

**SENATE COMMITTEE ON RULES AND ADMINISTRATION
UNITED STATES SENATE**

**Testimony of
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March 24, 2021

Chair Klobuchar, Ranking Member Blunt, and Members of the Committee:

Thank you inviting me to speak about S. 1. Although the bill purports to support “the people,” it ironically imposes significant burdens on the people’s core constitutional right to speak and associate. The most dramatic provisions of S. 1 would not regulate speech about elections, but speech about issues and public policy.

Indeed, S. 1 proposes many restrictions on the right of the American people to speak about issues and politicians, hear ideas, and associate freely. It exposes Americans to an unprecedented system of mandatory public doxing and exposure when they desire to spend as little as \$500 to discuss sensitive policy issues. It likewise imposes new civil and criminal liability on American media companies, which will push many media companies to eliminate low-cost online advertising platforms from populist organizations for political messages. Some already have closed their platforms to political advertising. S. 1 would hasten more such closures and de-platforming of populist political speech.

Many of the bill’s core provisions are vague and untested. Many of its predicate findings and justifications are outdated or simply incorrect. If enacted many of the bill’s provisions would be challenged immediately and likely ruled unconstitutional.

At a time of intense political polarization, when “cancel culture” and “call out tactics” and political polarization and intolerance are at their zenith, this bill exacerbates all of these social problems. At a time when legislators around the country are demanding greater privacy protections by social media companies, this bill goes in the opposite direction and compels public exposure of citizens’ speech and associations. At a time when people distrust government, this bill would foment greater distrust about the fairness and bi-partisanship of the FEC.

The bill’s approach starts from a false premise. It starts from the erroneous proposition that American democracy is ailing from the Supreme Court’s decisions in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) and *McCutcheon v. FEC*, 572 U.S. 185 (2014). S. 1 asserts that these Court decisions “erroneously invalidated even-handed rules about the spending of money in local, State, and Federal elections. . . . These flawed decisions have empowered large corporations, extremely wealthy individuals, and special interests to dominate election

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spending, corrupt our politics, and degrade our democracy through tidal waves of unlimited and anonymous spending.”

Aside from the explicit resistance to the Constitution of the United States and the citizen rights it guarantees, as interpreted by the Supreme Court, this starting premise of S. 1 is fundamentally flawed as a legal and empirical matter. First, S. 1’s premise statement overlooks the Supreme Court’s rulings in *Buckley v. Valeo* (1976) and *Massachusetts Citizens for Life v. FEC* (1986) that ruled that wealthy individuals have a First Amendment right to spend unlimited personal funds to advocate the election or defeat of candidates (*Buckley*) and to donate their funds in unlimited amounts to non-profit organizations that do the same (*MCFL*).

Second, statistics indicate that spending by non-profit organizations in connection with federal elections consistently constitutes between 3 to 5 percent of all regulated expenditures in the election cycles. See Scott Blackburn, *Five Lessons About Spending in the 2016 Election You Might Have Missed*, Institute for Free Speech Blog (Apr. 17, 2017)

(<https://www.ifs.org/blog/five-lessons-about-spending-in-the-2016-campaign-you-might-have-missed/>). Under a recent court decision and FEC guidance, non-profit organizations that fund independent expenditures featuring express advocacy must also disclose their donors. *Citizens for Responsibility and Ethics in Washington v. FEC*, 316 F.Supp.3d 349 (D.D.C. 2018). Thus, non-profit spending to advocate the election or defeat of candidates already is subject to a vast amount of public disclosure and our elections can hardly be termed elections awash in “dark money.” But the prelude to S. 1 purports this as the bill’s animating purpose nonetheless.

Spending by regulated political committees (candidate committees, political parties, PACs) makes up over 95 percent of total regulated and reported political spending. And one study indicated that over 90 percent of Super PAC funds come from individual contributors. The 8 percent of funds that come from corporations is not exclusively from big corporations. See Theo Francis, *Despite Citizens United, Corporate Super PAC Contributions Trail Individuals, Study Finds; Companies Donated 8% in the Period Examined; Unions Accounted for 1.9%*, Wall Street Journal (Nov. 2, 2016) (citing study by the Conference Board’s Committee for Economic Development conducted by Professor Anthony Corrado of Colby College). Indeed, business corporations have largely been chased out of electoral participation by boycott and cancel campaigns.

Moreover, independent spending by non-profits and Super PACs is evenly distributed on the left and the right of the political spectrum. And all of these funding statistics are dwarfed by the amount of spending on non-regulated political speech by the free press. Thus, the extension of the First Amendment right to business corporations and labor unions in *Citizens United* has had little practical impact on our elections or our democracy.

Most significantly, S. 1 vastly expands FEC compulsory disclosure of speakers to **ISSUE** speech. It does this over the objection of many judicial admonitions over decades distinguishing between ISSUE speech and ELECTION-INFLUENCING speech. *Buckley v. Valeo* (1976); *McIntyre v. Ohio* (1995). Even the most speech-restrictive rulings have painted within this organizing dichotomy of issue speech versus electoral speech. *McConnell v. FEC* (2003).

I would like to focus on some examples of S. 1's expansive speech provisions with the widest and most pervasive impacts on the free speech rights of American citizens.

1. Compulsory Exposure of “Covered Organizations” That Sponsor “Campaign-Related Disbursements” Is Likely Unconstitutional.

S. 1 would require any organization that spends \$10,000 in an even-numbered calendar year to discuss an incumbent officeholder who also happens to be a “candidate” under the FEC’s definition to be publicly exposed. The standard for disclosure is intractably vague: any speech that is deemed to “promote,” “support,” “attack,” or “oppose” a public officeholder who happens also to be a federal candidate – no matter the context or purpose or clear and unmistakable public policy content – triggers a requirement for the speaker to publicly expose the organization’s identity and related information.

The “PASO” standard was established by Congress for the very limited purpose of controlling political parties and state political committees from using unregulated funds (also known as “soft money” or funds not subject to federal limits) to circumvent contribution limits to assist federal candidates. 52 U.S.C. §§ 30101(20)(A)(iii); 30125(b)(1) & (f)(1). The PASO standard has not worked even for that limited purpose. It has proved a highly subjective content standard that requires government bureaucrats to parse hair-splitting nuances, contexts and words within the text of advertisements. But it bears observing that the PASO standard was never intended to be wrenched from its narrow use with avowed state political committees, whose speech was presumed to be electoral, to serve as an omnibus speech standard applicable to all issue speech by non-political organizations that desire to speak about public policy while referencing the politicians who are involved with that policy – i.e., issue speakers and issue speech.

Unlike clear standards like “express advocacy” and “electioneering communications,” there is no judicial guidance and scant regulatory gloss on the meaning of “PASO” content. The Commission has found the task of divining PASO messages quite difficult. The standard is so vague and practically impossible to apply that the Commission has been known to throw up its hands – i.e., punt – on difficult determinations. One such example was Matter Under Review 6684 where Democratic gubernatorial campaign Gregg for Indiana ran ads featuring original video footage of a Republican U.S. Senate candidate, Robert Murdoch – and without adding any editorial viewpoint about Murdoch or his Senate election. The ad closed with a tag line that focused solely upon the state gubernatorial election. The Commission was unable to determine whether the ad contained PASO and thus dismissed the matter in an exercise of prosecutorial discretion. Two documents about the case are attached. *See* Exhibit 1 (FEC Factual & Legal Analysis, MUR 6684 (Gregg for Indiana)); Exhibit 2 (Commissioner Lee E. Goodman’s Concurring Statement of Reasons, MUR 6684 (Gregg for Indiana)).

The Commission’s inability to determine whether the Gregg advertisement contained PASO inspired significant commentary by practitioners and academics about the patent difficulty of applying PASO as a regulatory standard. Former White House Counsel for President Obama, Bob Bauer, commented that the Gregg matter illuminated that “(1) the PASO standard is disastrously vague and unworkable, and the Commission’s disposition did little to help matters; and (2) it is better that someone challenge this law and have us rid of PASO, because otherwise

the test will limp along in the halls of the Federal Election Commission, without any possibility of legislative action to correct the problem.” Bob Bauer, “Of Something Called ‘PASO’ and the Sound of Dog Whistles,” *More Hard Money Soft Law* (Apr. 2, 2014) (<http://www.moresoftmoneyhardlaw.com/2014/04/something-called-paso-sound-dog-whistles/>).

S. 1 completely and purposely ignores these demonstrated and intractable problems inherent in the PASO standard and chooses to plow national speech regulation into this “disastrously vague and unworkable” territory.

