Committee on House Administration

American Confidence in Elections: Protecting Political Speech

Testimony of Audrey Perry Martin

Good morning, Chairman Steil, Ranking Member Morelle, and committee members; I appreciate the opportunity to appear before you today to address the critical topic of protecting political speech in US Elections.

My name is Audrey Perry Martin; I am a political and campaign finance attorney at The Gober Group. My practice focuses on advising corporations, candidates, political action committees, political parties, and major campaign donors in political and election law. Many years ago, I was staff council for this committee, and I have also worked for several Presidential campaigns and at the Federal Election Commission.

I want to focus today on the necessary and primarily nonpartisan modernization changes outlined in section III of the American Confidence in Elections Act ("ACE Act")[1] and the importance of updating federal campaign finance laws to support state and local political parties.

Modernization of Campaign Finance Laws

Although campaign finance policy is the subject of intense debate and public interest, current federal campaign finance laws are woefully outdated. Significant changes have occurred in campaign finance policy, technology, and the political landscape since the last time Congress passed a substantial amendment to campaign finance law over 20 years ago with the Bipartisan Campaign Reform Act ("BCRA").[2] Since 2002, Congress has only made minor changes to related federal statutes. Although the Federal Election Commission ("FEC") has attempted to fill this gap with regulations, many provisions of the Federal Election Campaign Act of 1971 ("the FECA") need modernization to keep the law in line with current political realities.

First, The Treasury and General Government Appropriations Act passed in 2000 required the Commission to make electronic filing mandatory for political committees and other persons required to file with the Commission if they have contributions or expenditures over $50,000.[3] In addition, many independent expenditure reports are already subject to mandatory electronic filing under section 304(a)(11)(A)(i) of the FECA.

Data from electronically filed reports are received, processed, and disseminated more quickly and efficiently than paper filings. Electronically filed reports are generally almost immediately available to the public. Paper reports must be filed and scanned and take several days to appear online and use more staff time for processing. Paper reports are subject to mail delays that have become increasingly common.

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[1] H.R. 8528 as introduced by Rep. Rodney Davis in the 117th Congress.

[2] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155.

[3] The current amount. See Pub. L. No. 106-58, § 639, 113 Stat. 430, 476 (1999).

However, electioneering communications reports are not currently required to be filed electronically. Because political committees do not file them, and the funds spent are "disbursements," the mandatory electronic filing provisions do not apply to electioneering communications reports.

The ACE Act addresses and effectively solves this issue by subjecting electioneering communications to the mandatory electronic filing requirement for communications over $50,000.

Second, the lack of legislation focused specifically on online campaign activity has led to much uncertainty in the regulated community about how to report communications made over the internet and what type of disclaimers are required on internet political ads. This issue has not just affected campaigns and political committees. Private citizens expressing their opinion over the internet can unknowingly run afoul of federal campaign finance laws by expressing their political views online.

As a result, it was left to the FEC to attempt to modernize these rules through the regulatory process. After more than a decade of rulemaking proceedings, in December 2022, the FEC adopted a rule that clarifies the application of the disclaimer requirement for digital ads.

Although somewhat helpful, this regulation did not address several important issues, including what to do about “promoted” internet content or how to deal with internet media companies in the modern era.

The ACE Act addresses most of these issues. The bill codifies the FEC’s 2006 internet rulemaking by exempting unpaid internet communications from the definition of a contribution and expenditure, even if they are coordinated with a candidate. It also states explicitly that online communications are not required to contain disclaimers unless "information or communication is disseminated for a fee on another person’s website, platform or other internet-enabled application,” effectively codifying the FEC’s new internet regulation.

Furthermore, the ACE Act expands the media exemption to include electronic and internet-based news companies, clearing up confusion over which companies were eligible for the exemption. Under the ACE Act, a news organization not owned or controlled by a party, political committee, or candidate should qualify for the media exemption. These technical amendments to the FECA are needed to modernize the law for the internet era.

