JAMES MADISON CENTER FOR FREE SPEECH

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January 12, 2015

Federal Election Commission
Washington, D. C.

Re: Notice of Proposed Rulemaking ("NPRM") 2014-12: Aggregate Biennial Contribution Limits, 79 FED. REG. 62361 (Oct. 17, 2014)[1]

Ladies and Gentlemen:

On behalf of the James Madison Center for Free Speech, James Bopp, Jr., requests an opportunity to testify on this rulemaking. The Madison Center understands that the hearing date is February 11, 2015. *Id.* at 62361.

In 2005, the FEC received comments about, *inter alia*, regulating[2] political speech that occurs on the Internet.

The final section of NPRM 2014-12 asks a different question. It does not focus on political speech that occurs on the Internet. Instead, the NPRM quotes *McCutcheon v. FEC*, 134 S.Ct. 1434, 1459-60 (2014), which mentions not speech that occurs on the Internet but "disclosure" that occurs on the Internet. *Id.*[3] Following suit, the NPRM asks about what the FEC itself puts on the Internet:

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[1] *Available at* http://sers.fec.gov/fosers/showpdf.htm?docid=305653.

[2] *I.e.*, requiring disclosure of, which differs from "limiting." *See Yamada v. Kuramoto*, 744 F.Supp.2d 1075, 1082&n.9 (D. Haw. 2010), *appeal dismissed*, No.10-17280 (9th Cir. June 10, 2011).

[3] Even then, *McCutcheon* has no holding on "disclosure" of speech, much less speech that occurs on the Internet. 134 S.Ct. at 1459-60.

> The Supreme Court observed that disclosure requirements "may ... 'deter actual [*quid-pro-quo*] corruption and avoid the appearance of [*quid-pro-quo*] corruption by exposing large contributions and expenditures to the light of publicity.'" *McCutcheon*, 134 S.Ct. at 1459-60 (quoting *Buckley v. Valeo*, 424 U.S. 1, 67 (1976)). Particularly due to developments in technology – primarily the Internet – the Court observes that "disclosure offers much more robust protections against corruption" because "reports and databases are available on the FEC's Web site almost immediately after they are filed." *Id.* at 1460.
>
> Given these developments in modern technology, what regulatory changes or other steps should the [Federal Election] Commission take to further improve its collection and presentation of campaign[-]finance data?

79 FED. REG. at 62363 (original brackets omitted).

Because the NPRM mentions not speech that occurs on the Internet but "disclosure" that occurs on the Internet, *id.* (citing *McCutcheon*, 134 S.Ct. at 1459-60), any rule focusing on speech that occurs on the Internet is beyond the scope of this rulemaking and would be improper. *See, e.g., VanHollen v. FEC*, ____F.Supp.2d____, No.11-0766(ABJ), Order at 14-18 (D.D.C. Nov. 25, 2014).[4]

Alternatively, in case the NPRM – when it refers to "disclosure" on the Internet, 79 FED. REG. at 62363 (citing *McCutcheon*, 134 S.Ct. at 1459-60) – asks about regulating speech that occurs on the Internet,[5] the Madison Center recalls previous comments on this topic[6] and re-asserts pertinent points here.

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[4] *Available at* http://www.fec.gov/law/litigation/van_hollen_dc_opinion4.pdf.

[5] *See generally* Lee E. Goodman, *Online Political Opinions Don't Need Regulating*, WALL ST. J. (Jan. 1, 2015), *available at* http://www.wsj.com/articles/lee-e-goodman-online-political-opinions-don't-need-regulating-1420155421.

[6] James Bopp, Jr. & Richard E. Coleson, Comments Concerning NPRM Regarding 11 C.F.R. Parts 100, 110, and 114 (May 26, 2005), *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=36913.

Introduction

When the American experiment was fresh from the hands of its Founders, Americans could speak their minds on any subject of public interest without having to think about government regulation. People didn't need a specialist in the minutiae of statutes, rules, court opinions, and advisory opinions before they could speak or print their thoughts.

Now, regulation of speech is often called "reform," and people must think twice before speaking. But the common person should not need (and most cannot afford) to retain a legal specialist before speaking. And that is the effect of increasing regulation—a creeping chill on expression and participation in self-government. The Founders understood that liberty is fragile, that it needs room to breath and strong protections, and they gave us the first and best reform, which is the First Amendment's command that "Congress shall make no law . . . abridging freedom of speech, or of the press . . . ."

The Madison Center writes in defense of people of average means who want to say and print what is on their minds and who want to associate freely with others—perhaps in a group blog or in a citizen watchdog group (incorporated, if desired, to protect against individual liability)—without having to stop first and ask "Can I do this in America?" and having to hire a lawyer to find out.

