TECHFREEDOM
LAW FOR A DYNAMIC FUTURE

Comments of

TechFreedom

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In the Matter of

Technological Modernization

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[iii] Technological Modernization, 87 Fed. Reg. 75518 (Dec. 9, 2022), https://www.federalregister.gov/documents/2022/12/09/2022-26777/technological-modernization.

The Internet has transformed the way we communicate. Never before have Americans been so connected and so able to share our thoughts with one another. "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general."[1] Today, we share our thoughts on virtually any topic—including politics—with not just our close everyday acquaintances and family, but with the entire world.

The ability of Americans to broadly communicate and express themselves on political issues has been greatly aided by the 2006 Internet Freedom Rule.[2] In excluding uncompensated Internet posts from regulation, the FEC correctly distinguished between high-cost forums available to the few, and low-cost, democratized forums that provide avenues for any citizen or group to engage in unfettered political discussion. This has unleashed political expression on the Internet, where one now finds thousands of political blogs, web-based political commentary shows, political "influencer" personalities, and countless everyday political discussions among civically engaged citizens. Reviewing empirical research for the six years after the adoption of the Internet Freedom Rule, a 2016 meta-analysis found that expressive and informational use of online social media to discuss political issues bore a positive relation to civic and political participation.[3]

The freedom to engage in online political discourse unrestrained by campaign finance regulations is now more important than ever, as our expression and communications increasingly move from face-to-face interactions in the physical town square—where FEC regulations surely do not reach—to the digital realm and the "modern public square."[4]

Indeed, the proliferation of political speech by citizens is not merely a benefit to civic engagement and political participation; it is a prerequisite for democratic self-governance,[5]

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[1] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) (quoting Reno v. American Civil Liberties Union, 521 U. S. 844, 868 (1997)).

[2] *See* End of Year Statement from Chairman Lee E. Goodman, Federal Elections Commission 2 (Dec. 2014), https://www.fec.gov/resources/about-fec/commissioners/goodman/statements/LEG_Closing_Statement_Dec_2014.pdf; Ajit Pai & Lee Goodman, *Internet Freedom Works*, POLITICO (Feb. 23, 2015), https://www.politico.com/magazine/story/2015/02/fcc-internet-regulations-ajit-pai-115399/ ("The freedom protected by the 2006 rule fostered a robust national forum for political discussion."); Uncompensated Internet activity by individuals that is not a contribution, 11 C.F.R. § 100.94 (2016).

[3] *See* Marko M. Skoric et al., *Social Media and Citizen Engagements: A Meta-Analytic Review*, 18 NEW MEDIA & SOCIETY 1817 (Oct. 2016), https://journals.sagepub.com/doi/10.1177/1461444815616221.

[4] *Packingham*, 137 S. Ct. at 1737.

[5] Citizens United v. FEC, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."); Barr v. Matteo, 360 U.S. 564, 577 (1959) (Black, J.,

indeed, the most fundamental aim of the First Amendment.[6] Because the First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office,"[7] the Commission's authority to regulate political speech is narrowly limited to preventing corruption and the appearance of corruption, and in some instances providing the electorate with information about the sources of election-related spending.[8] The Commission must proceed with caution to ensure that it does not disrupt the vibrant online political discourse that the Internet Freedom Rule helped to create.

There is simply no evidence that any politician has been corrupted by free online political discourse, whether promoted for a fee or not. Nor is there, to our knowledge, any evidence that promotion of online political communications has led to a surge in covert spending that leaves the electorate uninformed as to the source of spending in our elections.

Without cause, the Commission's proposal to include communications "**promoted for a fee**" in the definition of "internet public communication" and subject them to disclosure and disclaimer requirements would substantially chill the online political expression of ordinary citizens. While the regulatory burden on the activities and expenditures of campaigns and committees may be surmountable, average participants in online political discussion will face extraordinary challenges in discerning and complying with their regulatory obligations, and they may decide simply to abstain from political speech altogether rather than face potentially steep penalties.

