May 15, 2024

Chair Sean J. Cooksey
Vice Chair Ellen L. Weintraub
Commissioner Shana M. Broussard
Commissioner Allen J. Dickerson
Commissioner Dara Lindenbaum
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Federal Election Commission
1050 First St. NE
Washington, DC 20463

Re: Proposed Directive Concerning Requests to Withhold, Redact, or Modify Contributors' Identifying Information

Dear Commissioners:

Campaign Legal Center ("CLC") respectfully submits this comment on the Proposed Directive Concerning Requests to Withhold, Redact, or Modify Contributors' Identifying Information (the "Proposed Directive" or "Proposal"), designated Agenda Document No. 24-19-A for the Federal Election Commission's (the "Commission" or "FEC") May 16, 2024, open meeting.[1]

The Proposed Directive purports to create a "formal process" to "standardize [the Commission's] consideration" of contributors' requests for exemptions to the Federal Election Campaign Act's ("FECA" or the "Act") disclosure requirements.[2] But FECA nowhere authorizes such action by the FEC, and the Proposed Directive does not even purport to give sufficient weight to the crucial First Amendment interests implicated by a requested exemption, as required by the Supreme Court.

CLC therefore urges the Commission not to adopt this Proposal.

[1] *See* Memo. from Comm'r Allen J. Dickerson to the Comm'n, Proposed Directive Concerning Requests to Withhold, Redact, or Modify Contributors' Identifying Information (May 2, 2024), https://www.fec.gov/resources/cms-content/documents/mtgdoc-24-19-A.pdf ("Proposed Directive").

[2] *See id.* at 2–3.

A. The Proposed Directive Exceeds the FEC's Authority Under FECA

FECA requires political committees to identify each individual who contributes over $200 in the aggregate to the committee during an election cycle or calendar year (depending on the committee type).[3] Congress did not include any exemptions to that requirement in the Act, nor did it authorize the FEC to excuse compliance with the statute's requirements. This statutorily mandated public disclosure of information about who is spending money to influence elections forms the bedrock of transparency and accountability in our elections. Ensuring such transparency lies at the core of FECA's purpose and is one of the most fundamental and important duties that Congress assigned to the FEC.

The Supreme Court, however, recognized that an exemption from particular disclosure requirements would be warranted "where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied."[4] The Court described the types of evidence needed to establish the "reasonable probability" of such a threat:

> The proof may include, for example, *specific evidence of past or present harassment* of members due to their associational ties, or of *harassment directed against the organization* itself. A *pattern of threats or specific manifestations of public hostility* may be sufficient. New parties that have no history upon which to draw may be able to offer *evidence of reprisals and threats directed against individuals or organizations holding similar views*.[5]

This exemption is commonly known as the "NAACP exemption" because it stems from two Supreme Court cases in the 1950s and 1960s, where the National Association for the Advancement of Colored People ("NAACP") prevailed in as-applied challenges to orders or ordinances that would have required it to disclose its membership lists in the Jim Crow South.[6] The analysis of this exemption in the electoral context involves assessing both the First Amendment interest protected by laws requiring transparency about who is spending money to influence elections, and the extent to which threats, harassment, or reprisals inhibit a donors' ability to

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[3] 52 U.S.C. § 30104(b)(3).

[4] *Buckley v. Valeo*, 424 U.S. 1, 71 (1976).

[5] *Id.* at 74 (emphases added).

[6] *See Bates v. City of Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958). In these cases, one of the country's foremost civil rights organizations—which was operating across the Jim Crow South at a time when politically- and racially-motivated violence was disturbingly common—established through voluminous evidence that its members faced shootings, bombings, economic reprisals, and threats, and that the risk of public disclosure as an NAACP member would be enough to deter people from joining or remaining part of the organization. *See Bates*, 361 U.S. at 523–24; Brief for Petitioner, *NAACP*, 357 U.S. 449 (No. 91), 1957 WL 55387, at *16 n.12.