The Madison Center's first preference for the Internet—and the option most advancing liberty and citizen self-government—is no FEC regulation. To the extent that this is not possible, then any regulation must be done in the most minimal degree possible. Any regulation must have extremely bright lines that are readily comprehensible by the common person, without the need to hire a lawyer, attend a seminar, or read extensive regulatory language. The common person is not stupid—in fact the Founders correctly trusted the common people (as always with appropriate checks and balances) because of their common sense—but most people have little desire to learn legalese. Nor should they have to do so. Liberty is not only for those who have learned legalese or have money for a lawyer. The guiding theme for FEC regulation of the Internet should be that the common person should not have to think twice as to legal ramifications before posting thoughts about political matters on the Internet.

About the James Madison Center for Free Speech and Its Internet Use

The James Madison Center for Free Speech ("Madison Center") is an internal educational fund of James Madison Center, Inc., a District of Columbia corporation recognized by the IRS as nonprofit under § 501(c)(3) of the Internal Revenue Code. Its general counsel is James Bopp, Jr., and its mission statement declares:

> The mission of the James Madison Center for Free Speech is to support litigation and public education activities in order to defend the rights of political expression and association by citizens and citizen groups as guaranteed by the First Amendment of the United States Constitution.

As do nearly all advocacy groups, the Madison Center makes use of the Internet. And as for many such organizations, Internet communications serve in lieu of a printed newsletter, but they serve the same purpose. The Madison Center offers persons the opportunity to subscribe to its "email list." Those who subscribe regularly receive email communications that are most frequently styled as "press releases," but sometimes they are not so labeled, and they have been sent in letter format. They could appropriately be called "news updates," for they go to news-media contacts and other contacts alike. These news updates concerning Madison Center activities are emailed to substantially more than 7000 interested individuals and organizations. The Madison Center publishes these news updates when there is pertinent news to report, not on a fixed schedule. There is no volume and number on the news updates, but they are generally dated (and in any event the email header dates them). There are provisions for persons to subscribe and unsubscribe, but there is no charge for a subscription to the email news updates.

When the Madison Center started up, one of its first activities was to compile an email list to which to send its news updates. It did not pay for any of the email addresses, but it received lists of likely-sympathetic recipients by donation and collected on its own many addresses on its email list. It initially sent unsolicited emails to persons on its email list, announcing the Madison Center and its planned news updates and offering the opportunity to unsubscribe. The Madison Center invests time and effort to maintain its list, both to add and remove subscribers upon request and to deal with frequently changing email addresses. The Madison Center believes that some start-up organizations might not have access to the list resources it had and would have to purchase lists as a means of building their initial email list. It also believes that initial unsolicited emails are essential to a new organization.

The topics of the Madison Center's news updates range from Madison Center fundraising and recognition activities; to campaign-finance-reform legislation, rulemaking, litigation, and scholarly publications; to litigation concerning judicial canons that improperly ban, otherwise limit, or regulate political speech.

The Madison Center sends its news updates using its ordinary AOL account that is also used for other email correspondence, and it maintains its addresses in AOL's address book and as files in a typical word-processing program.

Consequently, there is de minimis cost in sending out emails, and the cost per individual email is so low as to be negligible.

The Madison Center's website, at http://www.jamesmadisoncenter.org/, makes available to the general public information about itself and its personnel and a variety of publications, such as current and past news updates, popular and scholarly articles, briefs and court opinions from its litigation, and written testimony before Congress and federal agencies. Website hosting is of modest cost and updating is done with donated time, so that the cost is de minimis. The website hosting cost is a sunken cost, making the cost of adding any new material to the website negligible.

The Madison Center has no advertising in its news updates or on its website, but has no policy against doing so. The Madison Center's income is from donations, but it would have no problem with receiving income from sale of advertising or rental of its emailing list in situations compatible with its mission.

In its various litigation efforts to protect freedom of expression, the Madison Center represents many nonprofit corporations, some of which also send out news updates and legislative and other action alerts by email as well as maintaining websites. While these clients are not officially named as commenters here, the Madison Center also comments from concern for their interests. The Internet is now a vital and necessary tool for citizen groups seeking to participate in the "marketplace of ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

The Madison Center believes (a) that its Internet activity is entitled to full First Amendment protection under free speech, press, and association guarantees, (b) that there should be no regulation of the activity described above, (c) that due to the Internet's unique nature it should be free from congressional limitation and agency regulation, and (d) that the FEC should do the absolute minimal regulation and take great care to do no harm to the people's public forum and press.

