INSTITUTE FOR FREE SPEECH

Testimony of the
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on
American Confidence in Elections: Protecting Political Speech
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Chairman Steil, Ranking Member Morelle, and members of the Committee on House Administration, on behalf of the Institute for Free Speech, thank you for inviting me to testify at this hearing on the "American Confidence in Elections: Protecting Political Speech."

I. Introduction

I have the distinct pleasure of working and living with issues related to protecting political speech every day. The Institute for Free Speech is a nonpartisan, nonprofit, 501(c)(3) organization focused on promoting and protecting the First Amendment rights of free speech, press, assembly, and petition, particularly in the political arena. I founded the Institute in 2005, after completing my term as a Commissioner on the Federal Election Commission. Even at that time, it was clear to me that the public is greatly misinformed about laws regulating political speech, including their real-world consequences. The Institute works tirelessly to bring an honest, nonpartisan approach to these issues.

I commend the Committee for its work developing the American Confidence in Elections Act.[1] This proposal is not perfect—no piece of legislation is. But Title III is a good step in the right direction. It recognizes that many of our campaign finance laws have drifted away from their sole legitimate purpose—preventing *quid pro quo* corruption or the appearance of such corruption. It proposes a number of provisions to protect the free discussion of politics and politicians, including on the internet. And it recognizes that the Federal Election Commission is a unique agency with an unusual bipartisan structure that helps prevent abuses of the legal process. As such, it is the best agency to serve as the lead authority on federal campaign finance law, not the Internal Revenue Service or the Securities and Exchange Commission.

[1] As of the time of this drafting, the legislation has not yet been formally introduced. References to specific provisions of the bill in this prepared testimony are based on the legislation as it was introduced in the 117th Congress.

II. The *Only* Recognized Purpose of Campaign Finance Laws is Preventing *Quid Pro Quo* Corruption or the Appearance Thereof

It can be easy to lose sight of what is really being regulated and what is really at stake when discussing campaign finance law. Federal campaign finance law is complex and often esoteric. At first blush, it looks like any other regulatory scheme. But campaign finance regulation is fundamentally qualitatively different from other forms of government regulation. It concerns issues at the heart of democratic self-governance: when and how we discuss issues of public policy and candidates for public office.

"In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1971). Therefore, "[t]he First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Federal Election Commission v. Cruz*, 142 S.Ct. 1638, 1650 (2022) (quoting *Monitor Patriot v. Roy*, 401 U.S. 265, 272 (1971)).

Too often, people discuss campaign finance regulations in terms of what they think might be better or worse for their preferred values. But the framers of the Constitution already made the decision to "err on the side of protecting political speech rather than suppressing it." *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 457 (2007).

The government should not and cannot constrain the right of the American people to discuss candidates and policies lightly. The "Court has recognized only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance" and "consistently rejected attempts to restrict campaign speech based on other legislative aims." *Cruz*, 142 S.Ct. at 1652 (quoting *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 207 (2014) (plurality opinion)).

Whether through deliberate choice or bureaucratic inertia, many provisions of federal campaign finance law have drifted away from this basic purpose.

a. Contribution Limits and Disclosure Thresholds are Set Too Low to Be Meaningful Proxies for Preventing Corruption

In the 2022 midterm elections, the average candidate for U.S. Senate raised about $13.8 million, while the average candidate for the U.S. House raised $1.8 million. *See* Taylor Giorno, *'Midterm Spending Spree': Cost of 2022 Federal Elections Tops $8.9 Billion, a New Midterm Record*, Open Secrets (Feb. 7, 2023), https://www.opensecrets.org/news/2023/02/midterms-spending-spree-cost-of-2022-federal-elections-tops-8-9-billion-a-new-midterm-record/. At the same time, during the 2022 election cycle, federal political action committees raised $7.4 billion and spent $6.5 billion, while federal PACs and other independent speakers spent $1.1 billion on independent expenditures. *Statistical Summary of 21-Month Campaign Activity of the 2021-2022 Election Cycle*, Federal Election Commission (Jan. 5, 2023),

https://www.fec.gov/updates/statistical-summary-of-21-month-campaign-activity-of-the-2021-2022-election-cycle/.

In order to prevent people from improperly influencing federal candidates, individual contributions to candidates were limited to $2,900 per election. At the same time, any group of people that banded together with the major purpose of supporting or defeating one or more federal candidates and raised or spent more than $1,000 was required by law to register and file burdensome reports with the Federal Election Commission. Anyone who wanted to spend money independently trying to elect or defeat a federal candidate was required to file an "independent expenditure report" if they spent more than $250.

