regular basis a program that disseminates news stories, commentary, and/or editorials.”²⁰ Here, Grand Central Publishing “has been in the business of disseminating information and commentary to the public in book form (including e-books and audio books) for decades, and routinely markets its book through print, radio, television, magazines, and on-line advertising.”²¹ Furthermore, “[t]he Publisher averages approximately six (6) such politically themed books and book promotions each year.”²² In light of these facts, the Publisher is a press entity for purposes of this advisory opinion.

¹⁵ See MUR 5569 (The John and Ken Show, *et al.*), First General Counsel’s Report at 9 (in a matter where a radio talk show expressly advocated the election and defeat of Federal candidates, and also staged and broadcast public rallies outside the offices of Federal candidates, the Commission concluded that the media exemption applied to the rallies because they were “similar in form to other broadcast events featured on the Show” which were “within the media exemption”).

¹⁶ Advisory Opinion 2008-14 (Melothe, Inc.) at 3 (quoting *Explanation and Justification for the Regulations on Internet Communications*, 71 Fed. Reg. 18589, 18608-09 (Apr. 12, 2006)); see also Advisory Opinion 2010-08 (Citizens United) (same). Although one early Commission advisory opinion narrowly concluded that the exemption covered only the media explicitly enumerated in the Act, see Advisory Opinion 1987-08 (AIG/U.S. News), the Commission abandoned that narrow and logically indefensible interpretation of the exemption. Commission actions since that time, as well as court opinions, have read the press exemption to include a broad array of “other media” formats. Indeed, it would be patently indefensible to exempt a text published in a soft-cover magazine, but to regulate the very same text because it is published in a hard-cover book or on the magazine company’s online news website.

¹⁷ See, e.g., Advisory Opinion 2010-08 (Citizens United) at 4-7; Advisory Opinion 2005-16 (Fired Up!) at 4-6.

¹⁸ See, e.g., Advisory Opinion 2010-08 (Citizens United) at 5-6; Advisory Opinion 2005-16 (Fired Up!) at 5.

¹⁹ Advisory Opinion 2010-08 (Citizens United) at 6-7; Advisory Opinion 2005-16 (Fired Up!) at 6; see also *Reader’s Digest Ass’n*, 509 F. Supp. at 1215.

²⁰ Advisory Opinion 2010-08 (Citizens United) at 5 (citing Advisory Opinions 2008-14 (Melothe, Inc.); 2007-20 (XM Radio); 2005-19 (Inside Track)).

²¹ Advisory Opinion Request at 13.

²² *Id.*

The Publisher is not owned or controlled by a political party, political committee, or candidate.²³

In prior Advisory Opinions, the Commission has looked to two factors in determining whether an entity is engaging in its legitimate press function: “(1) whether the entity’s materials are available to the general public, and (2) whether they are comparable in form to those ordinarily issued by the entity.”²⁴ Here, Grand Central Publishing’s books “can be bought at book stores across the country and from numerous online book sellers, and they can be borrowed usually at no cost from public libraries.”²⁵ Accordingly, the Publisher’s materials are publicly available. Further, the Publisher “regularly produces ‘news stories, commentary, or editorials’ in the form of books,” including an average of six politically themed books and book promotions per year.²⁶ Thus, the publisher’s materials are comparable in form to those it ordinarily produces. Therefore, the publisher is engaging in a legitimate press function by publishing and promoting the book in question.

Based on the facts presented in the request, the publisher’s activities satisfy both prongs of the Commission’s test. The Commission has previously concluded that “where the underlying product is covered by the press exemption, so are advertisements to promote that underlying product.”²⁷ Accordingly, Grand Central Publishing’s costs related to the publication and promotion of *The Way Forward* fall within the Act’s media exemption and are exempt from the Act’s disclosure, disclaimer, and reporting requirements.

The Commission’s opinion here recognized that Grand Central Publishing has a historically limited, highly conditional exemption to market and sell political books. Instead of subjecting press entities to content-based restrictions and inquiries, the Commission should have granted the Requestors the affirmative protection of an advisory opinion based upon the threshold determination that the publisher is a press entity entitled to the media exemption when it publishes, markets, and disseminates its book.

²³ *Id.*

²⁴ Advisory Opinion 2010-08 (Citizens United); *see also* *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986); Advisory Opinions 2005-16 (Fired Up!); 2000-13 (iNEXTV).

²⁵ Advisory Opinion Request at 13.

²⁶ *Id.*

²⁷ Advisory Opinion 2010-08 (Citizens United) at 7 (citing *Phillips Publ’g*, 517 F. Supp. at 1313). The Commission further noted that the “advertisements will only come within the press exemption to the extent that [the media entity] is not ‘acting in a manner unrelated to its [press] function’ when it produces and distributes the advertisements themselves.” Advisory Opinion 2010-08 (Citizens United) at 7 (citing Advisory Opinion 2004-07 (MTV)); *see also*, MUR 3709 (Cinema World, Inc., *et al.*) (promotional sponsorships are exempt); MUR 2567 (Gannett Company, *et al.*) (same); *Readers Digest Ass’n*, 509 F. Supp. 1210.

2. The Act Permits the Leadership PAC to Advertise the Book on Its Website and On Free Social Media Outlets

Second, the Requestors asked whether Representative Ryan's leadership PAC, Prosperity Action, is legally permitted to place material promoting *The Way Forward* on its website and on free social media pages. The Commission could only approve by the required four votes the placement of a limited amount of material promoting the book at *de minimis* cost. There were not four votes to conclude that personal use restrictions do not apply to leadership PACs and allow Prosperity Action to do more.

