FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**

FROM: **Office of the Commission Secretary** LC

DATE: **May 14, 2024**

SUBJECT: **AGENDA DOCUMENT NO. 24-19-A - Comment #2**

The following is AGENDA DOCUMENT NO. 24-19-A - Comment #2 from Stuart McPhail. This matter will be discussed on the next Open Meeting of May 16, 2024.

Attachment

RECEIVED
By Office of General Counsel at 1:07 pm, May 14, 2024

RECEIVED
By Office of the Commission Secretary at 1:59 pm, May 14, 2024

CREW
CITIZENS FOR RESPONSIBILITY & ETHICS IN WASHINGTON

May 14, 2024

The Honorable Sean J. Cooksey
Chair
Federal Election Commission
1050 First Street, N.E.
Washington, DC 20463

The Honorable Ellen L. Weintraub
Vice Chair
Federal Election Commission
1050 First Street, N.E.
Washington, DC 20463

By electronic mail (AO@fec.gov; CommissionerCooksey@fec.gov; CommissionerWeintraub@fec.gov; CommissionerTrainor@fec.gov; CommissionerBroussard@fec.gov; CommissionerDickerson@fec.gov; CommissionerLindenbaum@fec.gov)

Re: Comments Regarding Agenda Document No. 24-19-A: Proposed Directive Concerning Requests to Withhold, Redact, or Modify Contributors' Identifying Information

Dear Chair Cooksey and Vice Chair Weintraub:

Citizens for Responsibility and Ethics in Washington ("CREW") submits the following comment in opposition to Agenda Document No. 24-19-A: Proposed Directive Concerning Requests to Withhold, Redact, or Modify Contributors' Identifying Information (the "Proposal"). The Proposal, at least as currently drafted, promises an unprecedented special right to large financial patrons to censor their critics, while discriminating against those with differing views, all in violation of Americans' First Amendment rights to receive information, speak, and criticize those affecting policies that impact their lives. The Proposal should be changed to limit the offered anonymity to last for no more than one presidential election cycle and to be available to only those groups or organizations supporting candidates from parties holding no federal office and those unlikely to win election, and to small donors like those contributing $1,000 or less in an election cycle. In the absence of those changes, CREW urges the Commission to reject the Proposal.

The Proposal states that it only seeks to "adopt a formal process providing for 'a fair consideration' of particular contributors' situations" in evaluating the narrow exception to disclosure provided in *Buckley v. Valeo*, 424 U.S. 1 (1976), for those facing threats, harassment, or unlawful reprisals. CREW supports efforts to combat violent extremism that threatens our democracy. *See, e.g., Democracy denied: How right wing extremists are endangering Coloradans and our democracy*, CREW (Jan. 22, 2024), https://www.citizensforethics.org/reports-investigations/crew-reports/democracy-denied-how-right-wing-extremists-are-endangering-coloradans-and-our-democracy/; *The case for Donald Trump's disqualification under the 14th Amendment*, CREW (July 18, 2023), https://www.citizensforethics.org/reports-investigations/crew-reports/donald-trumps-disqualification-from-office-14th-amendment/. The Proposal, however, is ill suited to that goal and will only worsen the problem.

Rather than address the violent threats, the Proposal promises to an unbounded pool of financial patrons a perpetual exception to the disclosure that is necessary to the "free functioning of our

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national institutions." *Buckley*, 424 U.S. at 66; *see also, e.g.*, Teo Armus, *GOP Ohio House speaker arrested in connection to $60 million bribery scheme*, Wash. Post (July 22, 2020), https://www.washingtonpost.com/nation/2020/07/22/ohio-house-speaker-arrested-republican/ (detailing utility's use of dark money to defeat ballot initiative by, in part, depriving voting public knowledge of utility's role in the opposition). Specifically, the Proposal offers to any applicant who may claim, in proceedings wholly secret from the public, a "reasonable probability" that such disclosure "will subject [the applicant or their associates] to threats, harassment, or reprisals from either Government officials or private parties." The Proposal contemplates no limit on who may apply, including large parties and donors, even corporations. The Proposal suggests there will be no temporal limit to an exception so that, once granted, the public would be denied transparency in perpetuity. The Proposal further states the entire process would be excluded "from the public record." Proposal ¶ 6.

This limitless exception the Proposal contemplates is inconsistent with caselaw, which created a narrow exception to disclosure for exceptional and exigent circumstances. The narrowness of that exception is compelled by the First Amendment, which recognizes that even a desire to prevent regrettable and unlawful acts by a tiny minority cannot justify efforts to deprive others of their Constitutional rights to read, speak, and criticize.