I. Any Rulemaking Should Be Based on Constitutional First Principles, Not Creeping Incrementalism.

Any rulemaking should be based on the following Constitutional first principles. The people are sovereign. U.S. CONST. preamble ("We the people . . . do ordain and establish this Constitution . . . ."); *Buckley*, 424 U.S. at 14 ("In a republic . . . the people are sovereign . . . ."). They have retained for themselves certain rights. *See* U.S. CONST. amend. X (reserving to the people or states the authority not granted to the federal government). Their retained rights to self-government through free speech, press, and association must be the starting point in any rulemaking. *See id.* amend. I.

In a constitutional system in which the people granted to the federal

government only limited powers, it was obvious from the U.S. Constitution that the power to limit the people's speech, press, or association was not included in that grant. Yet the people were so protective of these liberties and so suspicious of government efforts to strip them of these vital self-government tools, that they expressly commanded that "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.*

The First Amendment is designed "'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). "[S]peech concerning public affairs is more than self-expression; it is the essence of self government." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) (quotation marks and citation omitted). "It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 777. *Citizens United v. FEC*, 558 U.S. 310, 336-66 (2010), reaffirms these principles.

The freedom of the press had led the Supreme Court to reject licensing and censorship schemes. *See, e.g.*, *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002); *Lovell v. Griffin*, 303 U.S. 444 (1938). Prior restraints require extraordinary justification. *See, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) ("any system of prior restraints . . . bear[s] a heavy presumption against its constitutionality"). No control of content by government is permissible. *Near v. Minnesota*, 283 U.S. 697, 711-17 (1931). Publication may be done anonymously. *See, e.g.*, *Talley v. California*, 362 U.S. 60, 62-65 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-45, 347-49 (1995) (relying on free press rationale); *id.* at 359-71 (Thomas, J., concurring that anonymity is protected by press freedom). No discriminatory financial burden by tax or regulatory burden may be imposed. *See, e.g.*, *Grosjean v. American Press Co.*, 267 U.S. 233, 240-41, 250-51 (1936); *Arkansas Writer's Project v. Ragland*, 481 U.S. 221, 230 (1987); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

The express press protection is not limited to the institutional news-media corporations. It is guaranteed to *everyone*. "Every freeman has an undoubted right to lay whatever sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press." 4 William Blackstone, *Commentaries* *151-52. In his concurrence to *Bellotti*, Chief Justice Burger noted that "[t]he Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others." 435 U.S. at 798. But he proceeded to trace the development of the recognition of the right to demonstrate that "the history of the Clause does not suggest that the authors

contemplated a 'special' or 'institutional' privilege." *Id.* "The common 18th century understanding of freedom of the press is suggested by Andrew Bradford, a colonial American newspaperman," the Chief Justice continued, noting that Bradford did not limit freedom of the press to any particular group:

> "But, by the *Freedom of the Press*, I mean a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his Sentiments on the Important Points of *Religion* and *Government*; of proposing any Laws, which he apprehends may be for the Good of his Countrey, and of applying for the Repeal of such, as he Judges pernicious. . . .
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> "This is the *Liberty of the Press*, the great *Palladium* of all our other *Liberties*, which I hope the good People of this Province, will forever enjoy . . . ." A. Bradford, Sentiments on the Liberty of the Press, in L. Levy, Freedom of the Press from Zenger to Jefferson 41-42 (1966) (emphasis deleted) (first published in Bradford's The American Weekly Mercury, a Philadelphia newspaper, Apr. 25, 1734).

Bellotti, 435 U.S. at 798-99 (Burger, C.J., concurring). Justice Frankfurter put it this way:

> [T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. "[T]he liberty of the press is no greater and no less than the liberty of every subject of the Queen," *Regina v. Gray*, [1900] 2 Q.B. 36, 40, and in the United States, it is no greater than the liberty of every citizen of the Republic.

Pennekamp v. Florida, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring).

This guarantee of the freedom of the press for every person arose in reaction to the government's response to a new technology that allowed inexpensive public communications to large numbers of people—the printing press. The English crown feared that with this new technology the people would discuss the governing authority and so asserted its sovereignty—in the face of growing assertions that the people were the true sovereigns—by enacting licensing and censorship schemes, approved and disapproved reading lists, and taxation on printing:

> Soon after the invention of the printing press, English

> and continental monarchs, fearful of the power implicit in its use and the threat to Establishment thought and order—political and religious—devised restraints, such as licensing, censors, indices of prohibited books, and prosecutions for seditious libel, which were unknown in the pre-printing press era. Official restrictions were the official response to the new, disquieting idea that this invention would provide a means for mass communication.

Bellotti, 435 U.S. at 800-01 (Burger, C.J., concurring).