Committee members should also consider whether the following text would be deemed to PASO an incumbent Senator:

Senate Bill 1 is great legislation. It will solve everything that ails our democracy. It will empower people and prevent the powerful from drowning out populist voices. It will moderate political speech in America and bring harmony to our people. Senator [FILL IN THE BLANK] has sponsored this great legislation. Senator [FILL IN THE BLANK] needs your help to push this legislation through the Senate. Please lend your support to help make Senate Bill 1 the law of the land.

The language could likewise be flipped to say negative observations about Senate Bill 1 and to urge defeat of the bill. The message could be aired in January of an election year, 10 months before an election, would make no reference to an election or to the Senator as a candidate, and would have the full purpose of altering the course of legislation rather than an election. Either way, this legislative message about a pending bill and a Senator’s support for it would likely be viewed as flattering to the named Senator and therefore trigger full disclosure of the organization sponsoring the message. *See, e.g., Citizens for Responsibility and Ethics in Washington v. FEC*, 299 F.Supp.3d 83 (D.D.C. 2018) (making close, subjective calls on issue ads that manifested an “election-related purpose”).

Vagueness of the standard is a serious problem. Organizations will not have a clear idea about whether the issue speech crosses the vague line. That in and of itself is a significant First Amendment problem. The drafters apparently understand that expanding the reporting window for “electioneering communications” from 90 days before an election to the entire year of the election would almost assuredly be ruled unconstitutional for its overbreadth. So, the drafters of S. 1 no doubt have attempted to fashion a “middle standard” with all of its inherent vagueness and ambiguities.

Moving beyond the ambiguity problem is the constitutional problem of the right to speak anonymously about public policy and issues. The right to speak about issues anonymously is well-settled in the law. *Watchtower Bible & Tract Society of N.Y. v. Village of Stratton* (2002); *McIntyre v. Ohio Elections Commission* (1995); *Talley v. California* (1960); *NAACP v. Alabama* (1958).

S. 1 would compel even a well-intentioned non-profit organization to surrender its First Amendment right to speak anonymously in order to speak about issues, public policy, and

legislation if it mentions a politician in connection with the policy and government regulators believe the politician was featured favorably or unfavorably. Anonymity might be important to groups that discuss sensitive subjects such as gun control, abortion and life, immigration, climate change, police power, death penalty.

We live in a time of heightened intolerance and social and political polarization. One expert has documented the younger generation's intolerance for viewpoints with which they disagree. April Kelly-Woessner, *The End of the Experiment* (ed. Stanley Rothman) (Rutledge 2017) at 187-200; Greg Lukianoff, *The Coddling of the American Mind* (Penguin Press 2018). Counter campaigns against those who are brave enough to speak are increasingly vicious and costly to speakers. Kimberley Strassel, *The Intimidation Game; How the Left is Silencing Free Speech* (The Hachette Book Group 2016); Kirsten Powers, *The Silencing: How the Left is Killing Free Speech* (Regnery Publishing 2015). One federal court recently struck an expansive compulsory exposure law lamenting "a climate marked by the so-called cancel or call-out culture that has resulted in people losing employment, being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers to cyber harassment of others." *Americans for Prosperity v. Grewal*, Case No. 3:19-cv-14228, 2019 WL 4855853 *20 (D. N.J. Oct. 2, 2019).

At the core of these culture wars and political strategies – historically and today – has been the tool, the cudgel, of government-compelled exposure of private citizens and organizations that wish to do nothing more than speak about public policy in America. Victor Navasky, *Naming Names* (Viking Press 1980). Compulsory exposure tactics have almost always been justified in the name of national security or good government, whether it was the Red Scare or New Deal attacks on anti-New Deal interest groups. Certainly compulsory exposure was the central tool of McCarthyism's zeal to protect American from communism in the 1940s and 1950s.

S. 1 cannot escape this historical context. From the Red Scare tactics of "naming names" to the modern cancel culture, ever-expanding compulsory exposure laws can be extremely damaging to free speech. And for these reasons S. 1's compulsory exposure requirement for "campaign-related disbursements" – issue speech that has no obvious relation to elections but that even vaguely applaud or criticize the legislative work of politicians – would be headed to the Supreme Court shortly after enactment. The law's fate there might be more predictable than the outcome of ad-by-ad PASO determinations by bureaucrats.

2. The "Honest Ads" Provisions Are Likely Unconstitutional.

S. 1 would require American citizens and American media companies to post disclaimers and publicize extensive information about those who spend as little as \$500 to fund advertisements that discuss any issue of national importance. This is a vast expansion of compulsory exposure of issue speakers and issue speech in America.

At the outset, the Senate should be aware that two federal courts have ruled a functionally similar law adopted by Maryland that required online platforms to maintain public files and post sponsor identification to likely violate the First Amendment. *The Washington Post v. McManus*, 355 F.Supp.3d 272 (D. Md. 2019), *aff'd* 944 F.3d 506 (4th Cir. 2019).

The Washington Post Company and other online advertising/media companies challenged a Maryland law, the Maryland Online Electioneering Transparency and Accountability Act, in federal court. The Maryland law required online advertising platforms, such as www.WashingtonPost.com, to collect and post information about all “campaign materials” placed on their platforms for a fee. “Campaign material” was defined to include any text, graphic, or image that vaguely “*relates to* a candidate, a prospective candidate, or the approval or rejection of a [ballot] question or prospective [ballot] question.” The media company was required to post on its website the name and contact information of each ad purchaser, the identity of people who control the organization, and the total amount paid by the ad sponsor. Additionally, the media company was required to retain extensive information about the candidate or ballot issue to which the ad related including whether the ad supported or opposed the candidate or issue, the dates on which the ad was published, the “geographic location” where it was disseminated, its target audience, and total screen views of each ad. These provisions should sound familiar to those considering S. 1.

The U.S. District Court in Maryland preliminarily enjoined enforcement of the Maryland law on the basis that it quite likely violated the First Amendment rights of press platforms that sell advertising space for political messages. After the District Court enjoined enforcement of the statute against the *Post* and other plaintiffs, Maryland appealed the District Court’s ruling to the U.S. Court of Appeals for the Fourth Circuit.

The Fourth Circuit affirmed the district court’s ruling on the basis that Maryland’s imposition of campaign finance disclosure burdens on the online advertising platforms of media companies presents “a compendium of traditional First Amendment infirmities.” Among the infirmities, the appeals court found Maryland’s law to be a “content-based regulation” that singles out campaign-related speech for unique regulatory treatment. Judge Wilkinson’s opinion declared that content-based regulation of political speech is particularly problematic, because political speech is at the core of the First Amendment’s protection. The court also found Maryland’s law infirm because “the Act compels speech. And it does so in no small measure.” As the district court had found, the appeals court ruled that the law’s compulsory disclosure and publication provisions improperly “force elements of civil society to speak when they otherwise would have refrained.”

The court was particularly concerned with the conscription of press entities to serve as investigative arms of the government. The court distinguished traditional campaign finance regulations requiring disclosures from the Maryland statute on the basis that the latter “burdens platforms rather than political actors.” The court was not convinced that government’s traditional anti-corruption rationale justifies the regulation and punishment of neutral third-parties’ advertising platforms in the same way it might apply to political participants. The court recognized the very real consequence that online advertising platforms would simply close their platforms to political advertising rather than incur the costs and legal risks associated with the regulatory requirements. This, the court found, presented a unique kind of First Amendment problem. The court also distinguished Maryland’s compulsory disclosure requirements for online platforms from those that apply to broadcasters under federal communications laws. Broadcast frequencies are publicly owned and scarce, while the internet is private and infinite.

The Fourth Circuit also concluded that “the fact that the Act compels third parties to disclose certain identifying information regarding political speakers implicates protections for anonymous speech.” The court cited two lines of First Amendment jurisprudence in support of this protection. First, it cited the newsman’s right to resist disclosure of news sources to government recognized in *Branzburg v. Hayes* (1972). Second, it cited the “respected tradition of anonymity in the advocacy of political causes” recognized by *McIntyre v. Ohio* (1995).

In reaching its conclusion, the Fourth Circuit acknowledged “the imperative of some form of heightened judicial scrutiny,” although it declined to apply “strict scrutiny,” the standard of review that places the heaviest burden on government to justify laws impairing First Amendment rights. Instead, the court applied a high-bar “exacting scrutiny” standard, with the admonition that such a standard of review is decidedly not deferential to government. Under the exacting scrutiny standard, a “disparity between Maryland’s chosen means and purported ends” doomed the law.

