FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: **The Commission**

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

DATE: **May 15, 2024**

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

Attached is a comment received from Senator Sheldon Whitehouse of Rhode Island. This matter is on the May 16, 2024 Open Meeting Agenda.

Attachment

SHELDON WHITEHOUSE
RHODE ISLAND

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May 15, 2024

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Federal Election Commission
1050 First Street NE
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Dear Commissioners:

I write to express deep concern regarding the May 2, 2024, memorandum titled "Proposed Directive Concerning Requests to Withhold, Redact, or Modify Contributors' Identifying Information" to be considered during the Federal Election Commission's open meeting on May 16, 2024. If adopted, the proposed directive could create a disastrous loophole allowing entire political organizations to obscure their donors through a secret process, contrary to Congress's intent, established caselaw, and the FEC's own practice.

Anonymous spending in elections fundamentally undermines electoral transparency, an essential element of free and fair elections. In enacting the Federal Election Campaign Act of 1971 (FECA) and subsequent legislation regulating donor disclosure, Congress recognized that disclosure requirements are paramount to ensuring that citizens can make informed choices in the political marketplace and preventing corruption and the appearance of corruption.

Recognizing these important government interests, the Supreme Court has repeatedly upheld those donor disclosure laws for more than 40 years—in *Buckley v. Valeo* in 1976, in *McConnell v. FEC* in 2003, in *Citizens United v. FEC* in 2010, and in *McCutcheon v. FEC* in 2014. Disclosure requirements "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking," as Justice Kennedy wrote for an 8-1 majority in *Citizens United*.[1] Indeed, the *Citizens United* Court justified striking down caps on independent expenditures, in part, by upholding donor-disclosure provisions, which "can provide shareholders and citizens

[1] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366 (2010).

with the information needed to hold corporations and elected officials accountable for their positions and supporters."[2]

The logic of the Court's decision was inescapable: unlimited political spending, without transparency and independence, leads to corruption. Without transparency, you can't even properly assess independence. Several billion dollars spent in elections in political "dark money" proves beyond any dispute that we don't have transparency, and one need look no further than Congress's failed response to climate change to see the resulting corruption. Undisclosed political spending is corrupting, both in law and in fact.

The proposed directive purports to standardize the judicially recognized as-applied exemptions to FECA's reporting requirements where organizations or individual contributors demonstrate "a reasonable probability" that such disclosure "will subject [contributors] to threats, harassment, or reprisals from either Government officials or private parties."[3]

However, the proposed directive's suggested process for filing and granting such exemptions is a radical departure from both precedent and the FEC's past practice. The proposed directive would allow a political organization to seek a blanket exemption from publicly disclosing (or even filing with the Commission) some or all of the required information for its contributors. The proposed directive would allow this request to be made and granted in secret, and the evidence to be considered could consist of only a sworn and notarized statement citing the factual basis for a belief that the disclosure would subject the requestor to threats, harassment, or reprisals—without further elaboration as to what qualifies as a basis for an exemption. If someone is spending money for a corrupt and evil purpose, they can and should expect robust criticism—is that grounds for keeping the corrupting evil secret? If a company uses political spending for corrupt and evil purposes and is picketed as a result, is that grounds for keeping the corrupting evil secret?

Further, there is no demonstrated need of such a change. As I understand, the FEC fields a small number of exemption requests per year from individuals who face a real and specific threat to their safety, such as in intimate-partner violence contexts. I fully support individuals being able to seek redaction or removal of their personal information in such cases and the need to keep such cases confidential. However, allowing entire *organizations* to request blanket exemptions for their donors through an undisclosed administrative process, with no chance for opposing evidence to be presented and considered, would be wholly unprecedented.[4]

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[2] *Id.* at 370.

[3] *Id.* at 367 (citation omitted).

[4] The memorandum on the proposed directive cites the singular case of the Socialist Workers Party (SWP) being granted an organizational exemption from disclosing the identity of its members between 1979 to 2016. However, the exemption was granted only after a three-judge panel approved a consent decree in a suit by the SWP against the FEC. *Socialist Workers 1974 Nat'l Campaign Comm. v. Fed. Election Comm'n*, Case No. 74-1338 (D.D.C. 1979). A contemporaneous Supreme Court case exempting SWP from Ohio's donor disclosure laws revealed serious threats and harassment including receipt of threatening phone calls and hate mail by some SWP members, the destruction of SWP members' property, police harassment of a party candidate, FBI surveillance of SWP operations, and the firing of shots at an SWP office. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 99 (1982). Further, the SWP's exemption was extended in four-year increments through public FEC advisory opinions, and was terminated in 2016 after Commissioners determined that the level of continuing harassment did not justify the exemption. *Cf. Citizens United*, 558 U.S. at 370 (rejecting plaintiff's argument that it should be exempt from

Voters have a right to know who is spending to influence their vote. It's a citizen's job to police the political environment in our democracy, not to be a patsy at the receiving end of massive, secretly-funded propaganda barrages. Disclosure laws promote First Amendment interests by allowing voters to evaluate political messages and messengers in order to meaningfully participate in the democratic process. Because the proposed directive's suggested changes to disclosure requirements threaten to dismantle the disclosure system altogether, and plunge us into worse corruption, I urge you to reject this proposed directive.

Sincerely,

SHELDON WHITEHOUSE
Chairman, Senate Judiciary Subcommittee on
Federal Courts, Oversight, Agency Action,
and Federal Rights

FECA's disclosure requirements because disclosure would expose the plaintiff's donors to retaliation, citing lack of record evidence of any instance of harassment or retaliation).