These restrictions on the people fueled the call for liberty of the press and independence from monarchy. Freedom of the press has deep American roots in the early pamphleteers for liberty and a federal constitution. Some worked alone, such as Thomas Paine who wrote *Common Sense*, a call to arms for American independence that was first printed by Robert Bell.[7] He later added *The Crisis*, in support of the War of Independence. Sometimes they worked in association. The *Federalist Papers* were written by three individuals under the *nom de plume* of Publius: Alexander Hamilton, James Madison, and John Jay. These pamphleteers' efforts led to American independence, eliminated the government's claim to sovereignty, and for a time ended the ability of government to silence the people. The First Amendment was the first, and best, "reform" law.[8]

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[7] *See* http://www.ushistory.org/paine.

[8]Free expression and press is important for several reasons. In 1644, John Milton argued against English censorship laws because they suppress truth: "Let truth and falsehood grapple: whoever knew truth put to the worse in a free and open encounter?" J. Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644). In 1859, John Stuart Mill likewise argued that free expression was necessary to the establishment of truth. J.S. Mill, *On Liberty* at Ch. II (1859). In 1919, Justice Holmes argued that only in the freely competitive "marketplace of ideas" can truth be established. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting). This is particularly important at election time, when candidates hire expensive consultants to manufacture an amalgam of winning issues, based on polls and focus group research. But the truth about the candidate can't be known from these. Only when those pesky citizen watchdog groups come yapping in to ask about the candidate's record and real views on socially important issues, such as the environment, gun control, abortion, trade protection, that the truth comes out.

Free expression and press also permit individuals to participate in society, resulting in greater perceived and real fulfillment. *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. Penn. L. Rev. 591, 593 (1982). This greater involvement of individuals in

In recent years, however, some sanction the government once again silencing the people through licensing schemes, economic burdens, blackout periods, and the like. And some would extend this to the vast public forum called the Internet. But the Internet has been uniquely the public forum and press of the people. The place where everyone, individually and in groups, can publish thoughts on any subject. It is a great equalizer, where persons of ordinary means can put up a website and comment on anything, just like the rich who can buy presses, newspapers, and broadcast stations. As did that famous printer Benjamin Franklin, the people now have their own press, so they can print their own thoughts. They can do so anonymously if desired, as Franklin did with his Silence Dogood letters. The Internet has been the most free and democratic public domain of modern life—a celebration of American liberty that the Founders would have applauded.[9]

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turn creates healthy self-government in our Republic. *See* Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 Yale L.J. 438 (1983).

Free express and press also provide a necessary safety valve for society. *See Whitney v. California*, 274 U.S. 347, 375 (1927) (Brandeis, J., concurring) ("the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies").

And free expression and press require careful protection because "once we allow the government any power to restrict the freedom of speech, we may have taken a path that is a 'slippery slope.'" John E. Nowak, Ronald D. Rotunda & J. Nelson Young, *Constitutional Law* at 836 (1986) (citing inter alia Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B. Foundation Res. J. 521).

> Linedrawing in such an abstract area is always difficult and especially so when a government's natural inclination is moving the line towards more suppression of criticism and unpopular ideas. Thus, even if one could distinguish between illegitimate and legitimate speech, it may still be necessary to protect all speech in order to afford real protection for legitimate speech.

Id. (citations omitted). This slippery slope problem is especially problematic as the FEC now steps onto the Internet rulemaking slope, which it previously and wisely had avoided.

[9]The Internet is but the current expression and extension of the technological breakthrough that began with the printing press, which allowed low-cost mass communication. There has been a trend toward empowering the individual as the cost of producing printed communications has dropped and become more readily available. The trend includes the typewriter, mimeograph machine, copy machine, word processing, desk-top publishing, and quick-print shops. *McIntyre* dealt with this trend at an earlier,

Indeed, the liberty that *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 666-67 (1990), recognizes as belonging to the press belongs to all American persons after *Citizens United,* 558 U.S. at 336-66.

The alternative is an auto-expanding approach that looks only to the last judicial decision and seeks by analogy to build upon it. But *Citizens United* rejected this approach, *see id.,* and not just for *MCFL* corporations. *See generally FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) ("*MCFL*").

Finally, foremost in the FEC commissioners' minds in this rulemaking must be the icy wind that blows from the FEC's power of investigating complaints. By simply stepping into the field of Internet regulation, the FEC opens the door to complaints by adversaries and to burdensome, intrusive investigations. Complaints lead to the opening of a matter under review ("MUR") and a letter from the FEC asking for details that, up until the complaint were private. This may lead to an investigation with even further prying into activities, generally requiring on short notice a substantial volume of information. This requires the MUR target to set aside other planned activities to focus human and financial resources on responding to the requests. Most feel the need to retain counsel, which adds to the cost. This icy chill is bad enough for large organizations with financial and legal resources available to handle such investigations. But for an individual running a blog, likely as an avocation, it could be devastating. And the fact that a blogger has incorporated does not in any way change the unavailability of resources to deal with an investigation. All incorporation means is that the blogger sent in forms and paid a fee so that the blogger is now Blogger, Inc. It helps protect the blogger from liability, but it does not make Blogger, Inc., a big corporation with lots of resources.