exercise their First Amendment right to free association.[7] Under that analysis, courts will reject exemptions and require disclosure unless presented with the "specific evidence" required in *Buckley*; the threat must be "serious" and the disclosure interest "insubstantial" to justify withholding electoral information that the public otherwise has a legal right to know.[8] Accordingly, in the electoral context, courts have allowed the withholding of information only in the most compelling circumstances, where the parties seeking an exemption have built a detailed and comprehensive record demonstrating pervasive harms or harassment.[9]

The Proposed Directive purports to transform the careful judicial analysis required under *Buckley* into an expedited "no-objection" procedure where the FEC may override important statutory disclosure requirements based on a limited evidentiary showing and a secretive, unaccountable review process.[10] The Proposal tries to frame as merely a new agency procedure—*e.g.*, the creation of a new FEC form to apply for disclosure exemptions and a voting mechanism to adjudicate such applications[11]—a proposal that would fundamentally contravene the transparency mandate that is at the core of FECA and the Commission's statutory duty. FECA does not authorize the Commission to do this, and it is thus unsurprising that no existing Commission

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[7] As the Supreme Court has explained, exemptions from electoral disclosure requirements involve weighing the "associational interests" of parties and their supporters against the "consequent reduction in the free circulation of ideas both within and without the political arena." *Buckley*, 424 U.S. at 71.

[8] *Id.*

[9] *Compare Brown v. Socialist Workers '74 Campaign Comm.,* 459 U.S. 87 (1982) (granting exemption during the height of the Cold War where evidence showed that Socialist Workers Party members faced police harassment, property destruction, violence, job loss, and even FBI surveillance); *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 423 (2d Cir. 1982) (granting exemption to the Communist Party presidential ticket against a similar backdrop); *1980 Ill. Socialist Workers Campaign v. Ill. Bd. of Elections*, 531 F. Supp. 915, 921–22 (N.D. Ill. 1981) (granting exemption to the Illinois Socialist Party against a similar backdrop), *with Citizens United v. FEC*, 558 U.S. 310, 370 (2010) ("Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation"); *McConnell v. FEC*, 540 U.S. 93, 199 (2003) (denying exemption when there was a "lack of specific evidence"); *Rio Grande Found. v Oliver*, No. 1:19-cv-01174-JCH-JFR, 2024 WL 1345532, at *16–17 (D.N.M. Mar. 29, 2024), 2024 WL 1345532 (declining to strike down challenged electioneering and independent-expenditure reporting laws where the organization cited donors to similar groups facing "boycotts, online harassment, and social ostracism," but could not cite "any harassment or retaliation of its employees or donors in its over 20-year history"); *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 916–22 (E.D. 2011) (applying *Buckley* and concluding that plaintiffs' claims of harassment—including vandalism, angry protests, unsolicited phone calls, death threats, and various forms of economic reprisal—did not warrant an exemption from the state's disclosure requirements for ballot measure signatories), *aff'd in part*, *dismissed in part sub nom. ProtectMarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827 (9th Cir. 2014); *Doe v. Reed*, 823 F. Supp. 2d 1195, 1210, 1212 (W.D. Wash. 2011) (rejecting as-applied disclosure challenge by signors of a referendum petition regarding legal rights of same-sex partners, finding that plaintiffs' evidence did not rise to "level or amount" presented in *Brown* and the *NAACP* cases).

[10] *See* Proposed Directive at 3–4.

[11] *Id.*

directive even comes close to addressing the public's rights or undertaking interpretations of FECA's substantive requirements.[12]

B. The Proposed Directive Fails to Give Sufficient Consideration to Voters' First Amendment Rights

In addition to exceeding the FEC's statutory authority, the Proposed Directive departs dramatically from the scrupulous judicial analysis of constitutional interests required by *Buckley*. The Proposed Directive references "the country's charged political atmosphere" as grounds for its plan to excuse statutory disclosure requirements on the basis of a completed form and sworn statement asserting why an applicant contends that the relevant disclosure would likely subject them to threats, harassments, or reprisals.[13] Applications would be circulated on a "no-objection" basis—a voting procedure that the Commission uses for matters where the Commission's assent is presumed and is typically given.[14] This is a far cry from the careful constitutional test mandated by federal courts when evaluating whether an as-applied disclosure exemption is warranted.[15]