To the average citizen, $250—let alone $1,000—may seem like a lot of money. But in the context of a $1.8 million campaign, it is barely a drop in the bucket. In short, election activity at this level is highly unlikely to induce a candidate to change their policy views. The contribution limit and reporting thresholds are set too low for their intended purpose, preventing *quid pro quo* corruption or the appearance thereof.

b. Excessive "Disclosure" Harms Political Speech

It may be tempting to dismiss these concerns as the price we pay for erring on the side of caution in our political system. This would be folly. These are not costless decisions. Excessively low reporting thresholds create traps for the unwary.

For example, in a matter that came before me when I was a Commission at the FEC, two friends decided to work together to buy a piece of plywood, hire a sign painter to paint a sign supporting Texas Governor George Bush's campaign, and put it on the property of another one of their friends. The reward for their civic activism was to find themselves enmeshed in a federal inquiry over allegations that they did not include the appropriate disclaimer. *See* MUR 5165 (Mark Morton). As I've detailed elsewhere, depending on how much money they spent, they could easily have found themselves accused of a litany of other federal reporting violations. *See* Bradley A. Smith, *Campaign Finance Reform: Searching for Corruption in All the Wrong Places* 187-188, Cato Supreme Court Review 2002-2003, https://www.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2003/9/finance.pdf.

Low reporting thresholds and excessive reporting requirements can also chill protected political speech. As the Supreme Court has recognized, "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

Free societies thrive on the free exchange of ideas. This includes ideas that are controversial or unpopular. Too often today, we see people being publicly hounded for their association with groups, sometimes years in the past, that have for one reason or another become controversial. For example, California's Proposition 8 passed with over 52% of the vote in 2008, representing the votes of over 7 million people. Whether one agrees with Proposition 8, it was hardly outside of mainstream political discourse in 2008. Yet, nearly six years later, Mozilla CEO

Brendan Eich was pressured into resigning due to controversy surrounding a contribution he previously made supporting Proposition 8. *See* Jon Swaine, *Mozilla CEO Brendan Eich Resigns in Wake of Backlash to Prop 8*, The Guardian (Apr. 3, 2014), https://www.theguardian.com/technology/2014/apr/03/mozilla-ceo-brendan-eich-resigns-prop-8#:~:text=The%20new%20chief%20executive%20of,on%20gay%20marriage%20in%20California.

If anything, our political culture has become more unforgiving in the decade since Mr. Eich's resignation. When faced with this minefield, many people will simply refrain from supporting political or policy groups, rather than risk backlash that may come years later or in response to intervening decisions by the person or organization that were not contemplated at the time of the initial contribution. This is not healthy for our culture of self-government.

Compelled public association through disclosure discourages the free exchange of ideas. Outside of the narrow range of speech that expressly advocates for the election or defeat of federal candidates, it does little to further the core—and only legitimate—goal of preventing corruption or the appearance thereof.

The proposed legislation does not fix all of these problems. But it would make them better. First, it proposes to raise the registration and reporting thresholds for political committees and independent expenditure reporting. *See, e.g.* §§ 322; 323. Second, it limits unnecessary disclosure, including the overreporting of people who contribute to groups who engage in political activity as a secondary function of what they do. And third, it protects the free and open discussion of political ideas over the internet by codifying the internet exemption.

III. Political Parties Play an Important Role in Our Political System

Political parties play an important role in our political system. They help people come together and work for common goals. But they are currently at a large disadvantage. For example, independent expenditure-only committees are able to raise and spend unlimited amounts of money, while national, state, and local party organizations are subject to strict limits on how much they can raise, and how they can spend it. For good or ill, this has impacts on politics. It makes politics more atomized, more focused on individual candidates, and less of a team sport.

The proposed legislation will not fully unleash political parties to fulfill their traditional role as central organizing entities for contesting elections. But it would help alleviate the disparities by making it easier for political parties to work with their own candidates, expanding the scope of permissible federal election activity by state and local candidates, and equalizing contribution limits for state and national parties.

IV. The Role of the FEC in Preventing the Weaponization of Government

The Federal Election Commission is different from other federal agencies. "Unique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity—'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" *American Fed'n of Labor and*

Congress of Indus. Org. v. Fed. Election Comm'n, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *Fed. Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C.Cir.1981)).