In Washington, the investigation is often the punishment. *See, e.g., FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468 n.5 (2007) ("*WRTL-II*"). Bright-line rules curtail the chill on speech from investigations and provide a simple inquiry to determine whether an investigation would be necessary, so that in a

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but fairly recent stage of its progression noting that Mrs. McIntyre "had composed and printed [her leaflets] on her home computer and had paid a professional printer to make additional copies." 514 U.S. at 337. The Internet seems the epitome of this trend, making world-wide communication available at negligible cost, but of course the needs of individual empowerment will continue to drive the accelerating progression of this technology. Someday, today's Internet will doubtless be considered an old-fashioned communication device. So any rulemaking must not focus on current technology and format factors soon to be outmoded. Instead, it should focus on what activity is happening, namely, the information collection, dissemination, and commentary, which must be protected.

large number of cases, the inquiry may quickly end and complaints of violations may be resolved quickly, inexpensively, and without intrusion into the internal activities of organizations. *See Buckley*, 424 U.S. at 41-43, 76-77.

Without bright-line rules, the danger of burdensome and intrusive investigations increases. The investigative process itself "tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957). This is so, because "[t]he mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference." *Watkins v. United States*, 354 U.S. 178, 196-97 (1957); *see also Sweezy*, 354 U.S. at 250. Such compelled disclosures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64.

This is particularly true with FEC investigations because "[t]he sole purpose of the FEC is to regulate activities involving political expression, the same activities that are the primary object of the first amendment's protection. The risks involved in government regulation of political expression are certainly evident here." *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1284 (11th Cir. 1982). Therefore, constitutional considerations require the FEC to prove to the satisfaction of the courts that it has statutory investigative authority over the party it wishes to investigate. *Id*. at 1285; *see also FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981) (Because "[t]he subject matter which the FEC oversees . . . relates to behavior of individuals and groups only insofar as they act, speak and associate for political purposes," the Commission's investigative authority is subject to "extra-careful scrutiny from the court."). "The danger of treading too quickly or too blithely upon cherished liberties is too great to demand any less of the FEC." *Id.* *Machinist Non-Partisan Political League* held that FECA did not apply to "draft committees," based primarily on the fact that it would allow a dramatic expansion of the FEC's authority to intrude into citizens' First Amendment activities:

> [T]he subject matter of [the subpoenaed] materials represent[ed] the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and officeholding. The FEC first demands all available materials which concern a certain political group's "internal communications," wherein its decisions "to support or oppose any individual in any way for nomination or election to the office of President in 1980" are revealed . . . . Then this federal agency,

> whose members are nominated by the President, demands all materials concerning communications among various groups whose alleged purpose was to defeat the President by encouraging a popular figure from within his party to run against him. As a final measure, the FEC demands a listing of every official, employee, staff member and volunteer of the group, along with their respective telephone numbers, without any limitation on when or to what extent those listed participated in any MNPL activities. The government thus becomes privy to knowledge concerning which of its citizens is a "volunteer" for a group trying to defeat the President at the polls . . . [R]elease of such information to the government carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment.

Id. at 388 (footnote omitted).

Orloski v. FEC also recognized the danger of the chill from investigations when it stated that not only could disgruntled opponents harass by taking advantage of broad standards, but the FEC would be forced

> to direct its limited resources toward conducting a full-scale, detailed inquiry into almost every complaint, even those involving the most mundane allegations. It would also considerably delay enforcement action. Rarely could the FEC dismiss a complaint without soliciting a response because the FEC would need to know all the facts bearing on motive before making its "reason to believe" determination.

795 F.2d 156, 165 (D.C. Cir. 1986).

Bright lines minimize this danger and are essential here. Of course, the best course for the FEC is to stay out of Internet regulation to the greatest extent now possible.

II. The Internet Differs in Kind, Which Requires the Most Minimal Regulation Possible of the People's Free Public Forum and Press.

A. The Internet Is Less Invasive than Most Traditional Communications.

To access the Internet, one must log on with a browser, decide where to navigate and key in URL directions or click on existing links. Typical of such an experience is a "surfing" approach that skips from item to item of interest, with often little time spent at any one page or site. Many prefer receiving their news from Internet sources because one can tailor the news items offered by choice of

site and can skip from one item of interest to another, spending as much or as little time as desired. There is no baiting by a broadcast reporter to wait for an interesting story "later in our broadcast," after listeners "stay tuned for words from our sponsors."