The Act provides that an unlawful conversion of campaign funds to personal use occurs when such funds are "used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office."²⁸ The personal use prohibition applies only to "use of funds in a campaign account."²⁹ Because a leadership PAC is not a campaign committee, the personal use provision that limits Ryan for Congress's promotion of Representative Ryan's book to *de minimis* cost and a *de minimis* amount of material does not govern Prosperity Action's promotion of the book.

For years the Commission has recognized that the Act's personal use restrictions do not apply to leadership PACs. In Advisory Opinion 2008-17 (KITPAC), for example, the Commission concluded that leadership PACs are not subject to the Act's personal use restrictions, reasoning "[p]ursuant to 11 CFR 100.5(g)(5), a leadership PAC cannot be affiliated with an authorized committee. KITPAC [a leadership PAC] is a 'third party' for purposes of [the Commission's personal use regulation]."³⁰

Moreover, the Commission has repeatedly voted to recommend to Congress that the Act be amended to apply the personal use prohibition to leadership PACs. The Commission's most recent Legislative Recommendations, which were adopted by a unanimous vote of the Commission a mere seven months ago, proposed expanding the personal use provision at Section 439a to cover all political committees. In doing so, the Commission noted that "no corresponding provision covers individuals who convert contributions received by party committees, separate segregated funds, *leadership PACs*, and other political committees to their own personal use," and recommended that Congress revise Section 439a(b) to apply to all political committees.³¹ The Commission unanimously adopted the similar recommendations in 2012, 2011, and 2009.³² Based upon the text of the Act and Commission regulations, and

²⁸ 2 U.S.C. § 439a(b)(2); *see also* 11 C.F.R. § 113.1(g).

²⁹ 11 C.F.R. § 113.1(g).

³⁰ Advisory Opinion 2008-17 (KITPAC) at 4 n.4.

³¹ *Legislative Recommendations of the Federal Election Commission 2013* at 12 (Dec. 17, 2013), *available at* <http://www.fec.gov/law/legrec2013.pdf> (emphasis added); Draft Legislative Recommendations 2013, Certification (Dec. 17, 2013).

³² *Legislative Recommendations of the Federal Election Commission 2012* at 7 (May 10, 2012), *available at* <http://www.fec.gov/law/legrec2012.pdf>; Draft Legislative Recommendations 2012, Certification (May 10, 2010); *Legislative Recommendations of the Federal Election Commission 2011* at 4 (Mar. 16, 2011), *available at*

consistent with longstanding Commission interpretations, it is clear that the Act's personal use restrictions do not apply to leadership PACs. Surprisingly, the Commission now appears to lack four votes for this previously universal position, an abrupt about face.

That leadership PACs are not subject to personal use prohibitions does not mean that Prosperity Action may finance Representative Ryan's personal expenses without limitation. As set forth in Draft A, Commission regulations limit payments by third parties of candidates' personal expenses.³³ As the Commission has explained, "[i]f a third party pays for the candidate's personal expenses, but would not ordinarily have done so if that candidate were not running for office, the third party is effectively making the payment for the purpose of assisting that candidacy."³⁴

Here, Prosperity Action proposes to market Representative Ryan's book. Only expenses associated with marketing a book that a commercial publisher publishes and for which it pays royalties to the author are personal expenses that would exist irrespective of the author's election campaign or duties as a federal officeholder.

The request explains that Prosperity Action wishes to promote Representative Ryan's book "for fundraising purposes and other election-related activities for the purpose of influencing one or more elections for federal office."³⁵ Raising funds and supporting other candidates are standard, ongoing activities for leadership PACs, and because leadership PACs are formed (in part) to heighten their sponsors' profiles, Prosperity Action would presumably further these goals by promoting Representative Ryan's book irrespective of whether he happened to be a candidate for re-election at the time of publication. Accordingly, Prosperity Action may place material promoting the book on its website and social media pages without limiting such material to a *de minimis* amount or cost.

For these reasons, we supported Draft A, which would have respected the unfettered freedom of book publishers to publish and disseminate printed works, free of Commission regulation, and would have observed long-standing Commission interpretation of the Act with respect to the limits imposed upon leadership PACs.

<http://www.fec.gov/law/legrec2011.pdf>; Draft Legislative Recommendations 2011, Certification (Mar. 16, 2011); *Legislative Recommendations of the Federal Election Commission 2009* at 4 (Mar. 19, 2009), available at <http://www.fec.gov/law/legrec2009.pdf>; Draft Legislative Recommendations, Certification (Mar. 19, 2009). The Commission did not issue legislative recommendations in 2010. Consistent with these recommendations, legislation has been introduced in Congress to extend the Act's personal use prohibitions to leadership PACs. See, e.g., Leadership PAC Limitation Act, H.R. 465, 113th Cong., available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:hr465>. Most recently, this legislation has been referred to the House Committee on House Administration. *Id.*

³³ 11 C.F.R. § 113.1(g)(6); see Advisory Opinion 2014-04 (Ryan for Congress), Agenda Document 14-36 (Draft A).

³⁴ *Explanation and Justification for Final Rules on Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 Fed. Reg. 7862, 7871 (Feb. 9, 1995).

³⁵ See Advisory Opinion Request 2014-06 (Ryan for Congress) at 3.