In contrast to the unbounded exception offered in the Proposal, caselaw has recognized that the exception to campaign finance disclosure for those facing threats, harassment, or unlawful reprisals does not extend to those powerful enough to be likely undeterred. Rather, the exception is limited to only those persons or organizations "unlikely to win elections" where "the government's general interest in deterring the buying of elections is reduced." *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 95 (1982) (internal quotation marks omitted). Thus, the exception is an opportunity unique to "minor parties" and small donors. *Id.* at 93 (holding *Buckley* "set forth the following test for determining when the First Amendment requires exempting *minor partie*s from compelled disclosures" (emphasis added)); *see also John Doe # 1 v. Reed*, 561 U.S. 186, 201 (2010) (recognizing *Buckley*'s exception is limited to "minor parties"); *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 930–31 (E.D. Cal. 2011) (recognizing "[s]ince *Buckley*, as-applied challenges have been successfully raised only by minor parties" and collecting cases); Agenda Item 2017-01-C at 10, DRAFT AO 2016-23 (Socialist Workers Party), Mar. 23, 2017, https://www.fec.gov/files/legal/aos/2016-23/201623_2.pdf (draft earning three commissioners' votes stating "[t]he Commission must first determine whether SWP continues to maintain its status as a minor party"; finding such status based on vote totals and "small total amounts of contributions" when largest contributor provided $1,000); Agenda Item 2017-01-B at 11, DRAFT AO 2016-23 (Socialist Workers Party), Mar. 9, 2017, https://www.fec.gov/files/legal/aos/2016-23/201623_1.pdf (draft earning other two commissioners' votes, applying mandatory analysis but finding Socialist Workers Party was no longer a minor party); *cf. Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 616 (2021) (considering challenge to collection of information with "no disclosure to the general public"). Inherent in the idea that the exception is limited to minor parties, the exception may be granted for only limited periods of time and must be reassessed at regular intervals to ensure both that adequate threats remain and that public interest in disclosure has not increased. *See, e.g.*, Advisory Opinion 2012-38 at 11-12 (Socialist Workers Party), Apr. 25, 2013, https://saos.fec.gov/aodocs/AO%202012-38.pdf (granting exemption for four years, subject to an obligation to renew).

In the absence of limits on the scope and duration of the exemption, it is possible that the American people would be denied essential transparency into "moneyed interests" who may have officials "in [their] pocket." *Citizens United v. FEC*, 558 U.S. 310, 370 (2010). For example, under the

Proposal, either the Democratic or Republican parties could obtain perpetual secrecy for all their donors if any single one of their donors, candidates, or staffers faced a threat or harassment. Similarly, a donor who is the source of millions of dollars in reportable contributions could disappear into the shadows if they faced a threat or harassment, even if it was a single occurrence and never repeated. Moreover, in the absence of any temporal limit and need for re-application, even a minor party granted a legitimate exception could, for example, grow in import and elect candidates in positions of power, without any insight into their financial backers. Alternatively, a minor group granted an exception could incorporate itself into a larger network and become a screen through which contributions—including those originating from unlawful sources like foreign nationals—could be routed to more powerful players and yet shield any insight into their sources.

The Proposal, moreover, not only contemplates granting perpetual anonymity without any consideration of the weight of the public's interest in the applicant, but also to do so in a process that is itself concealed from the public. In contrast to the courts' contemplation that exceptions, if afforded at all, would be granted through as-applied judicial challenges—subject to the full public scrutiny afforded to judicial proceedings, *see, e.g.*, *Buckley*, 424 U.S. at 74 (noting "*courts* will [not] be insensitive" (emphasis added))—the Proposal contemplates secret Commission proceedings conducted without any opportunity for the public that is to be deprived of knowledge to contest the assertions. The Proposal does not even contemplate that the public would be informed of the Commission's decision or the basis for its award.

The public may not be excluded from a process designed to censor its access to facts necessary to its own speech. Such secrecy prevents the public from scrutinizing the FEC's grants to determine whether the FEC is exercising even-handed judgment, or whether the FEC is improperly favoring certain applicants over others or excessively granting applications while failing to give due weight to the public's interest. Moreover, secrecy prevents the public from scrutinizing exaggerated or misleading claims motivated by a desire to avoid mere criticism or disagreement. Some applicants have made exaggerated claims about suffering threats and harassment, for example, when they have only incurred a "large number of emails from people who disagree" with their position. *See* Pl's. Not. of Mot. and Mot. For Temp. Restraining Order and Prelim. Inj. at 4, *John Doe # 1 v. Reed*, No. 09-cv-05456 (W.D. Wash. July 28, 2009), *available at* https://volokh.com/files/ref71motion.pdf; *see also Protectmarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1201 (E.D. Cal. 2009) (alleging expressions of "displeasure with [plaintiff's] support of the ballot initiative" constituted threats and harassment warranting court-ordered anonymity); *see also Dark money faces accountability, not assaults; just as the First Amendment requires*, CREW (Jan. 28, 2022), https://www.citizensforethics.org/news/analysis/dark-money-faces-accountability-not-assaults-just-as-the-first-amendment-requires/ (discussing other examples). Such repercussions are not only different in degree but also in kind to those faced by groups protected from disclosure like, for example, the NAACP in 1950s Alabama when the state targeted the group to unmask its supporters. *See id.* Those efforts had no legitimate purpose but served only to enable state-proxies to carry out a state-sanctioned campaign of terror. *Id.* The information there was not sought to enable debate on matters of public concern.