The Commission's proposal would leave significant uncertainty with respect to what constitutes "promotion for a fee." Consider a social media user who uploads videos on political issues and monetizes its content via a platform's advertising revenue-sharing program. Under the current rules, presumably, because the monetization occurs irrespective of the choice of political message, the user's videos are not subject to regulation. But should such advertisements (and thus revenue) include those from political actors, it is not clear whether the FEC would determine that the user has been "paid to create or generate" the content. The matter is further complicated by the fact that the advertisements placed within or alongside particular content are not selected by the creators of that content; rather, they are selected by the platforms' systems on the basis—among other things—of the context of

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concurring) ("The effective functioning of a free government like ours depends largely on the force of an informed public opinion.").

[6] Burson v. Freeman, 504 U.S. 191, 196 (1992) ("[T]here is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs.").

[7] Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

[8] *See* Citizens United v. FEC, 558 U.S. 310, 357, 369 (2010).

the content. Thus, it seems that users who share free, but monetized, political content are more likely to have political advertisements selected for their communications. Similarly, a political blog that participates in Google's AdSense program will be assigned contextually relevant advertisements without any input by the blog's proprietor, likewise increasing the probability of their content appearing with advertisements from political actors. If such advertisements render their political communications "promoted for a fee," any speaker wishing to communicate revenue-supported political content will be subject to burdensome requirements with which they may be ill-equipped to comply.

The "**paid to create or generate**" distinction in the Commission's proposal also threatens to sweep in content that the Internet Freedom Rule clearly intended to exempt. An organization or group can presently post or send free online communications free from regulation. But those communications are often, if not always, created by a paid individual—an employee or external vendor. It is unclear under the Commission's proposal whether such communications, because they were created by a paid third-party, would now be subject to regulation. The Commission must ensure that so long as the communication is posted for free, it is not subject to regulation simply because its originator paid a third party to create it.

Furthermore, the term "public communication" does not inherently suggest that the paid endorsements of celebrities are a form of "general public political advertising," despite celebrities' access to free media exposure and large audiences. Today, online "influencers" have similarly large followings and access to free distribution channels for political expression. But payments to such individuals are not advertising fees as traditionally understood—they are payments for endorsements, which, like a retweet of a free online communication, should not be regulated as "advertising." Such payments to celebrities and online influencers must of course be reported by political committees, thus safeguarding the public's informational interests.[9] But the Commission's proposal risks subjecting to regulation every *subsequent* free online political communication from an individual who has received a payment as well, even if not specifically paid for.

A payment to a platform, website, digital service, application, or advertising platform to "**boost**" particular content appears at first to be closer to the traditional scope of campaign finance regulation. But while the Commission may be justified in regulating such payments by campaigns or committees, the Commission's proposal reaches much farther. Organizations, influencers, and even individuals often pay to promote their content for various reasons, including promoting that organization's or individual's visibility generally

[9] 52 U.S.C. § 30104.

or building their brand. The Commission should be mindful of a critical distinction: where the underlying communication being "boosted" would not itself have been subject to regulation, the Commission should not sweep self-promotion of that communication into its regulatory ambit.

This distinction is also warranted for practical reasons. When the creator of a communication pays to boost it, particularly on a social media platform, the result is simply that the communication is seen more often, by more people. But the underlying communication remains the same and cannot be readily edited. There is no practical, discernable way for the user to add a *post-hoc* disclaimer to the boosted communication. Were the Commission to subject such communications to disclaimer requirements, participants in online political discussion would be forced to refrain from boosting their political content—or perhaps all of their content, if the platform they use boosts a user's content generally, rather than boosting individually selected content.

Subjecting an ever-increasing amount of online political content to regulation will impose heavy burdens on individuals and organizations seeking to simply participate in the national political discourse and leverage the platforms available to them. Requiring them to determine whether and how their communications are subject to regulation, track expenditures, file reports, and issue disclaimers is beyond the sophistication and ability of a vast majority of speakers, and the risk of making a mistake is high: violations of campaign finance regulations carry steep penalties. Uncertainty as to whether their content will be subject to regulatory requirements, and the burden of compliance, will cause speakers to refrain from engaging in political discussion online in the first place. As the Fourth Circuit noted when striking down a Maryland political advertising disclosure law on First Amendment grounds, "Faced with this headache, there is good reason to suspect many … would simply conclude: Why bother?"[10]

Free and unfettered political discourse is the lifeblood of our democracy. Imposing unnecessary and unwarranted burdens on that discourse will harm—not help—our national interests.

Respectfully submitted,

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[10] Washington Post v. McManus, 944 F.3d 506, 516 (4th Cir. 2019).

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