

May 28, 2024

BY EMAIL

Arizona Citizens Clean Elections Commission
1110 W. Washington St., Suite 250
Phoenix, AZ 85007
Email: ccec@azcleelections.gov

Re: Advisory Opinion Request

Dear Commissioners:

Pursuant to Rule R2-20-808 adopted by the Arizona Citizens Clean Elections Commission (“*Commission*”), we seek an advisory opinion on behalf of Star Spangled Media. Star Spangled Media seeks confirmation that (1) its intended activities do not constitute “campaign media spending” under the Voters’ Right to Know Act (“*VRKA*”); and (2) it is not a “covered person” under VRKA.

I. Background

Star Spangled Media is a for-profit limited liability company that publishes original news stories, commentaries, and editorials on its website, known as The Morning Mirror.¹ Star Spangled Media is not a registered political action committee in any state, including Arizona, nor is Star Spangled Media owned, controlled, or operated by any candidate, their spouse, or a candidate’s committee, political party, or political action committee. Star Spangled Media does not make nor accept any “contributions,” as defined by Arizona law.² Like many other news entities, Star Spangled Media’s revenue derives from grants from nonprofit organizations.³

Star Spangled Media frequently publishes content on issues of public concern, elected officials, and candidates. It retains content writers on a freelance and/or permanent basis to write articles, commentaries, and editorials. It also publishes content on sports, pop culture, and weather. Like many other media outlets, Star Spangled Media has an ideological point of view – it is left-of-center. But Star Spangled Media does not endorse or oppose any candidate for public

¹ The Morning Mirror, available at <https://www.themorningmirror.com/>.

² See A.R.S. § 16-901(11).

³ See NPR, Public Radio Finances, <https://www.npr.org/about-npr/178660742/public-radio-finances> (“NPR’s two largest revenue sources are corporate sponsorships and fees paid by NPR Member organizations to support a suite of programs, tools, and services. Other sources of revenue include institutional grants, individual contributions and fees paid by users of the Public Radio Satellite System.”); see also ProPublica, Supporters, <https://www.propublica.org/supporters> (“As a nonprofit, ProPublica relies on donor support. We are grateful to the individuals and organizations that make our work possible. Following is a list of just some of our larger donors [...].”).

office or any political party, or solicit funds for any candidate, political party, or other political organization. And Star Spangled Media puts a premium on its content being educational in nature, providing sufficient information to allow readers to develop their own perspectives notwithstanding Star Spangled Media’s left-of-center viewpoint.

To drive traffic to its website, Star Spangled Media spends funds to boost its own content on third party websites like Facebook, Google, and the websites of other news entities (“*news boosting*”). News boosting can include headlines, pull quotes, or graphics from Star Spangled Media’s news stories and commentaries, and will often feature elected officials and/or candidates. To pay for its news boosting, Star Spangled Media utilizes the same sources of revenue that it does to retain content writers to publish the underlying content.

Star Spangled Media wishes to write and publish content that refers to issues, elected officials, and candidates in Arizona in 2024, and pay for news boosting ads that likewise refer to issues, elected officials, and candidates.

II. Questions Presented

- a. Is Star Spangled Media engaged in “campaign media spending”?
- b. Is Star Spangled Media a “covered person”?

III. Legal Analysis

The Commission should answer both questions in the negative.

- a. Star Spangled Media is not engaged in “campaign media spending.”

The VRKA defines “campaign media spending” to exclude “[a] news story, commentary or editorial by any [...] website or other periodical publication that is not owned or operated by a candidate, a candidate’s spouse or a candidate committee, political party or political action committee.”⁴ The VRKA’s exemption for news stories, commentaries, and editorials mirrors the exemption found in §§ 16-911 and 16-921 of the pre-VRKA statute.⁵

The VRKA exemption is also modeled on the Federal Election Campaign Act (“*FECA*”), which directs that the terms “contribution” and “expenditure” exclude the costs incurred in covering or carrying “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.”⁶ As the Federal Election Commission (“*FEC*”) observed in reviewing the legislative history of the so-called “media exemption,” 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

⁴ A.R.S. § 16-971(2)(b)(i).

⁵ *Id.* §§ 16-911(B)(2), 16-921(B)(2).