The Fourth Circuit’s opinion has particular relevance to Congress’ consideration of the Honest Ads provisions (and other compulsory disclosure provisions) of S. 1. The Honest Ads provisions would impose similar – if not greater – burdens upon large media companies as the Maryland law imposed. The Fourth Circuit’s nod to the right of anonymous political speech and *McIntyre* could well signal a revival of sorts for the First Amendment’s right of political privacy. Two cases are currently pending before the Supreme Court in associational privacy cases challenging a compulsory disclosure law in California: *Americans for Prosperity Foundation v. Becerra* and *Thomas More Society v. Becerra*. At minimum the Honest Ads provisions of S. 1 would likely be a dead letter in the Fourth Circuit and – depending on the outcome of the California cases – unconstitutional everywhere. Congress should consider whether passing a law likely to be void upon adoption is a responsible way to legislate. There are, of course, less-burdensome alternatives to addressing the foreign meddling concerns purported as a justification for S. 1’s Honest Ads provisions.

Turning to the specific justifications and provisions of the Honest Ads provisions in S. 1, meanwhile, shows further how vulnerable they would be when challenged in a court. Early signs of legislative and constitutional weakness appear in the bill’s “legislative findings” and “sense of Congress” recitations.

- Sec. 4202 asserts a “national security” purpose for compelling exposure of online speakers. Of course, many domestic speech restrictions on American citizens, including compulsory exposure campaigns, have been justified in the name of “national security.” Red Scare subpoenas and the Sedition Act of 1798 come to mind. But even accepting this purpose as honest, I previously critiqued the weakness in the exposure provisions as a tool for getting at Russian meddling in Lee E. Goodman, *Honest Political Ads; Watch Out Drudge, You’re Next*, The Hill (Sept. 4, 2019) (<https://thehill.com/opinion/cybersecurity/459896-honest-political-ads-watch-out-drudge-youre-next>).
- Sec. 4202 also asserts that “disclosure requirements for online political advertisements in order to uphold the Supreme Court’s well established standard that the electorate bears

the right to be fully informed.” This appears to be an overstatement. The Supreme Court has generally supported disclosure of large expenditures to influence the outcome of elections for the sole public purpose of preventing the corruption of politicians, not to generally inform the public of the identity and home address of fellow citizens speaking online about public policy issues. Even the disclaimer rules at the FCC are not in place for the general purpose of informing an electorate, but rather to police the fair use of the public airwaves.

- Sec. 4203 sets forth several proposed “findings” of Congress in an attempt to justify the compulsory exposure of online advertisers. Several of these findings are flawed or do not indicate the bill’s proposed measures. Paragraphs 2 and 3 recite Russian use of social media accounts to spread divisive social or political content. The vast majority of these tactics employed FREE social media posts, not PAID advertisements. FREE posts on the internet are not the subject of S. 1. Nor can they be restricted by the FEC under the doctrine of preventing corruption through the expenditure of money. If they are part of a concerted foreign propaganda campaign, they are better addressed by national security agencies like the National Security Agency, the Federal Bureau of Investigation, and the Department of Justice’s FARA Unit.
- Paragraph 4 points to the expenditure of \$100,000 by Russia’s Internet Research Agency to fund socially divisive messages. Paragraph 11 develops this point further. First, it is not clear that the divisive social messages disseminated by Russians in 2016 would be covered under S. 1’s definition of “national legislative issue of public importance.” And furthermore, it is worth observing that our national security agencies failed to detect this effort in 2016. And while it is indeed a noble cause to prevent foreign powers from meddling in our domestic political affairs, this finding begs a critical question: if online Russian propaganda is the target of new regulations, then why impinge upon the rights of American citizens and American media companies? The cure proposed in S. 1 is worse than the disease. There is a far more effective mechanism for addressing Russian propaganda: amend the Foreign Agents Registration Act and give the DOJ, FBI, and NSA greater capabilities for rooting out foreign propaganda campaigns. H.R. 4736 (Honest Elections Act, 116th Cong.) proposed a more effective and targeted approach to combatting foreign propaganda without infringing the free speech rights of American citizens. That more narrowly tailored approach illuminates how S. 1’s restrictions on the American people and American media platforms are overbroad and untailored. This problem makes the bill vulnerable to constitutional challenge.
- Paragraphs 5, 6 and 7 invoke Congress’ approval in the Bipartisan Campaign Reform Act of 2002 (“BCRA” or “McCain-Feingold”) of disclosure for “electioneering communications” to justify the expansion of compulsory exposure to online discussion of issues. *We are now sliding down the slippery slope.* When in BCRA Congress expanded compulsory exposure to a narrow band of broadcast ads that clearly reference candidates on the eve of elections under the rubric of “electioneering communications,” it touted how narrowly tailored and clear the standard was. The Supreme Court accepted that at least the speech targeted was clear, narrow, and confined to election periods. *McConnell v. FEC* (2003). But S. 1 expands compulsory disclosure far beyond that narrow realm to

online discussion of *public policy and issues*, at any time, that do NOT even mention politicians or public officials.

- Paragraph 8 articulates perhaps the most insidious of purposes underlying S. 1's "Honest Ads" provisions. Paragraph 8 asserts that S. 1 is intended to force speakers to identify themselves in order to empower their ideological and "political opponents" and "fact-checkers." Why a "fact checker" needs to know the identity of a speaker in order to check facts strains logic. Furthermore, paragraph 8 asserts that compulsory exposure of online issue speakers will "create[] strong disincentives" to dissemination of "false," "inflammatory," and "contradictory" messages. Under the First Amendment, government cannot police the truth or falsity of citizen speech. And using compulsory exposure as a tool to moderate citizen speech is a constitutional non-starter.
- Paragraphs 9, 10 and 11 assert that the FEC has somehow left online election advertisements completely unregulated. Paragraph 11 asserts that "The Federal Election Commission, the independent Federal agency charged with protecting the integrity of the Federal campaign finance process by providing transparency and administering campaign finance laws, has failed to take action to address online political advertisements." This is not accurate. FEC regulations expressly require sponsor identification notices on all PAID online advertisements that advocate the election or defeat of candidates. *See* 11 C.F.R. 100.94; 155; Internet Communications, 71 Fed. Reg. 18,589,18,603 (Apr. 12, 2006). The FEC has even clarified that such notices are required on all online that can accommodate them either on the face of the ads (AO 2017-12, Take Back Action Fund) or, in the case of small items, the "click-through" and landing page mechanism (AO 2010-19, Google, Inc.). Because this finding is inaccurate, it cannot justify the draconian compulsory disclosure provisions of S. 1 – especially not speech about issues.
- Sec. 4202 would express the "sense of Congress" that S. 1's Honest Ads provisions advance transparency in "campaign spending by foreign nationals." But the bill goes far beyond "*campaign spending*." It would expand compulsory public exposure to each citizen's discussion, at any time, of *pure issues* devoid of any mention of politicians or campaigns or elections. Thus, the bill's substantive provisions do not honestly follow from the expressed predicate.
- Sec. 4205 is critically important and flawed. It proposes to amend the language of the "Press Exemption" in Sec. 301 (52 U.S.C. § 30101(22)) of the Federal Election Campaign Act. The "Press Exemption" has allowed traditional and new media to publish news articles and editorials free of FEC regulation. The bill's re-definition of the press entitled to exemption is underinclusive. It would not protect the First Amendment press rights of cable, satellite, moving pictures, online streaming services, or books. There have been sharp disagreements within the Commission over the exemption's applicability to documentary films and books, for example. Since S. 1 proposes to change the definition, any omission might be deemed intentional and therefore meaningful.

Furthermore, S. 1 purports to address foreign meddling, it does not clarify a critically important issue about foreign-owned and operated news organizations. Will S. 1 apply to

foreign-owned news sources such as BBC.com, DailyMail.co.uk, and many other online publications with well in excess of 50 million unique visitors? The New York Times Company is reported to have about 20 percent of foreign ownership – S. 1 does not make clear whether the *New York Times* and its online platform will be exempt.

- S. 1 also imposes upon broadcast, cable and satellite television companies, as well as major online platforms, an affirmative duty to “ensure” that no “foreign national” either “directly or indirectly” purchases any advertising space for electoral or policy speech on their platforms. This is a sweeping imposition of new police responsibility upon American media companies – at the pain of civil and criminal penalties if they fail.