There is little chance of becoming a captive audience for Internet communications in the way that one might be forced to hear radio or television commercials in public waiting or transportation areas. And unlike soapbox speakers in a public forum of a park or a street corner, Internet speakers can readily be silenced with a click of the mouse to avoid them altogether or a downslide of the volume control icon to eliminate any audio component—not even the effort of walking away or putting on headphones is required. And while remote controls have made ads on favorite television programs easier to control (although requiring constant vigilance), avoidance of ads on the Internet is even easier. To be sure, there is the ongoing technical war between blockers of popup and banner ads (and spam and viruses) and those who would impose them, but that is a general technical problem on which progress is being made and which ought not to be the focus of *this* rulemaking. So far, the total interruption for several minutes in an hour of what one is viewing or auditing that occurs on television or radio has not occurred on the Internet. While a broadcasting corporation may need to interrupt programming on the scarce signal with commercial messages to pay the bills for expensive broadcasting, there is no such need on the Internet because of its low cost.

B. Much Internet Communication Has Little Objective Cost or "Value."

Federal law regulates things of "value," i.e., a contribution or an expenditure is defined as "anything of value," 52 U.S.C. § 30101(8) ("contribution"), and (9) ("expenditure"), not things without value.

How should the "value" of Internet communications be determined? There are two accurate means. First, the FEC may calculate the "value" the same way it does for several other activities —by assessing the market value of the activity in question.[10] Market value provides an accurate and objective determination of the true monetary worth of any given Internet campaign activity. Second, the FEC may calculate "value" as a measure of the actual cost an entity pays for a given service or product. The Code of Federal Regulations incorporates both measures

[10]One example of the FEC's use of an objective market standard to determine value is embodied in 11 C.F.R. § 100.52(d)(1)-(2). This provision determines the value of advertising services by the "usual and normal charge" for such a service. Further, the "usual and normal charge" consists of the "hourly or piecework charge for the services at a commercially reasonable rate[.]"

to determine "value."[11] Under either approach, much Internet activity lacks any determinable value due to its minimal worth.

The FEC already recognizes the "occasional, isolated, or incidental use" by employees of corporate or labor organization facilities in connection with a federal election as an activity not subject to regulation.[12] Such activities are not subject to regulation because of their low value.

The evaluation of any campaign activity should not be based upon the subjective worth of the communication, but rather upon its objective worth. The occasional-use exemption[13] does not analyze the value of the use of an employer's facilities in connection with a federal election under a subjective evaluation. Rather, it evaluates whether such use is subject to regulation based on objective hourly data.[14] It does not matter if the use is subjectively more valuable because it is performed by a famous employee or the president of the corporation. The exemption simply analyzes the value of the activity based on the number of hours of such use. Similarly, 11 C.F.R. § 100.52(d)(1)-(2) measures costs of goods or services based on the objective "usual and normal charge" standard. Likewise, any proposed regulation of Internet campaign activity should evaluate "value" not by the subjective importance of the Internet communication but by the objective costs associated with such a medium.

Given the increasingly ubiquitous access to computers and the Internet and many established websites, the costs to the Internet communicator are largely sunken costs. People already have computers and Internet service, or they can go online for free at the library or at school. Bloggers already have their blog set up. Server and storage costs or bandwidth allocations are already paid for. These sunken infrastructure costs cannot be calculated in the communication costs any more than one would add to the taxi cost of going across town the cost of the roads, storm sewers, and traffic signals, or vehicle purchase, maintenance, licensing fees, gasoline, etc. One simply pays the incremental taxi fare. Similarly, when one pays to send a letter, the cost is the price of a stamp, not the cost to run

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[11] 11 C.F.R. § 100.52(d)(1)-(2) typifies a market value approach, while 11 C.F.R. § 114.9(a)(1) measures value according to the cost incurred by the entity.

[12] 11 C.F.R. § 114.9.

[13] 11 C.F.R. § 114.9.

[14] 11 C.F.R. § 114.9(a)(2) describes when "voluntary Internet activities" are "occasional, isolated, or incidental use of" facilities.

the U.S. Postal Service and the infrastructure it uses.[15] The incremental cost for typical Internet communications is de minimis.

A hyperlink costs almost nothing. In 2001 comments to the FEC, the Madison Center demonstrated that the effective cost of creating a hyperlink was approximately 85 cents.[16] That calculation assumed paying a content engineer the median salary for such work in a major city, not the do-it-yourself approach that many on the Internet would take. While that cost calculation could be recreated using current salary rates for 2015 or adjusted for inflation, it is sufficient to note that little has changed and a hyperlink still costs very little to create. Similarly, sending emails, even in large quantities, costs nothing but a bit of time. One can even have a personal website for free, if one is willing to put up with a bit of non-site-related advertising from the host. The do-it-yourself website creator using a free site has no expenditure but time.