No doubt, those engaged in the tumultuous works of politics may face speech that is "offensive," *Cohen v. California*, 403 U.S. 15, 25 (1971), or "hurtful," *Snyder v. Phelps*, 562 U.S. 443, 456 (2011), or even "aggressive," *McCullen v. Coakley*, 573 U.S. 464, 472 (2014), but that speech is constitutionally protected, *Texas v. Johnson*, 491 U.S. 397, 408 (1989). "[H]arsh criticism . . . is a price our people have traditionally been willing to pay for self-governance." *Reed*, 561 U.S. at 228 (Scalia, J., concurring). They do not amount to the narrow categories of threats or harassment that may trigger

legal sanction, never mind the loss of First Amendment rights belonging to wholly innocent third parties. And while contributors may be willing to contribute more if they can do so without any fear of criticism, "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Citizens United*, 558 U.S. at 349-50 (quoting *Buckley*, 424 U.S. at 349).

The narrowness of the exception and the obligation of public proceedings to secure one is no mere policy preference. Rather, they are compelled by the inherently viewpoint discriminatory nature of the exception and the severe infringement it imposes on the First Amendment rights of Americans.

First, while the desire to avoid threats, harassment, and reprisals are understandable, the protection contemplated by the Proposal is only afforded to those of a particular viewpoint: those who support engaging in electoral politics through significant monetary contributions. Most Americans are either unable or unwilling to do that. In fact, less than 1% of Americans give over $200 to political campaigns, the threshold for disclosure, *see Donor Demographics*, OpenSecrets.org, https://www.opensecrets.org/elections-overview/donor-demographics (last visited May 14, 2024), and so must engage in the political process through First Amendment activities for which the Proposal contemplates no protection.

For example, peaceful street protesting is at the very center of First Amendment protections, but one engaged in such a protest who is stopped by police on no more than reasonable suspicion may be forced to identify themselves. *See Hiibel v. Sixth Jud. Dist. of Nev.*, 542 U.S. 177, 187 (2004). Moreover, the government and public may record protests, s*ee, e.g.*, *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) (involving surveillance of protest by government), and the public may circulate videos to identify participants. Protesters may not obtain an agency order or court injunction against such distribution even if distribution will, with reasonable probability, result in threats, harassment, or reprisals.

Thus, under the Proposal, it is possible that one side of a public dispute who has the financial means and inclination to debate through large contributions may do so free of the risk of any reprisals, but those with whom that side disagrees (and who lack commensurate resources to ensure their own safety) are compelled to counter entirely exposed. The State is forbidden from exercising such "viewpoint discrimination, even when the limited public forum is one of its own creation." *Rosenberger v. Rector and Visitors of U. of Va.*, 515 U.S. 819, 829 (1995). Rather, the appropriate way to address threats, harassment, and reprisal is through generally applicable laws that protect every speaker, regardless of their viewpoint.

Second, the exception, by its very design, infringes on the First Amendment rights of Americans to read the disclosures, and to use them to speak, debate, and even harshly criticize. Those rights may not be infringed because some third party may use that information for unlawful purposes.

A third party's "violence or threats or other unprivileged retaliatory conduct" do not justify "suppress[ing]" free speech. *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 879 (7th Cir. 2011). "To allow the intolerance (and threats) of a vocal minority (or even the majority) to determine who shall and shall not speak 'would lead to standardization of ideas' and would 'fictionaliz[e] the rationale of the First Amendment.'" *NAACP Legal Def. & Educ. Fund v. Devine*, 727 F.2d 1247, 1261 (D.C. Cir. 1984), *rev'd on other grounds*, *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). A potentially "hostile audience," never mind a single hostile reader in a crowd of millions, "is not a basis for restraining otherwise legal First Amendment activity." *Nat'l Treasury Emps. Union v. King*, 798 F.

Supp. 780, 789 (D.D.C. 1992); *see also Bonta*, 594 U.S. at 608–09 (restraint must be narrowly tailored to combatting harm).

Rather, granting anonymity to contributors to prevent third parties from using disclosures for unlawful purposes is no different than banning a book because the ideas contained could be used by some small subset of readers for unlawful ends. "[T]he government violates the First Amendment when it denies access to a speaker" to "[f]acts … [that] are the beginning point for much of the speech that is most essential to advance human knowledge," even when it is a government program that makes those facts available in the first place, and even when the government seeks to prevent others from using those facts for unlawful purposes. S*ee Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *Cornelius*, 473 U.S. at 806. The grant of any exception to disclosure trades a definite, immediate, and intentional infringement on the First Amendment rights of millions of Americans in exchange for relief from a speculative possibility of harm that might indirectly reduce the expression of the few, and must be undertaken with great caution, consideration, and public scrutiny. Regardless of whether that sacrifice is justified for a limited time for minor players with little influence, it cannot be justified for powerful players in perpetuity.

We respectfully request the Commission reject Agenda Document No. 24-19-A as written. Regardless of whether the Commission standardizes its procedures for granting limited exceptions to disclosure, it should not suggest the exception is available for any organization or contributor regardless of their power, that it could be granted in perpetuity, or that it would be granted in secret.

Sincerely,

Stuart McPhail
Director of Campaign Finance Litigation