⁶ 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

right of the newspapers, TV networks, and other media to cover and comment on political campaigns.”⁷

The FEC “has historically conducted a two-step analysis to determine whether the media exemption applies.”⁸ First, “the [FEC] asks whether the entity engaging in the activity is a press or media entity.”⁹ Second, “the [FEC] applies the two-part analysis presented in *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), which requires it to establish: (A) [t]hat the entity is not owned or controlled by a political party, political committee, or candidate; and (B) [t]hat the entity is acting as a press entity in conducting the activity at issue (i.e., whether the press entity is acting in its ‘legitimate press function’).”¹⁰ We have not identified any cases in Arizona applying the media exemption. In the absence of a specific Arizona test, the Commission ought to apply the FEC’s judicially-influenced test.

Star Spangled Media’s planned activities meet the FEC’s two-part test and, as a result, should not be considered “campaign media spending.”

On the first prong – whether the entity engaging in the activity is a press or media entity – the FEC has looked at whether the “entity in question produces on a regular basis a program that disseminates news stories, commentaries, and/or editorials.”¹¹ Star Spangled Media regularly disseminates political *and* non-political news stories, commentaries, and editorials; in fact, that is its sole business function. Like other media entities, Star Spangled Media “retains editorial and formatting control over the content” of its news stories, commentaries, and editorials.¹² The fact that Star Spangled Media has an ideological viewpoint is immaterial; the FEC “does not investigate an entity’s viewpoints in determining whether it qualifies as a ‘press entity’ under the press exemption” and doing so would be plainly unconstitutional under the First Amendment.¹³ Nor are the media entity’s revenue streams material to the analysis; different media entities have different revenue streams, and the FEC has granted press exemption status to other media entities that derive funding from nonprofit organizations.¹⁴

On the second prong, Star Spangled Media is not owned, operated, or controlled by a candidate, a candidate’s spouse or a candidate committee, political party or political action committee, and accepts no funding from any such entity. Moreover, the proposed activities are part of Star Spangled Media’s legitimate press function. Disseminating news stories, commentaries, and editorials are, of course, the core function of any press entity. And purchasing advertisements to boost that content is also part of Star Spangled Media’s legitimate press function. “[W]here the underlying product is covered by the [media] exemption, so are advertisements to promote that

⁷ FEC Adv. Op. 2010-08 (*Citizens United*) at 4, quoting H.R. REP. NO. 93-1239 at 4 (1974) (emphasis added).

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ *Id.* at 4-5.

¹¹ *Id.* at 5. Likewise, the FEC “has not imposed a requirement that an entity seeking to avail itself of the press exemption first demonstrate that it has a track record of engaging in media activities.” *Id.* at n. 9.

¹² FEC Adv. Op. 2005-16 (*Fired Up*).

¹³ FEC Adv. Op. 2008-14 (*Melothé*) at 4.

¹⁴ *See, e.g.* FEC Matter Under Review 7789 (*Courier Newsroom*), First General Counsel’s Report at 7, n. 24.

underlying product.”¹⁵ And in a recent matter, the FEC determined that a progressive media outlet that boosted news stories featuring candidates was acting within its legitimate press function.¹⁶

b. Star Spangled Media is not a “covered person.”

Star Spangled Media is not a “covered person” for two reasons.

First, for the reasons set forth above, Star Spangled Media does not engage in “campaign media spending.” Therefore, it does not meet the spending threshold to qualify as a “covered person.”

Second, a “covered person” does not include “[o]rganizations that spend only their own business income for campaign media spending.”¹⁷ The term “business income” includes “[m]onies received by a person in commercial transactions in the ordinary course of the person’s regular trade, business or investments.”¹⁸ Star Spangled Media is a for-profit media company that is in the business of publishing and distributing original news stories, commentaries, and editorials. Star Spangled Media accepts funds in the ordinary course of its business from grants from nonprofit organizations that are interested in funding the type of news coverage that Star Spangled Media undertakes and building an audience for the news coverage via targeted advertising. For tax purposes, this revenue is treated like any other revenue derived from a commercial transaction. Because any funds that Star Spangled Media spends on content and news boosting are the monies it receives via these ordinary course commercial transactions, the monies would be considered “business income.” Accordingly, Star Spangled Media is not a “covered person” under the VRKA.

Sincerely,

Jonathan S. Berkon
Emma R. Anspach
Counsel to Star Spangled Media

¹⁵ FEC Adv. Op. 2010-08 at 7 (citing *Fed. Elections Comm’n. v. Phillips Publ’g*, 517 F.Supp. 1308, 1313 (D.D.C. 1981)).

¹⁶ See FEC Matter Under Review 7789, First General Counsel’s Report at 17-20.

¹⁷ *Id.* § 16-971(7)(b)(ii).

¹⁸ *Id.* § 16-971(1).