Significantly, this profound imposition of police responsibility and criminal liability – both are accomplished in one provision – directly contradicts established policy codified in the Foreign Agents Registration Act (“FARA”) at 22 U.S.C. § 611 which EXEMPTS American media companies from legal responsibility for foreign propaganda that makes its way into their advertising. Sec. 611(d) of the FARA provides that “[t]he term ‘agent of a foreign principal’ does not include any news or press service or association organized under the laws of the United States or of any State or other place subject to the jurisdiction of the United States, or any newspaper, magazine, periodical, or other publication for which there is on file with the United States Postal Service information in compliance with section 3611 2 of title 39, published in the United States, solely by virtue of any bona fide news or journalistic activities, **including the solicitation or acceptance of advertisements, subscriptions, or other compensation therefor**, so long as it is at least 80 per centum beneficially owned by, and its officers and directors, if any, are citizens of the United States, and such news or press service or association, newspaper, magazine, periodical, or other publication, is not owned, directed, supervised, controlled, subsidized, or financed, and none of its policies are determined by any foreign principal defined in subsection (b) of this section, or by any agent of a foreign principal required to register under this subchapter.”

The FARA is America’s law that has specifically regulated foreign propaganda in the United States for 80 years. FARA assigns liability to the foreign agents who place or fund advertisements – not American press organizations. Yet S. 1 would, on a separate track, make American press organizations civilly and criminally liable for running an issue advertisement without confirming the nationality of the advertiser.

In addition to contradicting a parallel law on the books, the S. 1 proposal would change nearly 50 years of precedent at the FEC that has assigned legal responsibility for ad disclaimers to those funding the ads, not media platforms, and there are sound legal and policy reasons underlying that legal treatment. *See Exhibit 3, Concurring Statement of Commission Lee E. Goodman in MUR 7210 (Chesterland News).*

- The bill further makes media companies civilly and criminally liable for displaying sponsor identification on political ads and for “ensuring” that the sponsor notice “will continue to be displayed if a viewer of the advertisement shares the advertisement with others on that platform.” Thus the media organization is legally responsible even if an

individual strips a sponsorship notice from an online ad and shares the ad with others. This is fundamentally unfair.

- The bill defines the online media platforms subject to the new legal liabilities as those with “50,000,000 or more unique monthly United States visitors. That covers big platforms like WashingtonPost.com and NewYorkTimes.com, USAToday.com and the two large social media platforms obliquely referenced in S. 1. But media companies – old and new media – should not take any comfort that this law will be limited only to the big platforms for long. There are thousands of highly visited websites that sell advertising and that, collectively, are viewed by hundreds of millions of Americans. Thousands of other online advertising platforms reaching hundreds of millions of Americans would soon be viewed as a “loophole” in the law’s coverage. Regulatory avarice, also called “loophole closing,” would soon expand regulation to many other highly trafficked platforms and websites. Likewise, the bill does not define if multi-media platforms owned and operated by one media company will be treated as one platform or several platforms for purposes of triggering the 50 million visitor test.
- Finally, the Honest Ads provisions subject media companies and online speakers to the penalties set forth in Sec. 309 of the Act, 52 U.S.C. § 30109. The penalties for non-compliance range from civil fines and injunctions to imprisonment for “knowing and willful” violations.

It should come as no surprise that this extensive degree of regulatory burden and exposure to criminal liability would cause many media platforms to simply close their online platforms to any political advertising. The costs and burdens will simply not be worth the public service or revenues. Some already have done exactly that – sometimes to cheers and sometimes to jeers depending on which side of the ideological debate felt most disadvantaged. Likewise, certain speakers will simply choose not to speak. That is anti-democratic result. American democracy is worse off, not improved, when entire platforms for democratic speech and discourse are de-platformed or speakers choose not to speak because of government compelled disclosure and the attendant regulatory and legal burdens.

In sum, the Honest Ads provisions of S. 1 present numerous intractable policy, practical, and constitutional problems and I submit them to the Committee for its sober consideration.

3. Other Problematic Provisions of S. 1.

Other provisions of S. 1 are problematic:

- Altering the FEC from a six-member Commission to a five-member Commission would have several profound effects. First, it would turn control over the agency to the President. Second, it is intended to supercharge an aggressive enforcement posture against all politicians. Although I have not devoted substantial analysis here, it suffices to observe that S. 1 is intended to diminish vastly the First Amendment sensitivities within the FEC. Even FEC subpoenas that investigate and rummage around the internal affairs of private political organizations can violate profoundly important First

Amendment rights. Courts have so ruled. *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387-388 (D.C. Cir. 1981) (quashing FEC subpoena that intruded upon the privacy of political activities outside the agency's jurisdiction). Even subpoenas should have affirmative bi-partisan support. S. 1 removes all protections – not just partisan protections, but prudential and First Amendment protections as well.

Far from instilling confidence in the FEC, S. 1's revisions to the FEC would necessarily excite a newfound distrust in the decisions of the FEC. Currently, when the FEC does pursue enforcement, the agency never is accused of unfair partisanship. That would change were S. 1 enacted. That would not be constructive at any time, but certainly not during the current atmosphere of political polarization.

- Although S. 1 has an admirable goal of encouraging small dollar contributions, its public-funding provisions have been largely eclipsed and rendered less compelling by innovations in Internet fundraising. Small dollar donations have been supercharged by low-cost fundraising technologies and platforms such as ActBlue and WinRed. Technological innovation has made an old idea unnecessary. Unless the goal is to harness some kind of partisan advantage.

Additionally, S. 1 professes to provide public funding without “taxpayer” funds. It claims to use “civil penalties” paid by one American sector – business corporations for vaguely defined “malfeasance.” That appears to be discriminatory and the penalties to be assessed appear to have no relationship to the use to which the funds would be put. But more fundamentally, recall that Justice Roberts opined in upholding the Affordable Care Act that penalties are “taxes” by a different name. *National Federation of Independent Business v. Sebelius* (2012). Thus S. 1 might reconsider its promise that no “taxpayer” funds would be transferred to aspiring officeholders.

- The provisions requiring shareholder notice and board votes on political expenditures might on first blush appear designed to protect shareholders, but as a shareholder of a number of corporations, I understand that the advocates of these provisions do not have the value of my 401k at heart. Instead of protecting my shareholder value, the advocates of these provisions desire to encumber pro-business/pro-capitalism speech, cancel it, and punish corporations that do not adhere to current political orthodoxies on everything from environmental policy to taxes to more sensitive social issues. The compulsory exposure and boycott campaigns aim to use these provisions to **harm shareholder value**, not increase it. It would harm shareholder value in order to achieve political objectives. These provisions should be understood in that light.

4. S. 1 Misses Opportunities to Empower People and Strengthen Democracy.

S. 1 is principally a pro-regulatory approach to speech limitation to achieve what its advocates perceive as better democratic results. I obviously disagree with the speech limitations. But I also see missed opportunities for achieving better democratic results, for example:

- Low cost Internet-based advertising platforms reduce the cost of political speech and activity and can lower the overall cost of competitive issue and electoral campaigning, especially for populist organizations and individuals. But S. 1's provisions close effective Internet-based platforms and deter people from using them. Congress could encourage more populist online political activity by deregulating it.
- Internet fundraising platforms supercharge low dollar fundraising. Congress could free internet fundraising platforms from cumbersome corporate in-kind contribution rules to empower small dollar fundraising through online platforms.
- Political parties are critically important democratic institutions. Congress could strengthen national political parties by, for example, eliminating coordinated spending limits. Allow the parties, which abide by contribution limits, to work with their candidates in constructive ways. The parties are constructive institutions and we need to augment constructive institutions now more than ever.
- State and local political parties harness and empower populist political participation. Congress could strengthen state and local political parties by increasing the \$10,000 federal contribution limit and removing the presumption that state and local parties are "affiliated."

Conclusion

The compulsory disclosure and related provisions of S. 1 represent a vast expansion of regulation and restriction of issue speech in America. It is important for the Congress to understand the social costs and constitutional doubts that necessarily are implicated. I am happy to answer any questions.

-end-



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

NOV 26 2013.

Neil P. Reiff, Esq.
Sandler, Reiff, Young & Lamb, P.C.
1025 Vermont Avenue NW
Suite 300
Washington, DC 20005

RE: MUR 6684
Gregg for Indiana, *et al.*

Dear Mr. Reiff:

On November 8, 2012, the Federal Election Commission notified your clients, Gregg for Indiana and John Gregg, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied your clients, the Commission, on November 19, 2013, voted to dismiss this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009).