Third, in 2014, the Supreme Court invalidated aggregate contribution limits in McCutcheon v. FEC. Following McCutcheon, individuals may contribute to as many candidates as they like, provided that they adhere to the base contribution limits. Section 303 of the ACE Act codifies the Supreme Court’s decision in that case. This technical change puts the FECA in line with current law and will reduce confusion among the regulated community.

Fourth, the proposed bill updates the law to align with current inflation. Under the FECA, certain contribution limits are indexed for inflation every two years based on the change in the cost of living. The FECA sets inflation-indexed limits for political party-coordinated

expenditures and contribution limits from individuals to federal candidates and national party committees.

However, the FECA does not tie the qualifying threshold for political committees, independent expenditure reports, or candidate committees to inflation. Rapid inflation in the past decades has resulted in an extremely low qualification threshold for filing reports with the FEC. For example, under current law, an entity – which includes a club, association, or any other group of individuals – will become a "political committee" after spending only $1,000 to support a candidate. A candidate is required to register as a political committee and start filing reports with the FEC after spending only $5,000. The independent expenditure reporting threshold is even lower – an entity spending just $250 on an independent expenditure must file a campaign finance report. That would include an individual who printed a few hundred flyers and distributed them to her friends – without ever talking to or meeting anyone from a candidate's campaign. These low qualification thresholds chill grassroots political speech by setting too low of a trigger to qualify as a committee or to file FEC reports.

The proposed bill addresses these outdated limits by increasing them and tying the qualification thresholds to inflation, avoiding the need for Congress to address these numbers again in 20 years. This inflation adjustment for inflation is sorely needed and would protect and encourage small, grassroots political activity on both sides of the aisle.

Fifth, the ACE Act allows political committees to engage in joint fundraising without unnecessary red tape. Currently, to fundraise together, political committees must designate a committee as the joint fundraising representative or create a new joint fundraising committee, agree to a formula allocating proceeds and expenses, sign a written agreement that names the joint fundraising representative and states the allocation formula, and establish a separate bank account for joint fundraising receipts and disbursements. Generally, political committees must hire an attorney to manage these requirements. In addition, these agreements must be updated and re-signed anytime the members of the joint fundraising committee change or the allocation formula is modified. As a result, political committees spend thousands of dollars in legal fees to jump through these unneeded hoops. We have many clients that are deterred from joint fundraising by these onerous rules. The bill retains the safeguards of the FEC's joint fundraising regulations but does not require a written agreement or the creation of a new committee and bank account.

Sixth, the ACE Act sunsets the outdated Presidential Election Campaign Fund and donates the funding to pediatric cancer research. John McCain was the last major-party presidential nominee to utilize the Fund in 2008. Although the size of the presidential general election grant is adjusted for inflation, the costs of campaigning have risen considerably faster than general inflation. It is highly unlikely that a presidential candidate could agree to the spending limits tied to the funding program and remain a viable candidate.

Finally, Section III of the ACE Act includes several additional significant nonpartisan changes. It implements the FEC legislative recommendation to make permanent the extension of administrative fines for qualified disclosure requirement violations, which for years has been

extended temporarily. It raises the annual rate of pay for staff and adjusts it for inflation – in the same manner as other positions on the Executive Schedule – allowing the FEC to attract and retain qualified employees. It also clears up the rules regarding what happens if a candidate dies, and no one is at the helm of a campaign committee.

The current federal campaign finance laws need to be updated and require modernization to keep up with the changing political and technological landscape. The modernizing sections of the ACE Act are a critical update to federal election law that addresses several important issues.

Leveling the Playing Field for State and Local Party Committees

Political parties as institutions are perhaps best suited to perform grassroots candidate support, voter mobilization, and voter registration activities, yet campaign finance rules have frustrated party vitality.