In sum, hyperlinks, emails, websites, and blogs generally have no cognizable value for election-regulation purposes. Where dedicated websites are set up to expressly advocate for or against a candidate, and there is substantial bandwidth purchased and professionals are paid to set up the website, there may be a cognizable disbursement.

C. For Present Analytical Purposes, The Internet Is Most Like a Traditional Public Forum and Pamphleteering.

These unique characteristics reveal that the Internet is very much like communications in a traditional public forum, only with some obvious improvements. Because no one has to listen to the Internet, there is no need for

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[15]Similarly, costs associated with independent expenditures – but not part of the independent expenditure themselves – are *not* reportable independent expenditures. *See In re George Soros*, MUR 5642, Statement of Reasons ("SOR") of Chairman Lenhard and Comm'r Weintraub at 2-3 (FEC Jan. 2, 2008) (*available at* http://eqs.fec.gov/eqsdocsMUR/29044223685.pdf). Otherwise, any one of "the framers of the Constitution . . . would need to report to the government how much he spent on oats to feed his horse en route to the town square." *Id.* at 3 (criticizing *id.*, SOR of Vice Chairman Mason and Comm'r von Spakovsky at [3-4,] 6-7 (FEC Dec. 31, 2007) (asserting unsuccessfully that costs associated with independent expenditure – "travel, accommodations, public relations, production, and logistics" – *are* reportable independent expenditures) (*available at* http://eqs.fec.gov/eqsdocsMUR/29044223677.pdf)).

[16]*See* http://www.fec.gov/pdf/nprm/use_of_internet/internet_rule_comments/jas_madison_ctr_free_spch.pdf.

reasonable time, place, and manner restrictions as there may be in the park. But the Internet is still the people speaking to one another about whatever they please, with de minimis cost.

The Internet is like traditional book publishing, with books by authors both famous and relatively unknown, old and new, all available online in a great library. Of course, what is a "book" is in transition. Clearly, tablet, scroll, or codex format is no longer required. Rather, a book is some piece of literature or collection of information of sufficiently substantial size as to have been traditionally considered to be of book length (although some books were quite short, e.g., children's books). And the traditional protection afforded book publishing must now be extended to vast quantities of material on the Internet. The Internet should also be treated like a library, in that the government doesn't control what you read. Even if it's the day before an election, you can check out and read a book about a candidate, even if it expressly advocates for or against the candidate.

The Internet is also much like the pamphleteering seen in early American history that was the focus of the guarantee of freedom of the press. While the Internet includes audio and video components, vast quantities of it are written material. The libraries of information available include information that once could only be found in books, periodicals, pamphlets, and leaflets. If Publius were writing today, would he/they have published on the Internet? Likely he/they would use both email and websites, although he/they might also have published the pamphlets in paper format or in letters to the editor (in a newspaper or other periodical or at on an online news and comment site). In any event, the works of Thomas Paine and Publius are instantly available on the Internet without added cost.[17]

Of course the Internet also has aspects that more or less resemble an art gallery, concert hall, market, telephone, postal system, police department, court, government, and red-light district, as well as having characteristics akin to radio and television broadcasting, albeit without the expense and limited access problems.

But for purposes of the present rulemaking, the analogies to a public forum and pamphleteering are most apt, which raises the following questions. If a neo-Publius (an individual or group of persons) maintains a weblog, publishing online printed thoughts about liberty, government, war, peace, spirituality, and other items of public interest, what is to distinguish this blog from the printed pamphlets

[17] *See, e.g.*, http://www.ushistory.org/paine/; http://avalon.law.yale.edu/subject_menus/fed.asp.

of the original Publius? How could it be possible to say that Publius was absolutely protected by the freedom of the press but neo-Publius is not? And if you can say what you want in the park or on a street corner, why can't you do so on the Internet?

D. The Internet Is the People's Press.

An apt description of the Internet, especially blogging, is that the Internet is the people's press, the place where persons of ordinary means can communicate ideas on an equal footing with the rich and famous.[18] If historically the first estate of the realm was the clergy, the second the nobility, the third estate the commons, 1 William Blackstone, *Commentaries* *153, and the so-called fourth estate was the institutional "press," then the Internet may fairly be considered the third estate's fourth estate—the people's own press.