If you have any questions, please contact Kasey Morgenheim, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

William A. Powers
Assistant General Counsel

Enclosure
Factual and Legal Analysis

13044350459

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4
5 **RESPONDENTS:** Gregg for Indiana
6 John Gregg

MUR 6684

7
8 **I. GENERATION OF MATTER**

9 This matter was generated based by a Complaint filed with the Federal Election
10 Commission ("Commission") by James R. Holden. See 2 U.S.C. § 437g(a)(1). This matter
11 involves allegations that John Gregg, the 2012 Democratic candidate for governor of Indiana,
12 and Gregg for Indiana, his state campaign committee, violated the Federal Election Campaign
13 Act of 1971, as amended (the "Act"), when they paid for an advertisement that allegedly
14 attacked Mike Pence, Gregg's Republican opponent, and Richard Mourdock, the Republican
15 candidate for U.S. Senate from Indiana. Public communications that "refer to a candidate for
16 federal office and that promote, attack, support, or oppose ('PASO') a candidate for that office,"
17 are considered "federal election activity" — a category of activities required to be paid for with
18 funds subject to the limitations and prohibitions of the Act. See 2 U.S.C. §§ 431(20)(A)(iii),
19 441i(f)(1). Gregg and Gregg for Indiana maintain that they did not violate the Act or
20 Commission regulations because the advertisement does not "attack" or "oppose" Mourdock.
21 The Commission exercises its prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821
22 (1985) and dismisses the allegation that Gregg for Indiana and John Gregg violated 2 U.S.C.
23 § 441i(f)(1).

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1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Factual Background**

3 The Complaint asserts that the Respondents violated 2 U.S.C. § 441i(f) and 11 C.F.R.
4 § 300.71 by using non-federal funds to pay for a public communication that “attacked” a federal
5 candidate. Compl. at 1. Unlike the Act, Indiana campaign finance law permits state candidates
6 to accept unlimited individual contributions and contributions of up to \$5,000 from corporate and
7 labor organizations, and therefore funds raised by a state candidate may not be federally
8 permissible. See IND. CODE § 3-9-2-4; see also [http://campaignfinance.in.gov/PublicSite/](http://campaignfinance.in.gov/PublicSite/AboutReporting.aspx)
9 [AboutReporting.aspx](http://campaignfinance.in.gov/PublicSite/AboutReporting.aspx). A review of Gregg for Indiana’s disclosure reports filed with the Indiana
10 Secretary of State confirmed that the Committee accepted corporate contributions, labor
11 organization contributions, and individual contributions in excess of the federal limits. See
12 <http://campaignfinance.in.gov/PublicSite/SearchPages/CommitteeDetail.aspx?OrgId=6174>.

13 The advertisement, entitled “Back and Forth,” began airing on October 30, 2012. Compl.
14 at 2. Public records attached to the Complaint show that Gregg for Indiana paid approximately
15 \$260,000 to air the advertisement through November 6, 2012. Compl., Attach. 2. The
16 advertisement generally provides a series of comparative statements and positions associated
17 with Mourdock, a candidate for federal office, and Pence, Gregg’s gubernatorial opponent:

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Male voiceover:	Richard Mourdock
Video clip of Mourdock:	"I think the Tea Party movement is one of the most exciting political activities in my lifetime."
Male voiceover:	Mike Pence
Video clip of Pence: On-screen news banner: CONGRESSIONAL TEA PARTY CANDIDATES RALLYING IN WASHINGTON TODAY	"Uhh, we'll welcome the Tea Party with open arms."
Male voiceover:	How they'd govern...
Video clip of Mourdock: On-screen news banner: REPUBLICAN REBELLION MOURDOCK: MUST CHANGE THE WAY SENATE LEADERSHIP THINKS	"To me, the highlight of politics, frankly, is to inflict my opinion on someone else."
Video clip of Pence:	"Let's go pick a fight."
Male voiceover:	And even after Mourdock said pregnancy from rape was something...
Video clip of Mourdock: On-screen news banner: INDIANA SENATE DEBATE RICHARD MOURDOCK Indiana, Candidate for U.S. Senate	"...God intended to happen."
Video clip of Pence:	"I support his candidacy for the Senate."
Male voiceover: On-screen photo of John Gregg Caption: JOHN GREGG FOR GOVERNOR PAID FOR BY GREGG FOR INDIANA	You can stop the Tea Party with Governor John Gregg.

1
2 Gregg and Gregg for Indiana assert that "Back and Forth" does not "attack" or "oppose"
3 Mourdock and therefore could be paid for with non-federal funds without violating the Act.
4 Resp. at 2. The Response contends that by including Mourdock in the advertisement, the Gregg
5 campaign's goal was to link Pence with Mourdock's views regarding the Tea Party and abortion,
6 which had received significant national media attention in the week before the advertisement
7 began airing. *Id.* The Response asserts that at the time of the advertisement's airing,
8 Mourdock's campaign had fallen significantly behind his opponent, while Pence's response to
9 Mourdock's views had become an issue in the Indiana gubernatorial election. *Id.* at 1-2. The

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1 Response also claims that the content of the advertisement demonstrates it did not “attack” or
2 “oppose” Mourdock. *Id.* at 3. Not only did the advertisement avoid a reference to Mourdock’s
3 candidacy, but, as the Response points out, the final tagline of the advertisement — “You can
4 stop the Tea Party with Governor John Gregg” — only mentions Gregg. *Id.* The Response
5 further asserts that, even if the advertisement presents a close call as to whether it attacks or
6 opposes Mourdock, the Commission should not use the enforcement process to define FASO, a
7 standard for which the Commission has purportedly failed to provide any meaningful guidance.
8 *Id.* at 3-4.

9 **B. Legal Analysis**

10 The sole issue in this matter is whether the “Back and Forth” advertisement attacks or
11 opposes federal candidate Richard Mourdock, such that Gregg for Indiana was required to pay
12 for the advertisement with federal funds.

13 The Act prohibits a candidate for state or local office or an agent of such candidate from
14 spending any funds for public communications that qualify as “federal election activity”
15 (“FEA”), unless the funds are subject to the limitations, prohibitions, and reporting requirements
16 of the Act. 2 U.S.C. § 441i(f)(1); 11 C.F.R. § 300.71. Public communications are considered
17 FEA, and thus regulable under the Act, if they refer to a candidate for federal office and they
18 promote, attack, support, or oppose a candidate for that office, regardless of whether the
19 communication expressly advocates a vote for or against a candidate.¹ 2 U.S.C.
20 § 431(20)(A)(iii). Public communications are not FEA, however, and thus not federally
21 regulated, if they are in connection with an election for a state or local office and refer only to the

¹ The term “public communication” is defined as a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public; or any other form of general public political advertising. 2 U.S.C. § 431(22).

1 candidates for the state or local office; but do not promote, attack, support, or oppose any
2 candidate for federal office. 2 U.S.C. § 441i(f)(2); 11 C.F.R. § 300.72.

3 Congress included the PASO standard in the Bipartisan Campaign Reform Act of 2002
4 ("BCRA"), but neither Congress nor the Commission has defined the concept. BCRA lacked a
5 definition of the PASO terms and the Commission has twice proposed but not adopted
6 definitions for PASO. *See* Prohibited and Excessive Contributions, 67 Fed. Reg. 35,654, 35,681
7 (May 20, 2002) (Notice of Proposed Rulemaking); Coordination, 74 Fed. Reg. 53,893, 53,898-
8 900 (Oct. 21, 2009) (Notice of Proposed Rulemaking).² Despite the lack of a statutory or
9 regulatory definition, the PASO terms themselves "clearly set forth the confines within which
10 potential party speakers must act in order to avoid triggering the provision," and they "provide
11 explicit standards for those who apply them and give the person of ordinary intelligence a
12 reasonable opportunity to know what is prohibited." *McConnell v. FEC*, 540 U.S. 93, 170 n.64
13 (2003).

14 In a series of advisory opinions that applied the PASO standard, the Commission has
15 determined that the mere identification of an individual as a federal candidate in a public
16 communication — such as when a federal candidate endorses a state candidate — does not, by
17 itself, promote, attack, support, or oppose the federal candidate. *See* Advisory Op. 2007-34
18 (Jackson); Advisory Op. 2007-21 (Holt); Advisory Op. 2003-25 (Weinzapfel). In Advisory
19 Opinion 2009-26 (Coulson), the Commission provided guidance on when a federal candidate's
20 state committee or state office account could pay for a communication. The Commission

² Despite the lack of a definition, Congress clearly did not intend the FEA provisions to prohibit "spending non-Federal money to run advertisements that mention that [state candidates] have been endorsed by a Federal candidate or say that they identify with a position of a named Federal candidate, so long as those advertisements do not support, attack, promote or oppose a Federal candidate." Statement of Sen. Feingold, 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002).

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1 concluded that non-federal funds could be used to pay for a “health care legislative update” letter
2 because the communication was solely related to state officeholder duties, did not solicit any
3 donations, and did not expressly advocate the candidate’s election or the defeat of her opponents.
4 Advisory Op. 2009-26 (Coulson) at 8. The Commission did state, however, that the following
5 phrases could be construed to promote or support Representative Coulson: (1) “I have remained
6 committed to making progress for the residents of this State,” and (2) “I will continue to look for
7 innovative ideas to help improve the healthcare system in Illinois, as well as help improve the
8 lives of those who need our care.” But the Commission determined that non-federal funds could
9 be used to pay for the letter because the adjectives were used to “address Coulson’s past and
10 ongoing legislative actions as a state officeholder” rather than her qualities as a candidate. *Id.* at
11 9.