By law, no more than three out of six Commissioners can be from any one political party. While many independent agencies have some level of statutorily mandated bipartisanship, the FEC is one of only two federal agencies—along with the U.S. International Trade Commission—that has an equal number of commissioners from each major party. Moreover, by law, the Commission cannot investigate or sanction political actors without the approval of four or more Commissioners.

The benefit of this structure is obvious: requiring four votes on a Commission divided three-three between Republicans and Democrats guarantees that there is some minimal level of bipartisan or nonpartisan support before embarking on enforcement proceedings against political speakers.

This bipartisanship is indispensable in an agency whose core function is regulating political speech, particularly in the context of federal elections. After all, a partisan structure would risk the reality or appearance of a referee with its thumb on the scale of the contest, using its immense regulatory power for partisan gain.

a. The FEC is Uniquely Situated to Limit the Risk of Partisan Enforcement of Campaign Finance Law

By virtue of its unique structure, the FEC has a valuable role to play in preventing the weaponization of government against unpopular speakers or political opponents.

Other agencies, such as the Internal Revenue Service and Securities and Exchange Commission, lack these structural protections.

In the case of the IRS, the result is a long and inglorious history of actual or alleged partisan abuses. President Franklin Roosevelt purportedly used the IRS to harass political opponents, including Huey Long, Father Coughlin, and former Treasury Secretary Andrew Mellon, as well as newspaper publishers like William Randolph Hearst and Moses Annenberg. President John Kennedy's IRS Commissioner established an "Ideological Organizations Audit Project" to audit and harass conservative opponents of the Administration. And the Nixon Administration gave the IRS a list of the President's enemies and targeted thousands of groups. *See* John A. Andrew, *The Power to Destroy: Political Uses of the IRS from Kennedy to Nixon*, (Ivan R. Dee 2002); John A. Andrew, *The Other Side of the Sixties* (Rutgers Univ. Press 1997); David Burnham, *A Law Unto Itself: The IRS and the Abuse of Power* (Random House 1990); *see also generally* Statement of Bradley A. Smith Before the Senate Finance Committee, Subcommittee on Taxation and IRS Oversight (May 4, 2022), https://www.ifs.org/wp-content/uploads/2022/05/2022-05-04_Smith-Testimony_US-Senate.pdf (describing the use of the IRS to harass political opponents). More recently, in the mid-2010s the Treasury Inspector General for Tax Administration (TIGTA) and Senate Finance Committee both found that the IRS under Lois Lerner targeted conservative and Tea Party groups because they were conservative and Tea Party groups. *See Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, Treasury Inspector General

for Tax Administration (May 14, 2013), https://www.tigta.gov/sites/default/files/auditreports/2013reports/201310053fr.pdf; *Bipartisan Investigative Report as Submitted by Chairman Hatch and Ranking Member Wyden*, United States Senate Committee on Finance (Aug. 5, 2015), https://www.finance.senate.gov/imo/media/doc/CRPT-114srpt119-pt1.pdf.

As long as there is regulation of political speech, there is a risk that such regulation will be abused for partisan purposes. The structure of the FEC makes this less likely than in other agencies.

The proposed legislation recognizes the unique role and structure of the FEC by taking a number of steps to prevent the (mis)use of other federal agencies as a back door to regulating political opponents. For example, Title III makes clear that regulating political contributions and political activity is not a proper or advisable role for the Securities and Exchange Commission. *See* § 341. It also takes a number of steps to prevent abuses by the IRS, such as those we saw under Lois Lerner, including raising the reporting threshold for tax-exempt organizations from $5,000 to $50,000 and codifying protections for donor privacy. *See* §§ 307, 308. These are laudable proposals to protect political speech from both partisan encroachment and ham-fisted or even contradictory regulatory requirements.

b. The FEC Should Not Abdicate Its Responsibilities to the Federal Courts

In addition, the proposed legislation also takes an invaluable step to prevent FEC Commissioners from attempting to abdicate their responsibilities to the federal courts. As described above, it takes a bipartisan/nonpartisan vote of at least four commissioners to pursue an enforcement action. Historically, if there were not four commissioners to move forward with an enforcement action, the Commission took a ministerial vote to "close the file," which would formally mark the end of the Commission's consideration of a complaint or other enforcement action.

