



FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary ^{VFV}

DATE: May 10, 2024

SUBJECT: Agenda Document No. 24-19-A -Comment

Attached is a comment received from Clean Elections Texas. This matter is on the May 16, 2024 Open Meeting Agenda.

Attachment

RECEIVED

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COMMENT ON PROPOSED RULEMAKING

Federal Election Commission
1050 First Street, N.E.
Washington, D.C. 20463

May 8, 2024

TO: Acting General Counsel, Lisa Stevenson
Via Email: LStevenson@fec.gov
Associate General Counsel, Neven Stepanovic
Via Email: NStipanovic@fec.gov

FROM: David E. Jones
President
Clean Elections Texas

RE: Proposed Directive Concerning Requests to Withhold, Redact, or Modify Contributors' Identifying Information - AGENDA DOCUMENT NO. 24-19-A --
For the meeting of May 16, 2024

Clean Elections Texas, a non-profit and non-partisan Texas public interest advocacy organization (<https://cleanelectionstx.org>), submits the following comment in opposition to the above referenced proposed rulemaking. For the reasons stated below, Clean Elections Texas would show that the proposed rule would serve to broadly negate one of the most fundamental elements of campaign finance regulation -- donor disclosure -- a principle established over many years by the Supreme Court, the Congress and the FEC. The proposed directive would weaken the showing necessary to obtain an exception to disclosure contrary to established law and likely subject the commission to unjustified obstructive interference; thereby operating to obscure and ultimately undermine free and fair political debate and permit unknown interests to privately contribute to political campaigns. The proposed rule should not be further considered or adopted by the commission.

The Supreme Court has consistently upheld disclosure requirements for donors to political campaigns and groups engaged in election-related speech. In *Buckley v. Valeo*, 424 U.S. 1, 66 (1976),

the Court upheld disclosure requirements for individuals and groups that expressly advocated for or against political candidates, finding that the government's interests in providing information to voters and deterring corruption are sufficiently important to justify the requirements. The Court has consistently reaffirmed the government's interests outlined in *Buckley* and found that disclosure provides necessary information to voters. Although exceptions may be necessary under appropriate circumstances, they should be rare and only justified under extreme circumstances upon a showing that meets a high standard of proof.

The directive's proponent raises First Amendment considerations, but in *Citizens United v. FEC*, 558 U.S. 310, 371 (2010), the Supreme Court considered a broad First Amendment challenge to federal disclosure and disclaimer provisions. Although more famously known for striking down limits on corporate spending in federal elections, in Part IV of its opinion—the Court soundly rejected the First Amendment arguments. The Court explained that the disclosure and disclaimer provisions advanced the government's "informational interest"—that is, an "interest in 'provid[ing] the electorate with information' about the sources of election-related spending" *Id.* at 369 (citing *Buckley*)—and thus easily survived the "exacting scrutiny" the Constitution required. *Citizens United* at 368. The Court reasoned that disclosure furthered important democratic values, explaining that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 371 "[D]isclosure . . . can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions" *Id.* at 371.

Not long after deciding *Citizens United*, the Court decided *Doe v. Reed*, 561 U.S. 186 (2010) regarding a Washington state citizen referendum. A number of groups sought access to the referendum petitions under the state's public records law. *Id.* at 192. The Court upheld disclosure requirements for petition signors, reasoning that disclosure was justified by the government's compelling interest in "preserving the integrity of the electoral process." *Id.* at 197. Justice Scalia wrote separately that the state was not only constitutionally permitted, but also to be applauded for making its petitions publicly available, stating: "Requiring people to stand up in public for their

political acts fosters civic courage, without which democracy is doomed." *Id.* at 228 (emphasis added).

Disclosure of the identity of political participants and speakers is inextricably linked to other important constitutional values. Disclosure relates directly to the right to vote. If the right to vote is to be exercised in a meaningful way it must be informed. Full disclosure is necessary for informed voting. "[T]he purpose of politics is to debate about and collectively decide what the public good requires." S. Issacharoff & P. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX.L.REV. 1705, 1723-24 (1999). Fair debate cannot occur if citizens are kept in the dark about all the true participants in the debate.

Importantly, in other contexts, the Supreme Court has also acknowledged a First Amendment right of citizens to *receive* information about public issues in order to fairly discern what is true and what is not. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail...." *Id.* at 390 (emphasis added).

As the Supreme Court's decisions on campaign finance have become more clearly limited to questions of quid pro quo corruption or its appearance, the Court has continued to support the foundational importance of transparency and disclosure. In *McCutcheon v. FEC*, 572 U.S. 185 (2014), donor disclosure was not specifically challenged, but the Court nevertheless described how disclosure "offers a particularly effective means of arming the voting public with information...minimizing the potential of abuse of the campaign finance system." *Id.* at 223-224. Knowing the funders of a campaign is absolutely necessary in order for the voting public to hold candidates accountable for actions that might amount to corruption or the appearance of corruption.

In *NAACP v. Alabama*, 357 U.S. 449 (1958), the Court recognized that the right of private association was protected against disclosure of the NAACP's membership list, because disclosure would have constituted an effective restraint on its members First Amendment freedom of association. *Id.* at 461-463. There was an uncontroverted particularized showing that disclosing the identity of

rank-and-file members of the NAACP, exposed members to “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” *Id.* at 463.

The directive’s proponent here seeks a rule permitting exception to the Federal Election Campaign Act’s disclosure requirements – and the overwhelmingly compelling state interest in donor disclosure established by the Supreme Court - based only on a personal sworn statement that survives for 48 hours without objection. An exception could be achieved without any particularized or corroborated showing of a burden on the declarant’s First Amendment rights. Such a possibility must be viewed as insufficient to overcome the important public interest in campaign finance disclosure.

Other adequate means already exist to protect the rare instance where non-disclosure may be justified. Putting non-disclosure exceptions under a fast-lane procedure that would either permit insufficiently justified claims of First Amendment burden to succeed – or potentially overwhelm the commission with a gridlock inducing requirement of objection and adjudication of thousands of individual claims – constitutes an attempt to incapacitate reasonable campaign finance regulation and should fail.

For the reasons stated above, Clean Elections Texas opposes the proposed directive.