12 Here, the advertisement at issue focuses on the Indiana gubernatorial election,
13 specifically in opposition to Pence and in support of Gregg. Mourdock’s statements are included
14 in a manner that links Pence to Mourdock’s views and party affiliations, and the statements are
15 offered without commentary. Although Gregg attacks Pence by linking his policy positions with
16 Mourdock, the advertisement’s tagline — “You can stop the Tea Party with Governor John
17 Gregg” — emphasizes the ad’s purpose, to support Gregg.

18 Assuming, *arguendo*, that the advertisement could be interpreted as opposing Mourdock
19 under the PASO standard, the ad focuses on the Indiana gubernatorial election and does not
20 exhort viewers to vote against Mourdock. For these reasons, the Commission exercises its
21 prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985) and dismisses the
22 allegation that Gregg for Indiana and John Gregg violated 2 U.S.C. § 441i(f)(1).

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Gregg for Indiana
John Gregg

)
) MUR 6684
)
)

STATEMENT OF REASONS OF
CHAIRMAN LEE E. GOODMAN

In this matter, the Commission was asked to consider whether an independent advertisement run by a state candidate in a gubernatorial race criticizing his opponent violated federal law.

The Complaint alleged that John Gregg, the Democratic candidate for governor in the State of Indiana, and his campaign committee, Gregg for Indiana ("the Respondents"), violated the Federal Election Campaign Act of 1971, as amended ("the Act"), by using state campaign funds to pay for a television advertisement referencing a federal candidate.¹ The Response denied these allegations, asserting that the advertisement and its funding were permissible because the advertisement did not promote, attack, support, or oppose ("PASO") a federal candidate.²

The advertisement in question was titled "Back and Forth." The advertisement featured a series of alternating video clips of Gregg's Republican challenger for governor, Mike Pence, and the Republican candidate for the U.S. Senate, Richard Murdoch.³ The clips replayed original statements made by Pence and Murdoch on specific issues, in their own words and without edits, and the clip of Murdoch did not exhort viewers to vote for him or against his federal opponent.⁴

The video clip of Murdoch was replayed without editorial commentary about Murdoch.⁵ Other than replaying video footage of Murdoch speaking, at no point did Gregg's advertisement

¹ MUR 6684 (Gregg for Indiana), Complaint.

² MUR 6684 (Gregg for Indiana), Response.

³ See MUR 6684 (Gregg for Indiana), Complaint at 2 (*citing* <http://www.greggforgovernor.com/media/video>); see also MUR 6684 (Gregg for Indiana), First General Counsel's Report at 3 (transcript of the advertisement in question).

⁴ *Id.*

⁵ *Id.*

comment on Murdoch, express an editorial viewpoint on Murdoch, or exhort viewers to vote for or against Murdoch.⁶ After comparing video clips of Pence with Murdoch, the advertisement concluded with the tagline “You can stop the Tea Party with Governor John Gregg.”⁷

The Commission dismissed the matter on the grounds that even “[a]ssuming, *arguendo*, that the advertisement could be interpreted as opposing [the federal candidate] under the PASO standard, the ad focuses on the Indiana gubernatorial election and does not exhort viewers to vote against [the federal candidate].”⁸ I voted for this rationale because I agree that the advertisement focused on the gubernatorial election and believe that this matter should be dismissed. I write separately, however, to express my view that the advertisement in question did not PASO a federal candidate and to raise concerns about the continuing constitutionality of restrictions on independent speech by state and local candidates.

A. “Back and Forth” Does Not Promote, Attack, Support, or Oppose a Federal Candidate

Under the Act, a “candidate for State or local office . . . may not spend any funds for a communication described in [2 U.S.C. § 431(20)(A)(iii)] unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.”⁹ Section 431(20)(A)(iii) describes “a public communication that refers to a clearly identified candidate for Federal office . . . and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office”¹⁰ Thus, the Act requires that any public communication sponsored by a state or local candidate that promotes, attacks, supports, or opposes a candidate for federal office be paid for with funds subject to the Act’s source and amount limitations.

It is not enough under the PASO standard merely to identify a federal candidate in a communication that focuses on a state election.¹¹ The PASO standard requires the presentation of the sponsor’s editorial viewpoint about the federal candidate. A state candidate’s presentation of historical video clips of a federal candidate in his own words without expressing any independent commentary by the state candidate about that federal candidate — and moreover to

⁶ *Id.*

⁷ *Id.*

⁸ MUR 6684 (Gregg for Indiana), Factual & Legal Analysis at 6.

⁹ 2 U.S.C. § 441i(f)(1); *see also* 11 C.F.R. § 300.71.

¹⁰ 2 U.S.C. § 431(20)(A)(iii); *see also* 11 C.F.R. § 300.71.

¹¹ *See* MUR 6113 (Kirby Hollingsworth), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 7 (“Merely mentioning or referencing a federal candidate in a state candidate advertisement is not sufficient to transform the promotion of the state candidacy into a PASO communication.”); *see also* MUR 6207 (Mark DeSaulnier), Statement of Reasons of Chairman Matthew S. Petersen, Vice-Chair Cynthia L. Bauerly, and Commissioners Caroline C. Hunter, Donald F. McGahn II, and Ellen L. Weintraub at 4-5; Advisory Opinion 2009-26 (Coulson) at 7; Advisory Opinion 2007-34 (Jackson) at 3; Advisory Opinion 2007-21 (Holt) at 4; Advisory Opinion 2003-25 (Weinzapfel) at 4.

express an explicit point about the state candidate's own election -- does not PASO the federal candidate. The fact that certain historical video clips of a federal candidate's remarks may have relevance to the state election and may be perceived by some viewers as flattering or unflattering of the federal candidate is not sufficient to constitute an editorial message about the federal candidate by the state candidate sponsoring the communication. "Back and Forth" presented raw original video of a federal candidate, without further commentary about the federal candidate, and expressed an explicit message about the two state candidates in a state election. Thus, "Back and Forth" did not promote, attack, support, or oppose any candidate for federal office.

An alternative approach would require the Commission to evaluate the subjective message and intent of such advertisements based upon viewer perceptions. In *Buckley v. Valeo*, the Supreme Court observed that restrictions that put speakers "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning . . . 'offer[] no security for free discussion.'"¹² The Court in *FEC v. Wisconsin Right to Life, Inc.* supported this view, holding that "the proper standard for [evaluating political speech] must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect."¹³ Accordingly, "[t]he Commission is reluctant to make these difficult subjective determinations if they can be avoided."¹⁴ I see no reason to abandon that reluctance here.

B. Section 441i(f) As Applied to State and Local Campaigns Is Constitutionally Dubious

I write also to observe that section 441i(f) is constitutionally dubious in light of *Citizens United v. FEC* and its progeny.¹⁵ *Citizens United* held that Congress cannot limit independent political speech without a compelling state interest, and that "[l]imits on independent expenditures . . . have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption."¹⁶ By doing so, *Citizens United* and its progeny permitted individuals, organizations and corporations to make unlimited expenditures expressly advocating the election or defeat of federal candidates, and to make unlimited contributions to groups that make such expenditures.¹⁷ The only restriction on such expenditures is that they must be independent and that the Commission can require independent speakers to file expenditure-specific reports disclosing each expenditure.

¹² 424 U.S. 1, 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

¹³ 551 U.S. 449, 469 (2007) ("*WRTL*").

¹⁴ Explanation and Justification: Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35300 (July 6, 1995).

¹⁵ 558 U.S. 310 (2010).

¹⁶ *Id.* at 357; see also *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (striking limitation on non-coordinated, independent expenditures by political parties).

¹⁷ See *id.*

Section 441i(f) imposes federal source and amount restrictions on state and local candidate committees -- as a class of speakers -- that PASO a candidate for federal office. It does not distinguish between coordinated communications and communications that are made independent of any federal candidate. Thus as with the challenged statute in *Citizens United*, "Congress has created [a] categorical ban[] on speech that [is] asymmetrical to preventing *quid pro quo* corruption."¹⁸ Accordingly, *Citizens United* raises serious constitutional doubt regarding the continuing validity of section 441i(f).