In the past few years, several commissioners, unhappy that they were unable to convince their colleagues to go along with their aggressive, pro-regulatory interpretations of the law, adopted a new strategy: they refused to close the file even though the Commission had fully considered the matter.[2]

[2] *See Statement of Commissioner Ellen L. Weintraub On the Voting Decisions of FEC Commissioners* (Oct. 4, 2022), https://www.fec.gov/resources/cms-content/documents/2022-10- 04-ELW-Statement-on-Voting-Decisions.pdf; *Statement of Allen J. Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Regarding Concluded Enforcement Matters* (May 13, 2022), https://www.fec.gov/resources/cms-content/documents/Redacted_Statement_Regarding_Concluded_Matters _13_May_2022_Redacted.pdf; Shane Goldmacher, *Democrats' Improbable New F.E.C. Strategy: More Deadlock than Ever*, The New York Times (June 8, 2021), https://www.nytimes.com/2021/06/08/us/politics/fec-democrats-republicans.html; *see also Statement of Vice Chair Ellen L. Weintraub Regarding CREW v. FEC and American Action Network* (April 19, 2018), https://www.fec.gov/resources/cms-content/documents/2018-04- 19-ELW-statement.pdf (claiming "[i]t's time to break the glass and let this matter move forward unimpeded by commissioners" who voted against enforcement proceedings).

The effect was to create what one Commissioner termed "zombie matters"—cases that are "dead but unable to be laid to rest. They remain with the [A]gency and on [its] enforcement docket indefinitely, despite having been adjudicated, with the vote outcome and [c]ommissioners' reasoning withheld from the complainant, the respondent, and the public." FEC Commissioner Sean J. Cooksey, *Mem. re: Motion to Amend Directive 68 to Include Additional Information in Quarterly Status Reports to Commission*, June 3, 2021, 2, https://tinyurl.com/hwa798e6 (June 10, 2021)

This inappropriately left respondents, complainants, and the public in the dark about what the FEC was doing.[3]

The explicit goal of this strategy is to abdicate decisions about how to enforce campaign finance law to private groups by manipulating and misleading the federal courts. Here's how it works: Under the law, if the Commission does not act on a complaint within 120 days, "any aggrieved party"—generally, the person who filed a complaint—may file suit against the Commission. 52 U.S.C. § 30109(a)(8)(A) (2018). Due to the Commission's confidentiality requirements, the Commission is generally prohibited from publicly discussing the status of "open" enforcement matters. Since Commissioners refused to "close the file," "zombie matters" were trapped at the Commission with no public sign that the Commission has "acted" on the complaints—even though in some cases the Commission had fully considered and voted on the matters—opening the door for aggrieved parties—often liberal special interest groups—to pursue the matter in court.

To make matters worse, the same block of Commissioners that sought to push enforcement actions into the federal courts then sought to kneecap the Commission's response to resulting lawsuits. Unlike most federal agencies, the Department of Justice does not generally represent the FEC in court; the FEC has authority to represent itself. But there's a catch. Under the law, it takes a group of four Commissioners to agree to defend the agency. The same block of Commissioners that sought to block the Commission from closing the file, effectively hiding its decisions from the public, also sought to block the Commission from even appearing in court to defend itself.

The goal of this strategy is to force the federal courts to act in place of the FEC, effectively short-circuiting the FEC's bipartisan structure and expertise. When the FEC doesn't show up to defend the decision of the controlling commissioners on a matter, the Courts are then asked to issue a default judgment as favored by the private plaintiff. This is incredibly disrespectful to the courts, which are left to labor under the misimpression that the FEC has not acted, and contrary to the system Congress put in place, and cedes administration of the law to partisan groups.

Structural mandates that require bipartisanship are some of the FEC's great strengths. But gamesmanship on ministerial matters threatens to effectively undo the FEC's bipartisan structure, allowing the power of the federal government to be weaponized by partisan actors through strategic litigation in the federal courts.

[3] *See generally* Brief of the Institute of Free Speech *Amicus Curiae* in Support of the Movant-Appellant, *Campaign Legal Center v. Federal Election Commission*, Case No. 22-5140 (D.C. Cir. Nov. 7, 2022) (describing the background and problems with the FEC's failure to "close the file" and defend the agency in court).

The proposed legislation does not completely eliminate this problem. For example, it does not address the potential for "zombie matters" that are both alive and dead. But it does take valuable steps to preserve the structure of the agency and the proper respect for the federal courts by requiring the unanimous consent of the Commission to refuse to defend the Commission's actions in court. *See* § 355.

V. Conclusion

When discussing political speech, it's important to remember that we are dealing with the essence of what it means to live in a free society—the ability to discuss candidates and ideas for how we want to be governed. When in doubt, government should always err on the side of freedom.