Once it was believed that the institutional press represented the people's interests. That belief retains some currency, but increasingly the people are representing their own interests and are skeptical of the institutional press. The Internet has empowered them, and as the people are sovereign, the people's representatives and servants in government ought not to stand in the sovereign's way. At a time when many people of ordinary means feel that the fourth estate is controlled by the wealthy, that giant corporate conglomerates control media empires and create the news to their own liking, and that the institutional press has lost its trust-bond with the people because of flawed reporting and obvious but undeclared agendas, the Internet has blossomed with myriad alternate viewpoints, often reporting what the institutional press chooses, for its own agenda reasons, to withhold from the public. A profound transformation is taking place as fewer people read newspapers and monitor traditional broadcast news outlets, instead picking their own news stories from sources they find credible around the world. What until recently was the "main-stream" news media no longer controls the news, although those news corporations that can adapt to new realities will still

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[18]The notion that the freedom of the press belongs to the people shows up in some publisher/publication names, both traditional and online. A quick search on the Internet reveals that there is a book-publishing company called People's Press (Baltimore, Maryland), a newspaper called Owatonna People's Press , *see* www.owatonna.com (based in Minnesota; has paid subscribers for both paper and online versions of the newspaper; accepts paid advertising), and a newspaper called The People's Press. *See* www.peoplespressnews.com (has totally free online subscriptions; exists online and on paper; solicits articles from readers to make up the content; calls itself a "community viewspaper"; is published monthly; accepts paid advertising). All of these are obviously protected by the First Amendment guarantee of freedom of the press, although they vary considerably.

find a place and have a voice in the democratized marketplace of ideas.

In this new reality, who should be protected by a media exemption afforded to what was once called "the press"? If the people are collecting, reporting, linking, and commenting on the news, are they not doing what the institutionalized press has been doing? There is no constitutional justification for protecting a news corporation over an individual or association if they do the same thing. It is the activity that must be protected, not the organizational form of the communicator.

There is no critical mass of net worth or circulation that suddenly creates or uncreates a constitutionally cognizable protection, so that there is no justification in pointing to a newspaper publisher's bigness over a blogger's comparative smallness. If size mattered, no newspaper would be protected by the First Amendment until it reached a certain net worth or circulation. And when circulation slips, as is happening for most newspapers, a newspaper would at some point lose its media exemption and First Amendment protection under such an approach. Are subscriptions or advertising revenue required to have the right to freedom of the press? Did Publius have subscriptions and advertising revenue? No. Nor does the Constitution require it. Nor does format properly govern what is a press activity and what is not. If a blogger lays out a webpage in newspaper format, with columns, masthead, volume, and number, and publishes words on a published schedule, does the blogger by reason of that format obtain First Amendment protection to be withheld otherwise? Nothing in the free press guarantee requires or justifies such an approach. Or maybe you're really a journalist and are publishing news only if you went to journalism school, but if not, sorry, no free press for you. Such elitism has no constitutional or historical justification and may be precisely the sort of hubris that has led to the declining fortunes of the so-called fourth estate.

There is no constitutionally principled way to say that a blogger employing the people's press is any less a news publisher than the *New York Times* or the *Washington Post*. While some of the current usual characteristics of the institutional news media might be convenient indices of when someone *is* entitled to the freedom of the press, they are useless for *excluding* people who are obviously collecting, reporting, linking, and commenting upon the news.[19] The Internet is different in kind, so laws and regulations applicable to other public

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[19] *MCFL* used just such indices to determine whether MCFL's "special edition" newsletter fell within the media exception. 479 U.S. at 250-51. However, this was a matter of statutory interpretation, which must be limited to the facts before it (such as the facts that it dealt with a corporation and deviation from normal *newsletter* publication), and does not describe the full scope of the free press guarantee in the Constitution.

forums may not simply be extended to it by analogy. Any restriction must meet the test of constitutional first principles.

III. Applying First Principles to the Internet's Difference in Kind Reveals that the People's Press Should Be Left Alone to the Greatest Extent Now Possible.

It is often tempting to point to the ease with which attributions and disclaimers can be added to a communication, or to the asserted ease of reporting to the FEC, and then to ask why anyone would object to such an easy thing to do. Such an approach misunderstands the nature of First Amendment jurisprudence, the true weight and value of liberty, and the difficulty with which liberty is gained and the ease with which it is lost to creeping incrementalism.

Government cannot with impunity compel the burden of disclosure by the people without tailored justification for this burden on the presumption of liberty that undergirds this Republic and specifically the rights of free expression and association. What is required is constitutional analysis, not cost analysis. Unless the FEC can justify any rule in a manner that would pass judicial scrutiny under the Constitution, the rule should not be promulgated.

Respectfully submitted,

JAMES MADISON CENTER FOR
FREE SPEECH

By /s/ James Bopp, Jr.

James Bopp, Jr.