In *McConnell v. FEC*, the Court upheld section 441i(f)'s categorical restriction on state and local campaign committees, reasoning that Congress had but one sufficiently strong interest: preventing the circumvention of other contribution limits.¹⁹ The circumvention interest the Court identified in *McConnell* was a third-order consequence based on the following logic chain:

- Contributions to candidates pose a risk of *quid pro quo* corruption, therefore they may be limited;
- Once contributions directly to candidates were limited, would-be corruptors might turn to contributions to national parties to curry favor with federal candidates, thus all contributions to national parties could be limited;
- Once contributions to national parties were limited, would-be corruptors might turn to state and local political parties to corrupt federal officeholders, therefore contributions used for a broad category of federal election activity could be limited; and
- Finally, once contributions to state and local parties were limited, would-be corruptors could conceivably turn to state and local candidates to corrupt federal candidates, therefore contributions that might fund communications that PASO federal candidates could be limited.²⁰

Subsequently, *WRTL* held "a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny."²¹ The apparent prophylaxis-upon-prophylaxis-upon-prophylaxis justification countenanced by the Court in *McConnell* has not been tested following *WRTL* and *Citizens United*, particularly as applied to state and local campaigns that for all practical and technical legal purposes are more like independent expenditure committees than

¹⁸ *Citizens United*, 558 U.S. at 361.

¹⁹ 540 U.S. 93, 185 (2003).

²⁰ See *McConnell*, 540 U.S. at 268 (2003) (Thomas, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("The joint opinion's handling of § 323(f) is perhaps most telling, as it upholds § 323(f) only because of 'Congress' eminently reasonable *prediction* that . . . state and local candidates and officeholders will become the next conduits for the soft-money funding of sham issue advertising.' *Ante*, at 684 (emphasis added). That is, this Court upholds a third-order anticircumvention measure based on Congress' anticipation of circumvention of these second-order anticircumvention measures that might possibly, at some point in the future, pose some problem.").

²¹ 551 U.S. at 479.

the kinds of organizations that present direct circumvention risks. Thus, *WRTL* and *Citizens United* cast significant constitutional doubt over section 441i(f)'s restrictions.²²


LEE E. GOODMAN
Chairman

Mar. 26, 2014
Date

²² Furthermore, even if Section 441i(f) remains facially valid, there is no hint in the content of the advertisement that would indicate that the advertisement served any circumvention objective. *See* MUR 6113 (Kirby Hollingsworth), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 7 (dismissing similar allegations in part on the grounds that “there is no evidence that non-federal funds were being ‘laundered’ through the [Respondent’s] committee for the purpose of financing ads favorable to the [federal candidate referenced]” in order to avoid raising potentially serious constitutional questions).



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Frank Durkalski, *et al.*

)
)
) MUR 7210

**CONCURRING STATEMENT OF
COMMISSIONER LEE E. GOODMAN**

In this matter, the complaint alleged that *Chesterland News*, a newspaper in Chesterland, Ohio, ran two advertisements expressly advocating the defeat of Hillary Clinton which were paid for by Frank Durkalski but which lacked the disclaimers required by the Federal Election Campaign Act of 1971, as amended (the "Act").¹ The Commission's Office of General Counsel ("OGC"), consistent with over 35 years of precedent, recommended the Commission find no reason to believe that *Chesterland News* violated the Act on the basis "that a media entity has no duty to ensure a paid political ad complies with the Act's disclaimer requirements; instead, the obligation rests with the person placing the ad."²

Commissioners Weintraub and Walther objected to OGC's recommendation and, on December 12, 2017, Commissioner Weintraub proposed edits to the Factual and Legal Analysis recommended by OGC, attempting to change the no reason to believe finding as to *Chesterland News* to a discretionary dismissal under *Heckler v. Chaney*.³ The proposed edits deleted the language asserting the Commission's longstanding position that press entities are not responsible for ensuring paid political ads comply with the Act's disclaimer requirements. Commissioner Weintraub's proposal failed by a vote of 2 to 2.⁴

Returning to the matter, on January 9, 2018, I moved approval of OGC's original recommendation: no reason to believe *Chesterland News* violated the Act based on the

¹ 52 U.S.C. § 30120 requires persons paying for communications that expressly advocate the election or defeat of a clearly identified federal candidate or solicits any contribution to include a disclaimer identifying the person who paid for the communication.

² See MUR 7210 (Frank Durkalski, *et al.*), First Gen. Counsel's Rpt. at 2.

³ See MUR 7210 (Frank Durkalski, *et al.*), Certification (Dec. 12, 2017).

⁴ *Id.* (Commissioners Weintraub and Walther voted to approve Commissioner Weintraub's proposed edits; Commissioners Goodman and Hunter dissented).

established legal rule that press publications are not legally responsible for the sponsor's disclaimer. That motion failed by a vote of 3 to 2.⁵ Unable to agree upon the legal rationale with respect to *Chesterland News*, the Commission closed the file.⁶

I write separately to express my strong disagreement with any proposal to impose civil and criminal liability upon press entities, as well as their new media counterparts, when they agree to make their publications available for political advertisements.

Historically, responsibility for disclaimers has been placed solely on the person who pays for the advertisement. For example, in MUR 5158, the complaint alleged that a political committee failed to include the proper disclaimer on a television advertisement.⁷ The committee responded that the allegation should be dismissed because the media consultant was contractually required to place disclaimers on the advertisement, and thus the committee was not at fault.⁸ However, the Commission rejected that argument because "committees, not vendors, are responsible for ensuring that proper disclaimers appear on communications."⁹ Accordingly, the Commission found reason to believe the committee violated the disclaimer provision of the Act.¹⁰

The Commission consistently has applied this general rule to absolve press organizations of legal liability for over 35 years. For example, as far back as the 1980s, when the Commission enforced the disclaimer rules in *Furgatch*, the Commission and federal courts held only the ad sponsor legally responsible.¹¹ Mr. Furgatch had sponsored several advertisements, one without a disclaimer, in newspapers around the country, including the *New York Times* and *Boston Globe*. The Commission, which generated the enforcement matter *sua sponte*, did not name the newspapers as respondents or seek to impose liability upon them.¹²

A decade later, in 1994, the Commission found no reason to believe that the *Jewish Exponent*, a print publication in Philadelphia, was liable for publishing an advertisement paid for

⁵ MUR 7210 (Frank Durkalski, *et al.*), Certification at ¶ 1 (Jan. 9, 2018) (Chair Hunter and Commissioners Goodman and Petersen voted to approve OGC's recommended Factual and Legal Analysis; Commissioners Walther and Weintraub dissented).

⁶ *Id.* at ¶ 2.

⁷ MUR 5158 (Brady Campaign to Prevent Gun Violence, *et al.*), Factual and Legal Analysis at 1.

⁸ MUR 5158 (Brady Campaign to Prevent Gun Violence, *et al.*), Response at 4-5 (Nov. 9, 2004).

⁹ MUR 5158 (Brady Campaign to Prevent Gun Violence, *et al.*), Factual and Legal Analysis at 9.

¹⁰ MUR 5158 (Brady Campaign to Prevent Gun Violence, *et al.*), Certification (Nov. 4, 2003).

¹¹ See *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987); MUR 1438 (Furgatch).

¹² See MUR 1438 (Furgatch), Certification (Apr. 23, 1982).

by an authorized committee without the required disclaimer.¹³ The Commission made clear that “[u]nder the Act, however, it is Respondent’s [the committee’s] obligation to ensure that their advertisement includes the appropriate disclaimer.”¹⁴ Subsequently, the Commission found probable cause to believe that the political committee violated the Act’s disclaimer requirements.¹⁵

And in 2002 the Commission found no reason to believe that radio stations WORD and WSPA of Greenville, South Carolina, violated the Act when a political committee failed to include the required disclaimer in its advertisements.¹⁶ The Commission concluded that the radio stations’ “failure to treat the advertisement as a political advertisement does not implicate [the radio stations] in any violation of the Act or regulations.”¹⁷

In 2005, the Commission issued an advisory opinion concluding that a candidate committee could pay a radio station for broadcast time so the candidate could host a radio show.¹⁸ The committee asked the Commission: “what is the proper disclaimer that the Committee must include on all broadcasts?”¹⁹ The Commission stated that the *committee* was required to include the disclaimer, not the radio station.²⁰ The Commission explained that persons who do not have editorial control over the content of the program, and do not pay for or authorize the communication, are not required to make disclaimers.²¹ Thus, responsibility for disclaimers rests solely upon the person paying for and controlling the content of the advertisement.

Indeed, in over 40 years of enforcing the Act’s disclaimer requirements, the Commission has never held a press entity legally responsible for disclaimers in its own content or publication of paid ads.²² The Commission’s approach has conformed to the Act which as a general rule

¹³ MUR 3682 (Fox for Congress Committee, *et al.*), Factual and Legal Analysis at 4; MUR 3682 (Fox for Congress, *et al.*), Certification (March 4, 1994).