Indeed, the Proposal omits any mention of voters' vital interest in knowing who is spending money to influence their votes—the interest that is presumed to be *weightier* than a donor's interest in secrecy unless the donor can show otherwise. Courts engaging in the *Buckley* analysis must vindicate voters' First Amendment rights to the information they need to "make informed decisions" about candidates and political messages unless the donor seeking an exemption proves a tangible risk of harassment or harm.[16] Courts conducting this analysis in the elections context have, in recent years, distinguished the severity, proportionality, and magnitude of the evidence presented in the NAACP cases and *declined* to exempt groups from

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[12] The Commission's existing directives touch on purely procedural matters like deadlines for setting meeting agendas, voting procedures, status reports, and records management, and employment matters like an anti-harassment policy and computer usage policy. *Commission Directives and Policy*, FEC, https://www.fec.gov/about/leadership-and-structure/ (last visited May 10, 2024).

[13] Proposed Directive at 2, 4.

[14] *Id.* at 4. The 48-hour no-objection vote is reserved for routine, procedural matters. Directive 52, which governs the Commission's voting procedures, prescribes no-objection votes when the Commission is: (1) agreeing to suspend the deadline to vote on a matter; (2) voting on imposing an administrative fine when the respondent has not challenged the fine; (3) considering employment matters at the Senior Level; (4) considering documents that have already been accepted but require modification; and (5) determining an issue that is not a matter of first impression. Directive 52, Circulation Vote Procedure (Dec. 1, 2016), https://www.fec.gov/resources/cms-content/documents/directive_52.pdf. Clearly, highly fact-specific determinations about the application of the Act and constitutional rights are not meant for "no-objection" treatment.

[15] The Proposal's stated concern about a "charged political atmosphere" sounds remarkably similar to concerns about boycotts and hostile protests raised in *ProtectMarriage.com*. The court in that case, however, explained that boycotts and protests were themselves a form of constitutionally protected speech, and it ultimately found that the constitutional interests favored transparency. *ProtectMarriage.com*, 830 F. Supp. 2d at 934.

[16] *See Citizens United*, 558 U.S. at 371; *see Buckley*, 424 U.S. at 71.

electoral disclosure obligations, underscoring how difficult it is to overcome the public's disclosure interest.[17] These decisions drive home the problematic approach of the procedures outlined in the Proposed Directive, which does not even mention this fundamental constitutional interest, the protection of which is supposed to be a key function of the FEC.

The Proposal points to the Commission's previous advisory opinions extending a judicially recognized exemption for the Socialist Workers Party,[18] but those advisory opinions do not remotely resemble what is proposed here. First, the FEC's successive advisory opinions regarding the Socialist Workers Party extended a judicial consent decree that was the result of the very constitutional analysis described above.[19] Second, each advisory opinion was inherently limited; it followed the lead and blueprint of the underlying court decision, required a showing of ongoing threats for an extension,[20] and limited the timeframe of the extension.[21] Third, extending the Socialist Workers Party's court-granted exemption through the advisory opinion process provided transparency and accountability—there were opportunities for public comment, the Commission was required to make public a written explanation of the rationale for its decision, and that decision could be subject to judicial review. The Proposed Directive, in stark contrast, invites political organizations to seek indefinite, blanket disclosure exemptions through a secret process that involves no prior or subsequent judicial review and thus leaves the Commission completely unaccountable for any misapplication of the law.

The Proposed Directive also mentions recent occasions where the Commission has "granted several private requests to redact or substitute individual mailing addresses on Commission reports" where the requestor showed that they faced a specific threat of harm.[22] But the Commission's own past willingness to excuse public disclosure of certain *address* information does not demonstrate any legal basis

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[17] *ProtectMarriage.com*, 830 F. Supp. 2d at 932 (opining that the "proportionality and magnitude" of the evidence did not warrant relief); *Reed*, 823 F. Supp. 2d at 1210 (stating that the "level or amount" of evidence did not reach that provided in *Brown* or the NAACP cases); *see supra* note 9.