When the BCRA was passed over 20 years ago, it intended to prop up state and local parties. However, the law has had the opposite effect. Although most political party activity at the state and local levels is non-federal – the BCRA federalized much of that activity. The BCRA restrictions, in particular its definition of "Federal Election Activity," have hollowed out political parties at the local and state levels around the country and threaten their existence. If campaign finance laws are not modified to loosen the regulatory stranglehold on state and local parties, they are in danger of becoming completely irrelevant.

Currently, state parties are perhaps the most regulated political entities and have far less ability to participate in the grassroots politics they are best at. Third-party groups' mostly unregulated activities have largely supplanted state and local political parties' core electoral functions. That has been demonstrated in reduced state and local political party spending on campaign communications, voter registration, and get-out-the-vote activities. In the 2013-2014 and 2015-2016 election cycles, the evidence of third-party and independent groups' spending on voter registration and get-out-the-vote activities supplanting those of state and local political parties in "battleground states," and eclipsing the traditional political party dominance in those activities. Unlike many of these third-party groups, political parties operate with complete transparency and accountability. Campaign finance laws should, at the very least, allow parties to operate equally to third-party groups.

The BCRA's attempt to federalize mixed federal and state activities also impacted state and local political parties' ability to effectively conduct election campaigns for state and local offices. Not only did the BCRA federalization burden state and local political parties with undue complexity but its interplay with existing state laws and regulations introduced additional complications for state and local political party committees, causing them to forego campaign activities if it required federal funds they could not raise.

The FECA's definition of "federal election activity" is too broad and interferes with state and local parties' ability to effectively campaign in races involving generic or locally targeted voter registration and get-out-the-vote activities. This is even more significant when no competitive federal races are on the ballot. The party committees' requirement to use all federal

hard money to pay for these types of activities has taken the party off the field in those areas, making it unable to represent party views to voters, resulting in less speech, less debate, and less competitive local races.

As the Supreme Court made clear in *McCutcheon v Federal Election Commission*: "Any regulation must instead target what we have called 'quid pro quo' corruption or its appearance. … Campaign finance restrictions that pursue other objectives we have explained impermissibly inject the Government 'into the debate over who should govern.'"[4] It is difficult to imagine how a local party conducting voter registration activities could "corrupt" a federal candidate.

The ACE Act lifts state and local parties by raising contribution limits for state parties to match those of national party committees. It allows state parties to establish higher-limit convention, headquarters building, and legal proceedings funds – similar to those already used by national parties. Perhaps most importantly, the ACE Act allows state parties to participate in voter registration, get-out-the-vote, and other local party-building activities without using hard-to-raise federal dollars. The ACE Act brings state and local parties back to the playing field, allowing them to grow, support their candidates, and attract high-quality candidates and staff.

The BCRA inadvertently led to the rise of independent expenditure groups, such as Super PACs, which are not subject to the same contribution limits as political parties and can raise unlimited funds. These groups have filled the void left by soft money's decline and diverted funds away from state and local parties, further weakening their influence and role in elections. Super PACs have tremendously affected how political actors raise and spend money, necessitating a revision of federal laws to bring political parties back to the playing field.

Furthermore, Supreme Court decisions in Colorado Republican I and II[5] drove an artificial wedge between parties and their own candidates. If the party avoids communication with a candidate, it can make unlimited independent expenditures; if it communicates with a candidate, its spending is limited. To adequately support their candidates, political parties must "firewall" off an independent expenditure branch – duplicating resources and complicating personnel issues. The proposed legislation solves this unnatural state of affairs by repealing limits on coordinated party expenditures.

The reduction in resources and shift in focus to hard money led to a weakened party structure at the state and local levels. This has made it more difficult for these parties to support candidates, promote policy issues, and engage with voters, ultimately hurting their ability to be effective in their respective communities. The ACE Act would alleviate many of these problems and help state and local political parties thrive.

Thank you for this opportunity to speak with you today. I am happy to take any questions.

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[4] McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 192 (2014).

[5] Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431 (2001).