¹⁴ MUR 3682 (Fox for Congress Committee, *et al.*), Factual and Legal Analysis at 4.

¹⁵ MUR 3682 (Fox for Congress, *et al.*), Certification (Dec. 9, 1994).

¹⁶ MUR 5147 (Spartanburg County Republican Party), First Gen. Counsel’s Rpt. (Apr. 22, 2002); MUR 5147 (Spartanburg County Republican Party), Certification (May 8, 2002) (approving First Gen. Counsel’s Rpt.).

¹⁷ MUR 5147 (Spartanburg County Republican Party), First Gen. Counsel’s Rpt. (adopted by the Commission).

¹⁸ See Advisory Opinion 2005-18 (Rcyys).

¹⁹ *Id.* at 1.

²⁰ See *id.* at 5.

²¹ See *id.*

²² See, e.g., MUR 4863 (WABC AM 770, *et al.*), First Gen. Counsel’s Rpt. (May 27, 1999); MUR 4863 (WABC AM 770, *et al.*), Certification (June 3, 1999).

holds the person who makes an expenditure legally responsible for the legal compliance of her expenditure. Section 30120 imposes the responsibility squarely upon the person making the disbursement to disseminate the ad because the disclaimer is required to be included in the text of the ad and it is required to include voice-overs and pictures of ad sponsors—content exclusively within the control of the ad sponsor.²³

Nothing in the Act or its legislative history even suggests that Congress intended to impose upon press organizations the responsibility to police disclaimers in political advertising. Requiring press organizations to determine, before running an advertisement, if its text contains express advocacy, requires a disclaimer, or contains an adequate disclaimer would be a wholly unreasonable burden. Since a six-member Commission cannot always agree on what constitutes express advocacy, the *Chesterland News* cannot reasonably be expected to censor potentially hundreds of advertisements until its editors and lawyers are satisfied the sponsors have complied with the Act's disclaimer requirements.

Moreover, to hold press organizations legally liable for including such information would introduce an entirely extra-statutory realm of vicarious liability under the Act. There is no indication in the language of the Act or its legislative history that Congress intended to impose vicarious liability upon press entities. Instead, Congress expressly exempted press and media organizations from regulation under the Act, and this is fully consistent with the speech rights conferred by the Free Press Clause of the First Amendment and the absence of any articulated corruption justification.²⁴

Even when they sell advertising space, press entities retain their Constitutional and statutory protections.²⁵ The Supreme Court long ago held that press entities have First Amendment protection when publishing political advertisements. In 1964, the Supreme Court established clear First Amendment rights for press entities when they publish political advertisements in *New York Times Co. v. Sullivan*.²⁶ The *Times* published a political advertisement that a public official in Alabama claimed was libelous. The Court distinguished commercial speech from paid political advertisements and stated that the "advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection to which the *Times* was entitled."²⁷

²³ See 52 U.S.C. § 30120(a), (c), (d).

²⁴ The Press Exemption: 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 11 C.F.R. 100.73, 100.132 (exempting news stories, commentary, or editorials distributed through facilities of press organizations from the definition of expenditure and contribution).

²⁵ The Commercial Vendor Exemption: 52 U.S.C. § 30101(8)(A), 11 CFR §§ 100.52(d)(1), 100.111(e)(1), MUR 5474 (Dog Eat Dog Films, Inc.). In sum, newspapers and other media are exempt from § 30120(a) under two overlapping and independent exemptions, the Press Exemption and the Commercial Vendor Exemption.

²⁶ 376 U.S. 254 (1964).

²⁷ *Id.* at 266, 271.

Those who would point to the Federal Communications Commission's ("FCC") political file rules for broadcast licensees as a guide to imposing liability upon all media entities under the Act might overestimate its usefulness. The Supreme Court, by a 5 to 4 vote, upheld the regime against a *facial* challenge in *McConnell v. FEC*, but the Court left open *as applied* challenges,²⁸ and the Court's First Amendment jurisprudence has been trending to a decidedly more protective stance.²⁹ A more apt comparison may be the Foreign Agents Registration Act, which requires disclaimers on propaganda sponsored by foreign speakers, and which expressly exempts American press organizations from regulation as domestic agents of foreign ad sponsors as well as legal responsibility for the disclaimers.³⁰ Likewise, Section 230 of the Communications Decency Act generally protects online media platforms from civil liability based upon the content posted by third-party users.³¹

Contrary to these established principles, two of my colleagues supported a legal analysis premised upon the authority of the Commission to impose civil and criminal liability on the press as a condition of providing advertising space to political speakers. That is the flawed legal theory underlying the proposed Factual and Legal Analysis that I voted against.

Advertising platforms emphatically are not legally responsible under the Act for compliance with FEC disclaimers. To the extent the edits proposed in this matter and the split vote signal a renewed effort by some to change current law to impose civil and criminal liability upon traditional press organizations like *Chesterland News*, or to new media platforms like Facebook and Twitter, whether by prosecutorial fiat,³² rulemaking or legislation, I am confident

²⁸ 540 U.S. 93 (2003). The Supreme Court, by a 5 to 4 vote, held that the political file regime codified in the Bipartisan Campaign Reform Act of 2002, which requires broadcast licensees to maintain a public file of persons who request broadcast time for political advertisements, was facially constitutional because the administrative burdens were minimal for licensees, but left open *as applied* challenges. Chief Justice Rehnquist dissented arguing that the majority failed to apply any recognizable First Amendment analysis to the provision. *Id.* at 359. The D.C. District Court panel that first ruled on the case held that the political file provision did not serve a substantial governmental interest to outweigh the possibility of infringement on First Amendment rights. *McConnell v. FEC*, 251 F. Supp. 2d 176, 378 (D.D.C. 2003).

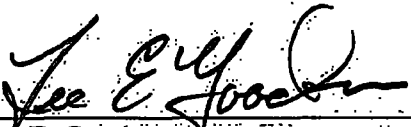
²⁹ See, e.g., *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017); *McCutcheon v. FEC*, 134 S.Ct. 1434 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (striking corporate ban on electioneering communications in *as applied* challenge left open by *McConnell*).

³⁰ 22 U.S.C. § 611(d).

³¹ 47 U.S.C. § 230.

³² Commissioner Weintraub's proposal to change 40 years of law in this enforcement matter was procedurally improper even if the new legal approach had substantive merit (it does not). *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 254-55 (2012); *CBS Corp. v. FCC*, 663 F.3d 122, 138 (3rd Cir. 2011), cert. denied, 132 S.Ct. 2677 (2012) (holding that an agency "cannot change a well-established course of action without supplying notice of and a reasoned explanation for its policy departure."). See generally HARVEY SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT (2001).

such efforts will fail as a matter of Constitutional law, faithful implementation of the Act, and tolerable public policy.³³


Lee E. Goodman
Commissioner

Feb. 12, 2018
Date

³³ Renewed debate within the Commission over the freedom of press organizations, and the boundaries of that freedom, have been cause for concern. Certain Commissioners have fought consistently to expand Commission authority to regulate and punish press entities under the Act, ranging from Fox News to Grand Central Publishing to independent filmmakers. *See, e.g.*, Agenda Document 16-43-C (Memorandum to proposed amendment to Technical Modernization NPRM) (Sept. 29, 2016). I proposed amendments to 11 CFR 100.73 and 100.133 to include satellite television and radio, internet-enable applications, motion pictures, and books in the press exemption. The motion to amend Agenda Document No. 16-43-B to include the above amendments in the Notice of Proposed Rulemaking failed by a vote of 3-3 (Commissioner Goodman, Hunter, and Petersen voting to approve the amendments while Commissioners Ravel, Walther, and Weintraub voted against); Agenda Document No. 16-64-A (Minutes of an Open Meeting of the Federal Election Commission) (Sept. 29, 2016); *see also* Advisory Opinion 2014-06 (Ryan for Congress), Concurring Statement of Chairman Lee E. Goodman and Commissioners Matthew S. Petersen and Caroline C. Hunter; MUR 6952 (Fox News), Statement of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman (June 28, 2016); MUR 6952 (Fox News), Supplemental Statement of Reasons of Commissioner Lee E. Goodman (June 30, 2016); MUR 6779 (Highway 61), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Lee E. Goodman and Caroline C. Hunter (April 14, 2016); MUR 6779 (Highway 61), Concurring Statement of Commissioner Lee E. Goodman (April 18, 2016); MUR 6703 (WCVB-TV), Statement of Reasons of Vice Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen; MUR 6320 (John Gomez, *et al.*).