[18] Proposed Directive at 3 n.1.

[19] Advisory Op. 1990-13 (Socialist Workers Party); Advisory Op. 1996-46 (Socialist Workers Party); Advisory Op. 2003-02 (Socialist Workers Party); Advisory Op. 2009-01 (Socialist Workers Party); Advisory Op. 2012-38 (Socialist Workers Party); *see* Consent Decree, *Socialist Workers 1974 Nat'l Campaign Comm. v. FEC*, Case No. 74-1338 (D.D.C. 1979).

[20] Advisory Op. 1990-13 at 4–6 (describing history of "FBI and other governmental harassment" and "a number of incidents" of "private harassment"); Advisory Op. 1996-46 at 4–6 (same); Advisory Op. 2003-02 at 6–8 (same); Advisory Op. 2009-01 at 9 (same); Advisory Op. 2012-38 at 3–7 (same).

[21] Advisory Op. 1990-13 at 6 ("Consistent with the length of the exemption granted in the original 1979 court decree, this exemption is to last through the next two presidential year election cycles."); Advisory Op. 1996-46 at 6–7 (same); Advisory Op. 2003-02 at 11 (same); Advisory Op. 2009-01 at 12–13 (reducing the length of the exemption from six to four years, citing a decline in "severe incidents," and stating that the Commission will need to reassess the exemption earlier); Advisory Op. 2012-38 at 11–12 (providing the shortened exemption).

[22] Proposed Directive at 2.

for the agency to selectively omit or redact individual contributors' names[23] and thereby deprive the public of any information about the source of the electoral spending at issue. The Proposal's approach to depriving the public of that information would not only be a significant departure from past practice; it would also be an improper and unlawful exercise of the FEC's authority under FECA.

C. The Proposed Directive Fails to Consider the Importance of the Information Sought to be Withheld

The Proposed Directive fails to examine the relative value of the information that would be withheld by a disclosure exemption, as required under the *Buckley* test, which presumes there is a stronger, more compelling interest in disclosure when the information pertains to a major political party or candidate. For example, the Supreme Court has explained that the public interest in disclosure is higher when the information in question relates to a competitive candidate, as the likelihood of that candidate taking office and becoming beholden to their donors is real, not speculative.[24] The Proposed Directive does not take into account the greater informational harm caused by withholding electoral information regarding contributions to major candidates, political parties, and super PACs that can more readily influence the electorate and influence election outcomes. Indeed, some entities that spend money on elections are so large, and represent such a diversity of viewpoints, that information about their donors may be the only way to understand their influence and effect on the electoral process.[25]

In the limited historical instances where an exemption has been granted, it was in the context of minor parties "with little chance of winning an election" and that espouse "definite" and well-publicized views.[26] As one lower court put it, "disclosure exemptions were primarily intended to combat harms suffered by small, persecuted groups."[27] These groups have little chance of electoral success and, as a result of having so few members, may become extinct if those in their already small donor base feel frightened to contribute.[28]

The Proposed Directive's failure to draw any distinction between fringe and mainstream candidates, political parties, and PACs, or to otherwise consider the relative importance of the information sought to be withheld, is yet another way in which it would mark a dramatic departure from the standard courts have employed when considering whether a disclosure exemption is warranted.

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[23] *Id* at 3.
[24] *See Buckley*, 424 U.S. at 70.
[25] *Id.*
[26] *Id.*
[27] *ProtectMarriage.com*, 830 F. Supp. 2d at 931.
[28] *See Hall-Tyner Election Campaign Comm.*, 678 F.2d at 419–20.

Conclusion

The Proposed Directive exceeds the Commission's statutory authority and would mark a dramatic and dangerous departure from judicial approaches to determining whether an exemption from election-related disclosure requirements is warranted. We respectfully urge the Commission to decline to approve the Proposal.

Respectfully submitted,

/s/

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